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Locke Lord QuickStudy: Memes, Emoticons, and Social Media ?Posts as Protected Concerted ?Activity ?

Locke Lord LLP

WRITTEN BY

Wasim K. Bleibel | Kevin D. Kelly | John Klinker

To navigate the pandemic, companies and employees shifted to virtual tools and platforms to conduct business and communicate with team members. With this transition into the virtual office space and increased screen time, social media posts and virtual expression have replaced person-to-person water cooler chats. In this space, employees often use non-text methods or tools—such as memes, gifs, emojis/emoticons, shares, likes, or some combination thereof—to express their views. A recent National Labor Relations Board advice memo opined on whether an employee's social media post that included a meme and prompted a "supportive" emoji from a coworker constitutes Section 7 protected concerted activity, and whether that employee's subsequent termination would violate Section 8(a)(1) of the National Labor Relations Act. The NLRB's response? Yes.

Background

The NLRB's memo relates to a charge against a surgical practice operating in Georgia. Before the termination, the Charging Party and other employees had been discussing concerns about a particular individual's management style.

Around the time of the above-described discussions, the Charging Party complained to management about having an unmanageable workload. That night, the Charging Party posted about workplace culture on Facebook. The Charging Party's post started, "Just in case someone needed to know," with a shrugging emoticon. It then incorporated a meme stating, "[a] bad manager can take a good staff and destroy it, causing the best employees to flee and the remainder to lose all motivation." The Charging Party concluded with, "Employees don't leave Companies, they leave Managers [.]"

Multiple people commented on the post, including at least two of the Charging Party's coworkers. One coworker commented, "YESS. Freakin YESSSSSS!! [sic]," while another posted an emoticon of a face with no mouth.

The Facebook post and employee comments quickly caught the attention of the employer. That evening, the first coworker received a text message from a representative of the employer saying they saw the post and comments and concluded with "[j]ust a heads up." That text message prompted a series of text conversations between the Charging Party and the two coworkers. These conversations included concern over the "[j]ust a heads up" text, the possibility that the employer might follow up on the post, and the rationale behind one of the coworker's impending resignation. Ultimately, both coworkers deleted their comments.

The following day, a representative of the employer questioned the first coworker about the post, noting that it was

forwarded to others within the organization, and asking if the individual was happy at work. The representative concluded by warning the employee to be careful posting online to avoid getting in trouble.

The same day, the employer claimed the Charging Party had been the subject of 11 patient complaints allegedly lodged within the last month, and then terminated the Charging Party based on those complaints.

Statements as Protected Concerted Activity, Generally

To be protected under Section 7 of the NLRA, employee conduct must be *both* "concerted" and "for the purpose of . . . mutual aid or protection." Protected concerted activity includes:

(1) statements by lone employees addressing their coworkers to initiate, induce, or prepare for group action;

(2) a lone employee's communications with management to convey a truly group complaint;

(3) statements made to elicit group action from like-minded coworkers for a personally held view about working conditions; and

(4) communications involving "inherently concerted" discussions about vital aspects of workplace life.

The Facebook Post as Protective Concerted Activity

Here, the NLRB concluded that the Facebook post constituted protected concerted activity. Specifically, the memo notes that the post was made to initiate, induce, or prepare for group action over the quality of employees' supervision and employee attrition—subjects affecting all employees. In reaching this conclusion, the NLRB relied on the first co-worker's comment and the second co-worker's mouthless emoticon, which the NLRB termed a "supportive emoticon." The NLRB provided no explanation for what makes an emoticon "supportive." (Note: In at least one prior case the NLRB briefly referenced meme use within a series of comments that it concluded were protected concerted activity (*see* Google Inc. Advice Memo 1 and Advice Memo 2); however, there does not appear to be any NLRB precedent or commentary about emoticon use in this context.)

Beyond the traditional protected concerted activity analysis, the NLRB also analyzed this situation using the theory of inherently concerted activity. Conduct is considered inherently concerted where, even though it is not expressly indicated, the actor implies a desire to induce group action by virtue of the subject matter discussed. A desire to induce group action is implied when employees discuss (1) higher wages, (2) changes in work schedule, or (3) job security. Here, the NLRB concluded that the Charging Party discussed job security and, therefore, the Facebook post constituted inherent protected activity. What's more, through this memo, the NLRB advocated for including a new item on the list of topics constituting inherent concerted activity. Specifically, the memo suggested that "discussions about quality of supervision" should be added to this list. While this advice memo does not establish precedent, it likely indicates that the NLRB will pursue this addition in future precedential matters.

Unlawful Preemptive Termination

Lastly, the NLRB opined that—even if the Facebook post did not amount to protected concerted activity—Johns

Creek's action was a preemptive termination in violation of the NLRA. The memo cites NLRB precedent for the conclusion that an employer cannot preemptively terminate an employee to "chill or curtail potential future Section 7 activity" because doing so interferes with and restrains the exercise of employees' rights under the NLRA.

The memo points to the Charging Party's complaint about an unmanageable workload, the employer representative's threats to the first employee-commenter shortly after the Facebook post, and the suspect rationale for the Charging Party's termination, as evidence of the preemptive nature of that termination.

Practical Impact

While the NLRB's memo does not establish binding precedent, it provides valuable insight into how the NLRB may interpret non-text responses as supportive messages and the position the NLRB may take in future protected concerted activity cases involving a virtual space or on social media. This memo is particularly useful as a reminder for employers to be cautious when reacting to employees' social media posts. Furthermore, employers should consider reviewing their existing social media policies relative to any restrictions that could arguably run afoul of the NLRA if they were challenged.

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