# NLRB Division of Advice Finds an Employer Lawfully Discharged an Employee for Inappropriate Tweets on Twitter

**May 27, 2011**

**By Josh Meeuwse**

The Hartford Regional Office of the National Labor Relations Board set the labor world abuzz last fall when it issued a complaint against a Connecticut employer for discharging an employee because of her posts on Facebook. The Board claimed that the employer unlawfully discharged the employee for criticizing her supervisor, because she was exercising her federal labor law rights by discussing the terms and conditions of her employment with her co-workers on Facebook. The Board also claimed that the company's social media policy was overly broad and unlawful because it prohibited employees from making any disparaging comments when discussing the Company, supervisors and co-workers. The case settled, however, leaving several issues unresolved.

Recently, the Board's Division of Advice issued an Advice Memorandum addressing another case in which the employee was discharged for making comments on a social media platform. In this case, however, the Board's Division of Advice found that the employer properly discharged the employee for misconduct. Importantly, even though the employer verbally instructed the employee to stop commenting about the company in any public forum, including all social media, before it discharged him, the Division of Advice found this was not an orally promulgated policy because it was directed only at him.

The employee was a reporter for the *Arizona Daily Star*, which encouraged him to tweet on Twitter, in order to entice followers to visit the newspaper's website. The employee was individually responsible for creating his Twitter account and controlling the content of his tweets, although his biography on Twitter stated that he worked for the *Daily Star* and had a link to the newspaper's website. The employee also occasionally referenced *Daily Star* articles in his tweets.

In early 2010, the employee posted a sarcastic tweet mocking the headlines chosen by the *Daily Star's* copy editors. There was no evidence that he discussed concerns with the headlines with any co-workers. In response, his managers told the employee that he was prohibited from airing grievances or commenting about the newspaper in any public forum. They also told him that although the newspaper did not have a social media policy, they were preparing one.

In August and September of 2010, the employee posted several sarcastic tweets related to his beat as a public safety reporter. For example, in one tweet he wrote, "You stay homicidal, Tucson. See Star net for the bloody deets." In others he wrote, "What?!?!? No overnight homicide? WTF? You're slacking Tucson," and "I'd root for daily death if it always happened in close proximity to Gus Balon's."

Several weeks later, the employee posted a tweet mocking a misspelling in a tweet by a local television station. The television station complained to the *Daily Star*, which investigated the employee's past tweets.

After reviewing the employee's tweets, the *Daily Star* discharged the employee for making derogatory comments on Twitter that potentially damaged the newspaper's goodwill and reputation. The employee filed a charge with the Board, claiming that the *Daily Star* had violated his Section 7 rights under the National Labor Relations Act, which include the right to form, join or assist a union, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. He argued that the *Daily Star's* policy prohibiting him from commenting on Twitter was overbroad and unlawful under Section 7. The Regional Office submitted the claim to the Board's Division of Advice, requesting advice on whether to issue a complaint.
The Division of Advice rejected the employee's claim. It noted in its Memorandum that although the Board has held that disciplining an employee under an overly broad unlawful policy violates federal labor law, this rule only covers conduct protected by Section 7. The Division found that the employee's inappropriate tweets were not protected activity because although they arose from his work assignment, they were unrelated to terms and conditions of his employment or protected concerted activity.

The Division also rejected the employee's claim that by prohibiting him from commenting about the *Daily Star* on any social media outlets, the employer had implemented an overly broad and unlawful policy. Because the prohibition applied only to the employee, and not to anyone else, the Division of Advice concluded that the prohibition did not constitute a company policy.
The Division of Advice's Memorandum is important because it highlights the application of a familiar rule to a developing area of the law. It also shows that despite the Facebook case, employers may still discharge employees for misconduct on social media, as long as their conduct is not protected by Section 7.

## More Information

Joshua D. Meeuwse
jdm@franczek.com
312.786.6512

## Related Practices

Labor & Employment