



ATTORNEYS AT LAW

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UPDATE: THE NATIONAL LABOR RELATIONS BOARD MAKES THE LEGALITY OF EMPLOYERS' SOCIAL NETWORKING POLICIES EVEN LESS CLEAR

The National Labor Relations Board (“NLRB”) recently released an advice memorandum regarding *The Arizona Daily Star*’s (“employer”) firing of a newspaper reporter (“employee”) over offensive tweets on the employee’s personal Twitter account. The employee filed a complaint with the NLRB alleging that the employer violated Sections 7 and 8(a)(1) of the National Labor Relations Act. The general counsel for the NLRB dismissed the case.

The employee created a personal Twitter account, invited some of his coworkers and supervisors to follow him, and linked *The Arizona Daily Star* website to his Twitter page. After the account was created, the employee began making a series of tweets that the newspaper considered offensive. First, he stated about his coworkers: “*The Arizona Daily Star*’s copy editors are the most witty and creative people in the world. Or at least they think they are.” Then the employee made the following series of tweets:

- August 27 - “You stay homicidal, Tucson. See Star Net for the bloody deets.”
- August 30 - “What?!?!? No overnight homicide? WTF? You’re slacking Tucson.”
- September 10 - “Suggestion for new Tucson-area theme song: Droening [sic] pool’s ‘let the bodies hit the floor’.”
- September 10 - “I’d root for daily death if it always happened in close proximity to Gus Balon’s.”
- September 10 - “Hope everyone’s having a good Homicide Friday, as one Tucson police officer called it.”
- September 19 - “My discovery of the Red Zone channel is like an adolescent boy’s discovery of his ...let’s just hope I don’t end up going blind.”

Finally in response to a misspelling on a local television station, the employee tweeted, “Um, I believe that’s PEDAL. Stupid TV people.”

The employer determined the employee’s misuse of his Twitter account was misconduct and reprimanded the employee several times. The employer also carefully documented the

employee's behavior and the reprimands. In response to these reprimands, the employee claimed that he was simply trying to convey information to the public and did not intend to offend anyone. *The Arizona Daily Star* terminated the employee for his misconduct on September 30, 2010.

The NLRB concluded that the employer did not violate Section 8(a)(1) because the postings did not involve "protected concerted activity" (i.e. action on behalf of others). Thus, even though the employer neglected to adopt a social networking policy, the NLRB recognized that an employer can nevertheless fire an employee where the employee engages in misconduct on a social networking website. The NLRB also found that the employer's reprimands were not unlawful pursuant to an overbroad rule in violation of Section 7 because employer specifically tailored its reprimands to the conduct of the employee and the employee's misconduct "interfered with the employee's own work or that of other employees."

Perhaps what is most interesting about this decision is that the NLRB noted that the conduct here did not "relate to the terms and conditions of his employment," thus dismissing any claim of a working condition protection, as discussed previously in *American Medical Response of Connecticut, Inc.* (the "Facebook Firing" case). Therefore, if the content of an employee posting does not involve general employment issues, such as working conditions, but rather involves topics pertaining only to the individual employee, such as commentary on a reporter's beat, then the employer can lawfully terminate the employee for misconduct. It seems that the NLRB is retreating from the Facebook firing case and once again making the law less clear for employers.

In conclusion, employers should take away the following:

- **Document instances of employee misconduct**
- **Tailor reprimands to employee conduct so as not to create overbroad rules**
- **Focus on content that espouses individual opinions, not general employment concerns, as such content will not likely be considered protected activity**

Please contact Denis Jacobson (336) 271-5242 or Brandy Mills (336) 271-5212 in the dispute resolution and litigation practice group if you have any questions concerning your social networking policy.