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Q&A WITH PAULA WILLIAMS

CHIPOTLE CASE UNDERSCORES RIGHT TO POST ABOUT WORKING CONDITIONS

Q: The National Labor Relations Board recently heard a case filed by a former Chipotle restaurant employee who claims he was fired for a social media post. What did the NLRB rule in this case?

A: The NLRB found Chipotle maintained an unlawful social media policy that was used to improperly punish an employee for "tweets" such as, "nothing is free, only cheap #labor. Crew members only make \$8.50/hr how much is that steak bowl really?" The employee also tweeted relating to Chipotle's attendance policies and comparisons to a Chipotle competitor. The NLRB ruled these social media posts stated facts posted to educate the public and create support for Chipotle's employees, which qualified as protected actions under the NLRB's rules and regulations. The NLRB required Chipotle to offer the employee reinstatement, provide back pay, and post a nationwide notice to employees regarding the unlawful social media policy.



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Q: What activities are protected under the National Labor Relations Act as it relates to social media?

A: The act protects rights of employees to act together to address conditions at work, which includes social media posts relating to wages and working conditions. Employee communications on social media may be protected by the act even if only one employee is engaged in the communication. An employee's "mere gripes," however, aren't protected by the act, when those "gripes" aren't related to the protection of a group.

Q: What does this mean for companies that want to monitor employee social media activity?

A: Part of the problem in this case was that several regional Chipotle stores utilized an outdated social media policy. Accordingly, employers should ensure that only current policies are distributed and enforced. These current policies must be clearly drafted, accessible to the employee, and should guide the employer's monitoring of social media posts.

Q: Chipotle had a social media policy but still lost the case. What elements should a good social media policy include?

A: An employer's social media policy may violate the act even if it only "chills" but doesn't explicitly prohibit protected activity. An employer may not prohibit mere false or misleading statements, which are protected unless the employee posted them with a "malicious motive." Additionally, the use of the word "confidential" in Chipotle's policy was found to be ambiguous, and thus, construed against Chipotle in the employee's favor. When drafting a social media policy, employers should use examples to clarify key terms and, when in doubt, be very specific in the policy. Finally, although worthy of inclusion in a policy, a disclaimer stating that the policy "doesn't restrict any activity protected by the National Labor Relations Act" will not cure otherwise unlawful provisions in the policy.

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