

## The NLRB Holds That Certain Activity on Facebook is Not Protected

The exact limits of employee protected speech on social media are still finding definition, but a recent National Labor Relations Board decision identifies at least one limit: premeditated insubordination. In [Richmond District Neighborhood Center](#), the Board held that two employees who discussed their plans on Facebook to engage in insubordinate activity on the job did not engage in protected activity, and the employer therefore did not commit an unfair labor practice by rescinding their rehire offers.

In Richmond, the employer operated a teen center in San Francisco. At an employee meeting, the employer solicited feedback on the program and employees submitted their perceived “pros” and “cons” regarding the program. Following the meeting, two employees requested a follow-up meeting and the employer denied their requests. During the subsequent summer break (during which employees are sent offer letters for rehire), the employer sent the two employees offer letters and the two employees engaged in the following conversation on Facebook about their plans to return to the program the following year:

**EMPLOYEE 1:** I'll be back, but only if you and I are going to be ordering s\*\*\*, having crazy events at the Beacon all the time. I don't want to ask permission, I just want it to be LIVE. You down?

**EMPLOYEE 2:** Im gOin to be a activity leader im not doin the [teen center] let them figure it out and when they start loosn kids i aint helpn HAHA

**EMPLOYEE 1:** hahaha. Sweet, now you gonna be one of us. Let them do the numbers, and we'll take advantage, play music loud, get artists to come in and teach the kids how to graffiti up the walls and make it look cool, get some good food. I don't feel like bein their b\*\*\*\* and making it all happy-friendly-middle school campy. Let's do some cool s\*\*\*, and let them figure out the money. No more Sean. Let's f\*\*\* it up. I would hate to be the person takin your old job.

**EMPLOYEE 2:** Im glad im done with that its to much and never appriciated sO we just gobe have fuN dOin activities and the best part is WE CAN LEAVE NOW hahaha I AINT GOBE NEVER BE THERE even thO shawn gone its still hella stuCk up ppl there that dont appreciate nothing

**EMPLOYEE 1:** You right. They dont appreciate s\*\*\*. Thats why this year all I wanna do is s\*\*\* on my own. have parties all year and not get the office people involved. just do it and pretend they are not there. i'm glad you arent doing that job. let some office junkie enter data into a computer. well make the beacon pop this year with no ones help.

**EMPLOYEE 2:** They gone be mad cuZ on wednesday im goin there aNd tell theM mY title is ACTIVITY LEADER dont ask me nothing abOut the teen cenTer HAHA we gone have hella clubs and take the kids ;)

**EMPLOYEE 1:** hahaha! F\*\*\* em. field trips all the time to wherever the f\*\*\* we want!

**EMPLOYEE 2:** U f\*\*\*\* right see u WednesdaY

**EMPLOYEE 1:** I won't be there wednesday. I'm outta town. But I'll be back to raise hell wit ya. Dont worry. Whatever happens I got your back too.

After a co-worker took a screenshot of the conversation and showed the employer, the employer rescinded the employees' rehire offers. The Board's General Counsel challenged the revocation of the offers as an unfair labor practice, arguing that the employees' Facebook conversation constituted protected concerted activity under Section 7 of the National Labor Relations Act.

The Board disagreed, noting that the "Facebook exchange contains numerous statements advocating insubordination" which could not be "easily explained away as a joke, or hyperbole divorced from any likelihood of implementation." The Board distinguished the conversation from "brief comments" which, in contrast, might be dismissed as hyperbole. The Board held: "The magnitude and detail of insubordinate acts advocated in the posts reasonably gave the Respondent concern that [the employees] would act on their plans, a risk a reasonable employer would refuse to take. The Respondent was not obliged to wait for the employees to follow through on the misconduct they advocated." Accordingly, the employees' conduct was not protected and the employer did not commit an unfair labor practice by withdrawing the rehire offers.

This decision demonstrates that even the current Board has a limit to what type of employee conduct on social media must be tolerated by employers. Although this decision will likely enable employers to more confidently take action against employees who discuss premeditated insubordination on social media, the distinction between true threats of insubordination and what the Board might consider to be hyperbole is somewhat murky. Employers should still tread carefully before disciplining employees for conversing on Facebook about work-related issues.

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