When Employees “Unlike” the Boss: Protected Concerted Activity in the Age of Social Media

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Protected concerted activity in the context of labor relations is defined as the legally protected right of employees to act together (in concert) in order to improve their working conditions. Incorporated in this is the right of employees to communicate with one another about issues relating to the terms and conditions of their employment.

The right of California public employees to engage in protected concerted activity is codified in the statutes under The California Public Employment Relations Board’s (PERB) jurisdiction. Among others PERB is responsible for administering and enforcing each of the individual statutes covering different subsets of public employees including The Meyers-Milias Brown Act (MMBA)(most municipal, county and local special district employees), The Trial Court Employment Protection and Governance Act (Trial Court Act) (trial court employees) and The Higher Education Employment Relations Act (HEERA)(California State University, University of California and Hastings College of Law employees).2

Taking MMBA as an example, municipal, county and local special district employees’ right to engage in protected concerted activity is codified in California Government Code Sections 3502 and 3506.

3502. Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

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1 Clicking **Like** under something you or a friend posts on Facebook is an easy way to let someone know that you enjoy it, without leaving a comment. Just like a comment though, the fact that you liked it is noted beneath the item; http://www.facebook.com/help/452446998120360/

2 CALPELRA Academy I
3506. Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

Even a decade ago no one could have predicted the ubiquity of social media. Facebook, Twitter and other virtual communities have provided an additional venue in which to interact with friends, family and co-workers. In the employment context, social media serves as the virtual water cooler, and as happens at the actual water cooler, can be the place where employees voice their workplace concerns. Given this, it was inevitable that the issue of protected concerted activity in the social media sphere would come to be addressed.

The National Labor Relations Board (NLRB or the “Board”) is the federal agency responsible for enforcing the National Labor Relations Act (NLRA), the private sector equivalent of the statutes governing public employees, e.g. MMBA, Trial Court Act, HEERA, etc.

Section 7, Rights of Employees, of the NLRA reads:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

In 2010 the NLRB began receiving unfair practice charges against employers related to social media. Most complaints involved employers disciplining employees for posting about their employer or workplace on social media sites. In several instances the Board’s findings were that the employer had violated federal labor law by violating the employee’s right to engage in concerted protected activity and accordingly issued complaints against the employers. As issues of social media were coming before the Board in increasing numbers, The NLRB Office of General Counsel issued three memos, one in 2011 and two in 2012, to provide guidance to employees and employers around issues of social media in the context of labor relations.3 In these memos the Board addressed primarily three issues:

- Protected activity on Facebook and Twitter

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3 http://www.nlrb.gov/node/5078
- Union coercion on Facebook and YouTube
- The legality of workplace social media policies

Our discussion will focus on the rationale and analysis the Board used in determining that employee posts on Facebook were protected and/or concerted speech.

Under the National Labor Relations Act a prima facie case of retaliation for protected activity is established by proving that:

1. the alleged discriminatee engaged in union or protected concerted activities
2. the Respondent knew about such activity
3. the Respondent took adverse employment action against the alleged discriminatee; and
4. there is a link or nexus between the protected activity and the adverse employment action.4

Similarly, under MMBA, to establish a prima facie case of retaliation, the charging party must show that:

1. the employee exercised rights under MMBA
2. the employer had knowledge of the exercise of those rights
3. the employer took adverse action against the employee; and
4. the employer took the action because of the exercise of those rights, or nexus5.

It is important to note that, while NLRB decisions are not binding on California public sector employers, the Board’s rationale and rulings can and are used by the Public Employment Relations Board when interpreting matters of a similar nature6. As such, public employers should heed the NLRB’s decisions and analysis in determining whether an employee’s conduct in the virtual world was protected.

When determining whether an action is protected, the Board looks to whether an employee acts “with or on the authority of other employees, and not solely by and on behalf of the employee himself.” This includes “circumstances where individual employees seek to initiate or to induce or to prepare for group action” and where individual employees bring “truly group complaints” to management’s attention.7

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4 Hays Corp., 334 NLRB 48 (2001)
5 Novato Unified School District (1982) PERB Decision No. 210
6 Fire Fighters Union v. City of Vallejo (1974)12 Cal. 3d 608 [116 Cal.Rptr. 507] confirmed that NLRB decisions may be used by PERB for guidance when interpreting issues of a similar nature
If the activity is deemed to be concerted then a determination as to whether the speech is protected is made using 3 factors:

(1) if the speech occurs in the context of an ongoing labor dispute;
(2) if it is related to that dispute; and
(3) if it is determined to not be egregiously disloyal, reckless or maliciously untrue.\(^8\)

The most common scenarios addressed by the Board in relation to concerted activity are those involving employees posting on Facebook. The following is a synopsis of the Board’s findings in some of those cases as well as an explanation of the Board’s determination as to the protected nature of the employee’s activity.

**Karl Knauz Motors, Inc. d/b/a Knauz BMW and Robert Becker (13-CA-046452)**

In *Karl Knauz Motors*, Robert Becker a terminated employee, filed an Unfair Labor Practice Charge claiming that he was discharged because he had engaged in protected concerted activities. Knauz Motors owned several luxury auto dealerships in Illinois and Becker was a salesperson at the BMW dealership. The dealership was planning to host an event for the release of a new model Series 5 BMW. Prior to the event Becker and his co-workers met with Management and expressed concerns about the “low rent” refreshments that were going to be served to potential customers. The employees continued to talk among themselves about these concerns.

The day of the event a salesperson allowed a 13 year old to get behind the wheel of a Range Rover. The car ended up in a pond and Becker photographed it. At this event, the dealership served hot dogs, bags of chips, cookies, apples, oranges and bottled water. Becker photographed his fellow salespeople holding the food items.

**EMPLOYEE ACTION:** Five days after the event Becker posted some of the pictures he had taken, including a picture of the Land Rover in the pond with the caption, “This is your car: This is your car on drugs.” He also posted, “this is what happens when a sales Person sitting in the front passenger seat (Former Sales Person, actually) allows a 13 year old boy to get behind the wheel of a 6000 lb. truck built and designed to pretty much drive over anything. The kid drives over his father’s foot and into the pond in all about 4 seconds and destroys a $50,000 truck. OOOPS!”

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\(^8\) NLRB v. Local Union No. 1229, IBEW (Jefferson Standard Broadcasting) (1953) 346 U.S. 464
Becker also posted the pictures of the food served at the event titling the pictures, “BMW 2011 5 Series Soiree.” He posted, “I was happy to see that Knauz went “All Out” for the most important launch of a new BMW in years… the new 5 series. A car that will generate tens in millions of dollars in revenues for Knauz over the next few years. The small 8 oz. bags of chips, and the $2.00 cookie plate from Sam’s Club, and the semi fresh apples and oranges were such a nice touch…but to top it all off…the Hot Dog Cart. Where our clients could attain a over cooked wiener and a stale bunn (sic).” One of the pictures shows his co-worker holding bottles of water with the post, “No, that’s not champagne or wine, it’s 8 oz. water. Pop or soda would be out of the question” In this photo, Fadwa (his co-worker) is seen coveting “the rare vintages of water that were available for our guests.”

Becker was terminated shortly thereafter. Knauz Motors maintained that Becker was fired solely for posting the Land Rover accident pictures and captions.

BOARD DECISION: As to the nature of the postings, the Board made the determination that Becker’s postings about the food were indeed protected. Salespersons’ pay at Knauz Motors is comprised of three elements: commission based on a percentage of profit, selling a minimum number of cars and a Customer Satisfaction Index. The underlying concern for the salespersons was that serving cheap food would have a negative impact on their wages in that a customer might not purchase a car or could give the salesperson a negative rating. Individual actions are concerted to the extent they involve a “logical outgrowth of prior concerted activity.” Becker’s posting about the food was part and parcel of this concerted activity. The Board also found that Becker’s comments were not “egregiously disloyal, reckless or maliciously untrue” pointing to the fact that, while the postings had a mocking or sarcastic tone, they did not lose protection of the Act because of it. Alas, as to the reason for Becker’s termination, the Board found management’s claim that it was solely as a result of the Land Rover postings to be credible. The employer maintained that they could not tolerate an employee making light of a serious accident where someone had actually sustained injuries. Management claimed that they actually found the food postings comical, an assertion the Board used in determining that the termination was not motivated by the food postings.

COMMENTARY: Because the Board found that Becker’s postings about the food were protected, had he only posted about the food, he would have likely been reinstated. The record

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9 NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 265 (9th Cir. 1995)
showed that the topic of the quality of the food had been the subject of conversation amongst the employees prior to the Facebook postings. Indeed, they had even voiced their concerns in a meeting with management. There is no question that Becker’s pictures and snarky commentary were a continuation of the conversation, thus a “logical outgrowth” of the employees’ concerted activity. In fact, at first blush the postings about the food do not seem to be about wages at all but just mocking the employer. What is interesting in this case is that the employee’s concerns were actually in line with what we would think management’s concerns would be, that BMW and its brand not be downgraded. Becker claimed, and the Board agreed, that a logical outgrowth of this tarnishing of the brand would be a negative impact on the salespersons’ wages. Unfortunately for Becker he chose to post about the accident at the same time as the food and handed the employer a valid cause for his discharge.

**Triple Play Sports Bar and Jillian Sanzone and Vincent Spinella (34-CA-12915)**

Similar to the employee in *Karl Knauz Motors*, Jillain Sanzone and Vincent Spinella, employees of Triple Play Sports Bar filed an unfair labor practice alleging that they were discharged for engaging in protected activity. In January 2011 the bar’s staff engaged in discussions regarding the amount of money that they owed the state of Connecticut after filing their taxes. The employees brought their concerns to the owners who scheduled a meeting with the bar’s accountant and payroll company in an effort to clarify the issue.

**EMPLOYEE ACTION:** On February 1, 2011 Sanzone engaged in an online “discussion” on Facebook with two of her co-workers, two former co-workers, and two *Triple Play* customers. The conversation centered on the fact that she owed extra taxes on her wages. In the conversation there is discussion of the owners having “fucked up the paperwork” for her and other current and former employees and the steps some of the current and former employees were going to take to remedy the situation, like going to the labor board. Vincent Spinella a co-worker engaged in the conversation by “liking” a comment that Sanzone had posted in the conversation, specifically a comment calling Ralph Delbuono, one of the bar’s owners, an “asshole.”

On February 2, 2011 a day after Sanzone’s posting, Triple Play Sports Bar terminated Sanzone’s employment. According to Sanzone, the owners of the bar told her that she was not
loyal enough to work in the bar as indicated by her Facebook posting. The employer maintained that Sanzone was discharged because her Facebook postings indicated that she was disloyal and because on several occasions her cash register had more money than receipt totals indicated she should have. A couple of days later, the employer hired an attorney to write a letter to Sanzone ordering her to take down her comment from Facebook under the threat of a possible defamation lawsuit being filed against her. Sanzone complied by removing the post.

On February 3, 2011, two days after having “liked” Sanzone’s comment, According to Spinella, the owners of the bar asked him if he had their best interests in mind as he had “liked” Sanzone’s comment, to which he responded “no.” He was told, as well, that he could be sued for making disparaging remarks about the bar. He was then told that it was time for him to go home for good, so he left. The employer maintained that Spinella was discharged for excessive cell phone use, excessive interaction with the waitresses, excessive cigarette breaks, and failing to timely perform his work. They maintained that Spinella’s activity on Facebook had no bearing on his discharge.

ADMINISTRATIVE LAW JUDGE DECISION: The Administrative Law Judge (ALJ) who heard the matter determined that Triple Play Sports Bar had discriminated against Sanzone and Spinella for engaging in protected activity and ordered they be reinstated. In her analysis the ALJ confirmed that the topic of wages, or taxes on those wages in this case, fell well within the employment relationship and as such conversations pertaining to them was protected. She also emphasized that the extra taxes had been a topic of conversation amongst the employees and the posting was an extension of that conversation as three employees, including Spinella were involved in the posting. Spinella’s clicking “like” was deemed to be sufficient participation in the discussion to become protected. She went on to point out that, as it pertains to protected activity, “The specific medium in which the discussion takes place is irrelevant to its protected nature.”

The ALJ dealt Triple Play a double whammy by also finding them in violation of The Act in that they had threatened to bring legal action against the employees for engaging in protected activity. Ultimately, despite the employer’s assertions to the contrary, Sanzone’s

10 As of April 2013 the matter is still pending before the full Board
11 Timekeeping Systems, Inc., 323 NLRB 244, 247 (1995) (e-mail regarding vacation policy sent by employees to fellow employees and to management concerted activity)
12 S.E. Nichols Marcy Corp., 229 NLRB 75 (1977)
single comment and Spinella’s one click of the keyboard to “like” that comment were found to be the motivation for their terminations and, having been found to be protected, allowed for the remedy of reinstatement.

COMMENTARY: As in Knauz Motors the employer in this case maintained they had other reasons for the employees’ discharge apart from the Facebook postings in which employees discussed their tax obligations. In this case it is hard to ignore the proximity of the Facebook activity and the terminations. Sanzone’s termination was one day after her posting. While the employer indicated that Sanzone’s termination was due not only to the posting but also the discrepant cash drawer, the fact that they only spoke to Sanzone once in 2010 made the employer’s reason for the discharge specious. Similarly, Spinella’s termination followed two days after his “like.” All of a sudden, according to Triple Play, he was an employee who had a multitude of performance issues. While Spinella conceded that he had been spoken to informally about some of the issues, the ALJ pointed out that he was never formally disciplined or otherwise put on notice. While the ALJ did not point to proximity of the discharge to the postings, I believe the fact the terminations were so close to the Facebook activity spoke volumes. The employer was then left to attempt to fill in the gaps with accounts of employee performance deficiencies.

The ALJ in this case specifically found that the employee clicking “like” was enough “participation” in a discussion as to be protected. Of course for this to apply to other situations one would have to evaluate the conversation or the post the employee “liked”. This interpretation however, greatly expands the universe of protected activity.

Wedge Corporation d/b/a Rock Wood Fired Pizza and Janelle Morehart (19-CA-032981)

In 2010 Janelle Morehart filed an unfair labor practice claim with the NLRB alleging that she was discharged from her employment with Rock Wood Fired Pizza for engaging in protected activity.

EMPLOYEE ACTION: In 2010 Morehart and some co-workers complained to management that a new bartender was not cleaning up after his shift, leaving more work for others. Shortly thereafter, after learning that the bartender was found to be substituting cheaper liquor in drinks that were to be made with premium liquor Morehart posted comments on her Facebook account calling him a “cheater” and “dishonest.” Morehart postings were seen by co-
workers, former co-workers and customers. Some of the coworkers posted responses intimating that she should be careful in what she says in her posts.

When she returned to work Morehart spoke to another bartender about problems with the “cheating” bartender but not about the substitution of liquor that Morahart had posted about. She also spoke to a server who told Morehart that her postings on Facebook had been “brave.” The bartender she had spoken to along with a couple of other servers then told Management about the posts indicating they were concerned that other customers would see the posting. Morehart was subsequently terminated and the employer indicated specifically that her termination was due to the “use of unprofessional communication on facebook to fellow employees viewed by employees.”

BOARD DECISION: The Board found that Morehart’s posts were not protected and, as such, her termination was not in retaliation for that activity. In their analysis they pointed out that complaints relating to the quality of service provided by an employer are not protected when the concerns have only a tangential relationship to the employee’s terms and conditions of employment. Accordingly they found that Morehart’s comments had only a very peripheral connection with the terms and conditions of her employment. Morehart maintained that she was concerned that her co-bartender’s actions would lead to the loss of sale or lower tips due to weaker drinks. The Board pointed out, however, that this was not a concern she actually articulated in her post. They also pointed out that, if that was truly her concern, she would not have communicated the fact that the restaurant was selling weak drinks to the customers who had access to her Facebook. In conclusion, the Board found that Morehart posted about her co-worker simply because she was upset and not in an effort to garner mutual aid or protection.

COMMENTARY: This case seems to have parallels to Knauz Motors in that Morehart, similar to Becker, was concerned that the employers’ actions or inaction in this case (allowing watering down of drinks) would impact patronage or wages (in this case, tips). The Board in this case, however, found that the fact that she made no mention of this in her posts and indeed advertised the fact that the drinks were watered down to customers and co-workers alike, took away from her assertion. In Knauz Motors, however, Becker did not make specific mention of his concern with wages and similar to Morehart, made his posts available to the public or possible customers. What seems to have been the deciding factor in determining that Morehart’s postings were not concerted activity was the fact that they were deemed not to have
been part of a “logical outgrowth” of prior concerted activity. While Morehart and her co-workers had voiced concerns prior to the posting about the “cheating” bartender, they had not voiced concerns about the cheating. Indeed, even after the posting, the conversation about the bartender was not about the cheating but about the posting itself (it was “brave”) and other issues with the same bartender. Had Morehart engaged her co-workers in discussing the “cheating” and the possible impact on their wages because of it, the outcome in this case would have likely been different.

Public Service Credit Union (27-CA-021923)

In 2011 a member service representative employed by Public Service Credit Union filed an unfair labor practice with the NLRB alleging that he was discharged from his employment for engaging in protected activity and that he was subjected to unlawful surveillance because his employer gained access to his Facebook posts. In this case, the employee had advised a customer on what location to go to in order to change his PIN because it could not be done at that branch. Shortly thereafter the service representative’s supervisor informed him that the customer had called to complain he had told the customer to drive to another branch in Fort Collins to change his PIN. She said that because of this, the customer said he was thinking of closing his account. The supervisor told the service representative that he needed to do a better job in servicing members.

EMPLOYEE ACTION: The employee posted twice to his Facebook account on his lunch hours recounting what had happened, calling the customer a “clown” and posting “**k him, then.” He also posted complaints about his supervisor “jumping down my (his) throat for really petty small crap”. Both friends and co-workers responded to his posting about the customer. Co-workers responded by saying not to forget to charge the customer the fee to close his account and “people are morons. Not to be mean.”

A few days later the representative called into a meeting with his Branch Manager. In the meeting he complained about his supervisor adding that, in the feedback given to him, she was condescending and negative instead of constructive. The Branch Manager indicated that she would be speaking to his supervisor.

Four days after his meeting with the Branch Manager the representative was told derogatory statements about customers would not be tolerated and he was discharged.
BOARD DECISION: The Board found that the representative’s Facebook postings did not constitute protected activity. It has been found that concerted activity does not require that two or more individuals act in unison to protest, or protect, their working conditions. Concerted activities can include individual activity where individual employees seek to initiate or to induce or to prepare for group employee action. It can also include individual activity where an individual employee brings truly group complaints to the attention of management. 13 Indeed, the Courts have stated that the “activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity.”14 In the present case the representative did not seek to initiate any action and when questioned in the course of investigating the complaint the employee himself admitted that he was merely venting and not attempting to initiate or induce any collective action. Further, while the representative’s comments were in reference to a situation at work, it did not cause other employees to bring forth similar or shared concerns about working conditions or issues with customers at the credit union. As is the pattern, when the finding is that the activity is unprotected, the termination is found to be lawful and the unfair practice charge is dismissed.

COMMENTARY: It is interesting that upon being interviewed this employee indicated that he was not attempting to bring forth any collective action but was merely venting. One wonders, why then, he filed the unfair labor practice charge? It may have been more of an issue of his taking exception to having his Facebook accessible to Management and the reason “unlawful surveillance” alleged in the charge was also dismissed. The Board dismissed the surveillance complaint because there were no protected activities that could have been put under surveillance and, in this case, a group of employees brought Management’s attention to the postings. But, what if there had been protected activity and the employer had actively sought out the employee’s page? To this, Assembly Bill 1844 which prohibits California employers from requesting social networking passwords from current or potential employees went into effect on January 1, 2013. 15 I believe the public nature of Facebook, privacy settings or not, will still make these types of surveillance charges unpersuasive.

14 Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969)
15 http://leginfo.legislature.ca.gov
In conclusion, a reading of even some of these cases makes it clear that social media is filled with landmines that both employees and employers must learn to navigate. Employees take to these sites casually and at times without much thought as to the consequences. A search of PERB’s website\(^{16}\) for cases containing the words “Facebook” “Twitter” and “Social Media” produced no cases in which the subject of concerted activity in the context of social media was addressed. I anticipate, however, that this will soon change as employees become better versed in their rights.

Public employees by the very nature of their employment, interact with and serve the community. While they may not complain about the watering down of drinks they could certainly take to Facebook and post about their agency or a co-worker not serving the public as well as they should e.g., a street sweeper taking shortcuts, a nurse giving the wrong medicine. The topic of wages is always ripe for discussion and in an environment where most public employees have not seen raises in years and have had to contribute more and more to their pensions we can be sure that there are plenty of “conversations” taking place that are protected. There may even be discussions of labor negotiations posted on someone’s “wall”. Not limiting themselves to Facebook, I have seen public employees post comments on online stories about their agencies or city council action. While most employee use aliases when posting I have seen some who have not. This can be troublesome.

The practitioner can head this off at the pass somewhat by ensuring that their social media policies do not unintentionally impede protected activity. The General Counsel of the NLRB has provided employers with guidance on what they deem acceptable policies. In short, any policy that would restrict or otherwise impede an employee from discussing wages and working conditions with co-workers would violate the law.

Of course the practitioner is not scouring Facebook or even OCRegister.com in an effort to find those employees who are discussing their employers, customers or other aspects of their workplace online. The employer must be ready to act, however, when the issue comes up. More importantly they must be able to differentiate, at least initially, if the employee is just griping or if the employee is engaging in what might be construed to be protected activity. As these cases show, context is everything. As such, employers must perform due diligence once they are aware of a possible situation to ensure that they have a full understanding of that context. The

\(^{16}\) http://www.perb.ca.gov/decisionbank/search.aspx
extra time spent is sure to pay dividends, but more importantly is likely to save all parties multiple trips to Glendale.\textsuperscript{17}

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