

# The Bennett Law Firm

## *Client Update*

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### **National Labor Relations Board Finds Violation Where Employer Discharged Five Employees For Facebook Postings**

In yet another Facebook related decision, the National Labor Relations Board (“NLRB”) continues to define when Facebook activity is protected under the National Labor Relations Act (“NLRA”). In a 3 to 1 vote, the NLRB ruled that a social service agency violated the NLRA by discharging five employees for Facebook comments they wrote in response to a co-worker’s criticisms of their job performance.

The social service agency employed two employees, Cruz-Moore and Cole-Rivera, to assist victims of domestic violence. These employees frequently communicated with each other both during work and outside of work. To the dismay of her coworkers, Cruz-Moore often criticized the work habits of other employees. The criticism escalated when Cruz-Moore sent Cole-Rivera a text message indicating that Cruz-Moore intended to complain to the Executive Director about the performance of employees. Cole-Rivera was upset with Cruz-Moore and posted the following on her Facebook page:

Lydia Cruz, a coworker feels that we don’t help our clients enough...I about had it! My fellow coworkers how do u feel?

Four coworkers posted responsive comments on Facebook objecting to Cruz-Moore’s opinion of them. Cruz-Moore saw the Facebook postings and complained to the Executive Director that her coworkers had “slandered and defamed” her. The Executive Director reviewed all of the Facebook postings and decided to terminate Cole-Rivera and the four other coworkers who criticized Cruz-Moore on Facebook. He testified that he found their postings to constitute harassment under the agency’s anti-harassment policy.

The NLRB found that the discharged employees were engaged in protected concerted activity for the purpose of mutual aid or protection. The employer argued that the employees’ Facebook conduct was not for the purpose of mutual aid or protection. The employer’s argument was that they merely criticized Cruz-Moore on Facebook and did not suggest that any concerted activity should take place for their mutual aid or protection. The NLRB conceded that none of the five discharged employees had explicitly recommended action for their mutual aid or protection. However, the Board found that the Facebook postings constituted a first step toward taking group action to defend themselves against Cruz-Moore’s criticisms of them. The Board further found that this so called first step was sufficient to trigger protection under the NLRA. The Board concluded that the employer should have anticipated that this first step could easily lead to group action for their aid or protection. The NLRB ordered the reinstatement of all five discharged employees.

Employers must be aware that disciplinary actions in response to social media activity are complicated and can violate federal law in some but not all circumstances. In previous decisions, the NLRB has invalidated certain social media policies as violating the NLRA. We have the necessary experience to be able to guide you through these decisions and hopefully to avoid the expense and embarrassment that this loss caused to this employer.