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Changes At NLRB Risk Retaliation For Posting #MeToo

By **Michael Ellement** (March 28, 2018, 11:11 AM EDT)


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The National Labor Relations Board is rolling back protections for workers who post on social media at a time when many women are taking to online platforms to share their stories of sexual harassment and assault in the workplace.

The Obama-era NLRB, relying on longstanding protections and interpretations of the National Labor Relations Act, took strong steps to protect workers who speak out about working conditions on social media. Beginning in 2011 with three reports by the then-acting general counsel, and culminating in a series of board and courts of appeals decisions, the NLRB found a number of employer social media policies unlawful and held in favor of workers who had been disciplined for social media use, on the grounds that social media postings are protected action under the NLRA, even in nonunion workplaces.

These employee protections are now under attack as the newly appointed general counsel and board have expressed a desire to overturn several key precedents established in recent years. The policy change comes at a critical juncture for online concerted activity, particularly by women using the internet to combat workplace harassment and violence.

#MeToo Activism is Succeeding

Beginning in October 2017, the #MeToo movement encouraged women to share on social media if they had been sexually harassed or assaulted. As my colleagues Lynne Bernabei and Devin Wrigley previously detailed, over the past several months, a new wave of online activism developed whereby women from varying professions utilized online resources to speak about harassment in the workplace.
Women in the media industry began using a Google Doc titled "Shitty Media Men" to anonymously post stories about sexual harassment they experienced from men in the media industry. This led to HR investigations and personnel changes at multiple companies.

Female comedians in Los Angeles have used private Facebook groups and Instagram to expose male comedians who have committed sexual assault. At least three men accused of sexual misconduct have since been banned from working in popular theaters.

Artists began communicating about their experience with harassment over WhatsApp, and eventually published a letter, signed by over 2,000 people and shared widely on various social media platforms, speaking out about the prevalence of sexual harassment in the industry.
These are only a few examples of women using social media and other online tools to speak about harassment they experienced in the workplace.

Legal Protections Have Already Been Rolled Back by the NLRB

The board made a major reversal in December 2017 affecting protections for online concerted activity. On a party-line vote, the board overturned Lutheran Heritage Village-Livonia[1], which previously held that facially neutral workplace rules were unlawful if they would be reasonably

construed to interfere with the exercise of rights protected by the NLRA. This was an important protection against overbroad workplace rules generally, but specifically for employer social media policies. Many employers in the last 10 years have included broad social media policies in their employee handbooks that limit employees' ability to post online information related to work, even on the worker's home computer. Lutheran Heritage and its progeny led to legal action against employers maintaining and disciplining employees under such overbroad policies.

In Boeing[2], the board overturned Lutheran Heritage and lessened the standard for finding a violation for maintaining an overbroad workplace rule, holding that the board will now balance the potential impact on NLRA rights with the employer's justifications for the rule — significantly reducing the likelihood that policies will be held unlawful. This change will make it more likely that overbroad social media policies are included in every employee handbook, and lead to more employees being disciplined for what they write online.

The NLRB is Proposing Further Rollbacks

Board members and the general counsel have also expressed their desire to change other board precedent related to concerted activity that could impact protections for discussing sexual harassment on social media.

Prior to the #MeToo movement, the Obama-era NLRB enforced broad protections for women complaining about sexual harassment in the workplace.

In Fresh & Easy Neighborhood Market[3] employee Margaret Elias wrote a note on a break room whiteboard asking her supervisor to sign her up for "TIPS training," which related to selling alcohol at the market. Another employee changed the word "TIPS" to "TITS" and drew a picture of a worm or peanut urinating on the employee's name. Elias hand copied the drawing and alteration, and told management she planned to file a sexual harassment complaint. She then took the copy of the drawing that she made and brought it to three other employees (her supervisor and two other female employees) and asked that they sign it, which they did.

The board found Elias' actions to be concerted and for the purposes of mutual aid or protection (requirements for NLRA application). The board held that although Elias was attempting to remedy sexual harassment that she experienced individually, she sought her coworkers' assistance by raising her concern to them and asking that they sign the drawing. This overruled a 2004 case holding that employees filing their own sexual harassment complaint were not acting concertedly, and therefore were not entitled to the act's protection.[4]

While Fresh & Easy did not involve internet activity, its holding is critical to protecting employees who use social media to complain about workplace harassment. Under Fresh & Easy, employees who, without the involvement of co-workers, post "#MeToo" or a personal story about harassment may be afforded NLRA protections on the basis that their posts seek to induce group action against workplace harassment. By contrast, in the pre-Fresh & Easy framework, such posts would not have been considered concerted activity, and therefore were unprotected.

Peter B. Robb, the NLRB's recently appointed general counsel, has signaled his desire to overrule Fresh & Easy. On Dec. 1, 2017, Robb published his "Mandatory Submissions to Advice" list. The list is published by every NLRB GC to instruct the agency's regional offices on handling particular labor law issues, and when the regions should submit cases to headquarters in Washington, D.C., before processing them in the normal course. Included in Robb's list are cases where there is a "Finding conduct was for mutual aid and protection where only one employee had an immediate stake in the outcome (e.g., Fresh & Easy Neighborhood Market, 361 NLRB No. 12 (2014) – individual sexual harassment claim)." Thus, such cases will be submitted for review in D.C. before a complaint is issued, and may lead to the GC refusing to file a complaint in such cases, or arguing that the board should overrule such protections.

Robb also included in the mandatory submissions list those cases involving the board's holding in Purple Communications.[5] There, the board held that employees have a presumptive right to use their employer's email system to engage in concerted activity protected by the NLRA. Like social media, employees can use workplace email to discuss and share experiences about harassment in the workplace. Because employees may not have contact information for co-workers outside the

office, work email is often the best place for an employee to share their workplace harassment experience with co-workers, and ask if they have also experienced or witnessed harassment. Robb's signal that he may seek overruling Purple Communications would be another major barrier to employees combating workplace harassment.

Conclusion

The NLRB's proposed rollbacks are disturbing enough on their own, as they seek to remove important workplace protections. But it is particularly troublesome that the changes are being proposed at a time when the #MeToo movement has shown the power of online activism to combat workplace harassment. The board should reconsider its retreat from protecting workers using technology to fight for change in the workplace. If it moves forward, Congress, courts and other administrative agencies should fill the gap left by the NLRB and enforce other strong protections against workplace retaliation.

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[1] Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)

[2] Boeing, Case 19–CA–090932 (Dec. 14, 2017)

[3] Fresh & Easy Neighborhood Market Inc., 361 NLRB No. 12 (2014)

[4] Holling Press Inc., 343 NLRB 301, 302 (2004)

[5] Purple Communications, 361 NLRB No. 126 (2014)
