

# Workers Claim Right To Rant on Facebook

By MELANIE TROTTMAN

Workers fired or disciplined for bad-mouthing employers on social-networking sites are fighting back using a decades-old labor law—a new front in the murky battle over what workers can do and say online.

Since the rise of Facebook and Twitter, companies believed they had the right to fire employees who posted complaints or hostile or rude comments online about their employers.

But in recent months, workers have sought to solve their very modern employment predicament by using the law that kick-started the U.S. labor movement: the National Labor Relations Act of 1935.

The law gives private-sector employees certain rights to complain about pay, safety and other working conditions. It doesn't protect simple griping.

More than 100 employers, including a saloon, a BMW dealership and Wal-Mart Stores Inc., have been accused by workers over the last 12 months of improper activity related to social-media practices or policies, according to the NLRB, a federal agency that enforces the law and decides whether employees' complaints have merit.

NLRB lawyers in Washington have decided that about half of the complaints they have reviewed thus far have sufficient merit for the agency to intervene, generally in the form of a civil complaint filed against employers on behalf of employees. Complaints are heard by an NLRB judge.

The NLRB actions, most of which involve nonunion employees, represent a new arena for the agency.

It already is on the hot seat

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## Not Safe for Work?

Examples of Facebook postings that were deemed protected by labor law by NLRB lawyers, and others that weren't.



### 'Scumbag'

A paramedic was fired after calling her supervisor a 'scumbag' on Facebook from her home computer.

**NLRB'S POSITION:**  
Language was protected



**OUTCOME:**  
Case settled just before trial



### 'Setting it off'

A Frito-Lay warehouse employee was fired after writing on Facebook he was 'a hair away from setting it off in that b—,' apparently referring to the warehouse.

**NLRB'S POSITION:**  
Language was not protected



**OUTCOME:**  
Employee's lawyer has appealed



### 'Rednecks'

A bartender was fired for communications on Facebook with a relative in which he called customers 'rednecks' and said he hoped they choked on glass.

**NLRB'S POSITION:**  
Language was not protected



**OUTCOME:**  
NLRB didn't file a complaint

Source: National Labor Relations Board

with Republicans and business groups, who say it has favored unions over employers under President Obama's watch, notably when it challenged Boeing Co.'s decision to install a non-union production line in South Carolina.

Rafael Gomez of law firm Lo Tempio & Brown in Buffalo, N.Y., who is representing a nonprofit group in an NLRB case involving Facebook posts, said his case and others suggest the agency is

"seeking to assert itself in a nonunion workplace."

In a separate case, Dawnmarie Souza, a paramedic for American Medical Response of Connecticut Inc., was fired after calling her supervisor a "scumbag" on Facebook, from her home computer. She was unhappy the supervisor had questioned her about a customer complaint, according to the NLRB's investigation.

The NLRB's complaint on Ms.

Souza's behalf—the agency's first ever involving a firing related to social media—came after NLRB lawyers concluded the firing was illegal because the postings were made during an online discussion among employees about supervisory action, which is considered "protected concerted activity" under the law.

The comments were provoked by what the NLRB deemed was the supervisor's unlawful denial of union representation during a workplace meeting about the customer complaint. The case was settled in February before it could advance to an NLRB administrative judge.

American Medical Response declined to comment. The company has said previously that Ms. Souza was fired "for serious violations of hospital and AMR protocols and procedures."

In a separate settlement with the NLRB, the ambulance company agreed to revise its Internet-posting policy so it wouldn't violate workers' rights.

Ms. Souza, who was recently still unemployed, denied poor work performance and said in an interview she didn't regret calling her supervisor names.

After Ms. Souza's case, others poured in.

By May, according to the agency's latest data, the NLRB's regional offices had received 113 complaints, called "charges," from employees alleging a variety of illegal activity related to social-media practices and policies, compared with just a handful seven months earlier.

Of the 39 cases reviewed as of last month, agency lawyers determined that 51% have

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# When Facebook Gets You Fired

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enough merit to proceed to an administrative judge. The lawyers are still reviewing 14 others. The remainder were settled or withdrawn before reaching agency lawyers in Washington, or could still be under investigation in the regional offices, an agency spokeswoman said.

The cases turn on whether online postings mirror activity that is protected under the Wagner Act, as the 1935 law is also known.

Passed in part to protect collective-bargaining rights, the law grants employees a right to engage in "protected concerted activity," such as discussing pay or other conditions. Individuals can be protected if they are speaking

"You have an agency that comes in and is pretty aggressive on these issues, but isn't really clear on drawing lines," he said.

The NLRB's Mr. Solomon said he has been deciding case merits based on offline precedent, but that he understands how companies could be confused. "I can only stress that each of these cases is very factual. It's not all apples-to-apples," he said.

The bottom line: "Companies can no longer have a knee-jerk reaction to these kinds of terminations," said Michael Pepperman, partner at Philadelphia law firm Obermayer Rebmann Maxwell & Hippel, who represents employers.

Some cases seem clear. A

last month with the NLRB's office of appeals in hopes of getting the agency to reconsider filing a complaint, citing another posting he said referred to Mr. Rhone's workplace frustration. He also said the managers' actions prove they didn't feel threatened.

The NLRB also decided comments weren't protected in the Wal-Mart case, in which an employee called his assistant manager a derogatory name during a series of Facebook posts after he was reprimanded.

The employee, Brian Morris, was suspended for a day and had promotion chances denied for a year. Mr. Morris didn't respond to requests for comment.

A Wal-Mart spokesman said the employee's "inappropriate" actions, regardless of where they occurred, "had a negative impact on the workplace environment, and that led to the negative action we took."

Many other cases aren't nearly as clear. Chicago-area car dealership Knauz BMW was hit with an NLRB complaint over its firing of salesman Robert Becker. In September, an NLRB judge disagreed with the agency's complaint that alleged Mr. Becker was wrongfully fired and sided with the dealership.

The problem: Mr. Becker posted on two different events, and the agency and the judge disagreed about which posting got him fired.

The judge's ruling has been appealed by the NLRB's acting general counsel. Mr. Becker, who is being represented by an NLRB lawyer in Chicago, declined comment.

Jim Hendricks of Ford & Harrison LLP, a lawyer for the dealer, said his client is contesting the appeal, adding that employers are in a bind now that the NLRB is "going to scrutinize every policy you have on whether or not it violates protected concerted activity."

## The NLRB has received 113 complaints since May from workers over social-media policies.

on behalf of other workers about the workplace.

To be protected, there must be group activity, said NLRB Acting General Counsel Lafe Solomon. Mere complaining isn't protected, he said.

Translating those principles to online activities isn't easy, and the NLRB hasn't provided specific guidance. Are postings made from workplace computers protected? The agency hasn't seen such a case. If an employee posts a message to a group of co-workers and no one responds, is that message protected?

It depends on the facts, the agency said, including what may have occurred in the workplace before or after the posting.

Michael Peterson, a vice president at the HR Policy Association, a trade group for human-resources executives, argues that employees' negative online postings could damage a company's reputation and that the agency needs to offer clearer guidance.

warehouse employee at Frito-Lay was fired after writing on Facebook he was "a hair away from setting it off in that b—," apparently referring to the warehouse where he worked.

He made the comment after a supervisor said he would lose attendance points if he left work early because he felt unwell.

An HR manager later told the employee the comment sounded like a threat to shoot everyone in the warehouse, according to the NLRB's written account of its investigation.

The employee, Roy Rhone Jr., told the manager he was just venting and "setting it off" meant swearing at someone or walking out on the job, according to an NLRB report. The NLRB said the comments weren't protected. A spokesman for Frito-Lay, owned by PepsiCo Inc., said the company doesn't comment on employees, for privacy reasons.

Michael Owens, Mr. Rhone's lawyer, said he filed an appeal

## What Workers Can—and Can't—Do on Facebook

Companies are facing a growing number of civil charges over disciplinary actions spurred by online comments from employees. Following are the National Labor Relations Board's guidelines on what workers and employers are allowed to do on social media:

### Protected employee behavior—things employees should be allowed to do without being fired:

—Workers discussing with each other pay or other workplace conditions, or an individual speaking on behalf of other workers about, or with the intention, to improve workplace conditions. The key is there has to be group activity, in intention or re-

sult. It is described under the law as "protected concerted activity."

—Name-calling—depending on the word used and the context—that doesn't involve physical or verbal threats.

### Unprotected employee behavior—things that could get an employee disciplined or fired:

—Mere griping solely by and on behalf of oneself, with no evidence of intended or actual group action to improve working conditions.

—Physical or verbal threats against an employer or co-worker, depending on the context.

### Unlawful employer behavior:

—Maintaining a company policy that restricts workers' rights to discuss online with co-workers their wages and other working

conditions.

—Firing an employee for engaging in protected concerted behavior.

### Unresolved questions:

—What kind of name-calling by workers is protected under the law, and what isn't? (The NLRB says it depends on the facts of the case.)

—Would negative employee postings made from a workplace computer be protected? (The NLRB hasn't reviewed a case involving this question but says it could depend on a company's policy about personal use of its computers.)

—What should a model employer social-media policy look like? (The NLRB has yet to see one that can be cited.)