

FACEBOOK: FIREABLE OFFENSE OR FREE SPEECH?

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Attorneys

Julia Hilliker

The interplay between an employee's postings on Facebook and the impact of those postings on his or her employment status is an evolving area of the law. Just last month, the U.S. District Court for the Northern District of California dismissed a lawsuit brought by a former employee who was fired over content posted to her Facebook account (*Guevarra v. Seton Medical Center, et al.*, No. C 13-2267, N.D.Ca. Dec. 2, 2013). The plaintiff, a nurse previously employed by the defendant, a private hospital, posted the following to her page:

Instead of spending my birthday celebrating, I will be working all night cleaning up feces. I hate loathe that effin heffer!!! Burn in hell you effed up spawn of satan. I curse you and wish you a lifetime of pain and suffering. That is not enough, right now I would give anything to smack you down and pound you to unconsciousness. ...

Thanks to the effin heifer who royally effed up my schedule, not only am I working Mothers Day, and my anniversary. And this Friday, I will be getting the smallest paycheck I have had in 12 years due to the 17 percent pay cut we had to endure."

When co-workers reported the post to the hospital, the police were immediately notified and the nurse was fired later that day. The nurse then filed for unemployment benefits, but her claim was denied on the basis that she violated hospital policy, which bans threatening or abusive language, and was therefore disqualified from receiving benefits.

She then filed suit alleging that her termination violated her right to free speech under the state constitution. The court disagreed, noting that state and federal courts alike require a showing of a state actor to support a claim under the state constitutional provision.

Prior to this ruling, the Fourth Circuit ruled this past fall that "liking" a post on Facebook could be protected speech (*Bland v. Roberts*, No. 12-1671, 4th Cir. Sept. 18, 2013). In that case, six employees of the sheriff's department "liked" a political candidate on Facebook. Their positions, however, were subject to reappointment by the incumbent sheriff, who was the opponent of the political candidate they supported. When the incumbent sheriff won reelection, he did not reappoint the employees. Finding that the "like" was protected speech, the court held that "liking" a page was the same as making a substantive statement. Legal commentators

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continue to speculate on whether the National Labor Relations Board will take a position on this issue. Although the NLRB has not yet issued a ruling on whether a “like” is protected speech, it has issued rulings on other social media policies.

Several factors can affect whether an online posting is protected speech. Employers who are made aware of questionable postings by employees should seek legal counsel to determine whether the posting is free speech or whether it is conduct subject to reprimand or dismissal of the employee.