
Protected Speech Issues in the Workplace

By Lynne Eisaguirre

Two recent cases point the way to a continuing of protected speech issues in the workplace. [In the first, the National Labor Relations Board \(NLRB\) sued a Connecticut ambulance company that fired an employee after she criticized her boss on Facebook.](#) The NLRB argued that the worker's negative comments were protected speech under federal labor laws. The company countered that it fired her because of complaints about her work. The suit settled when the company agreed to change its blogging and Internet policy, which barred workers from disparaging the company or its supervisors.

Under the National Labor Relations Act (NLRA), workers have a long-standing, legally protected right to discuss wages, hours and working conditions.

The comments were posted from the employee's home computer, hours after her supervisor said a customer had complained about her work. The expletive-filled posting referred to her supervisor using the company's code for a psychiatric patient.

Most legal experts agree that the law protects a company's right to govern disloyal comments or disclosure of truly confidential company behavior. Yet where the

boundaries are in terms of social media, especially the use from a home computer, remains unclear.

And what about hate speech, such as the U.S. Supreme Court's recent ruling in Kansas that a church has a right to protest against homosexuality at military funerals? How would that apply in the workplace?

Many employees are shocked to discover that their workplace free speech rights are limited, unless they work for a government employer. Even then, hate speech would violate harassment and discrimination laws and policies.

Employee hate speech *outside* the workplace continues to bedevil employers. Look for a trend of these cases to continue.

Ask the Experts and Look at Your Policies

As in most matters, you need to take a sharp look at your policies in light of recent decisions. Clearly, an employer has a right to enforce the use of appropriate speech on its own computers in the workplace. In general, there are no broad first amendment rights in private workplaces, such as the right to use hate speech, which would violate an employer's harassment or EEO policy. The NLRA Act would be limited to speech that involves working conditions. I have long advised shocked managers in my classes that we believe barring discussions of salaries at work, a common practice, would be a violation of the NLRA.

As to general workplace grousing on line, outside of work, as one of my clients, an experienced in-house counsel advised: "I think that we all just need to toughen up. This kind of talk has been going on forever. It's just a question of it now being on-line, instead of in front of the water cooler."

While I hesitate to disagree with someone I respect, I do think the issues are different if we are talking about online speech that can be immediately disseminated to 3,000 of your enemy's closest friends.

Also, if you see an employer marching outside of work in a KKK parade or disparaging gays, hands off, unless that behavior bleeds back to the workplace.

In summary, here are some tips:

- Review your policies to see if changes are needed in view of these recent rulings, as well as the continuing growth of social media
- Call the experts. Make sure that you consult legal counsel.
- Train managers that there are limits to what speech they can and cannot control.