

**MEMORANDUM**

**To:** ES&A Clients and Friends  
**From:** Anna Elento-Sneed, Esq.  
Trisha Gibo, Esq.  
**Date:** 7/6/2015  
**Subject:** **"Selfies" in the Workplace – The NLRB's Ruling in  
Tinley Park Hotel & Convention Center, LLC**

**SUMMARY**

On June 16, 2015, the National Labor Relations Board (the "Board") held that employer Tinley Park Hotel & Convention Center ("TPCC") violated the National Labor Relations Act ("NLRA") when it terminated an employee for posting, on Facebook, a *selfie*<sup>1</sup> taken at work. The Board held that TPCC's disloyalty rule was overbroad and, therefore, the termination unlawfully "chilled" employees' rights to engage in protected, concerted activity.

**FACTS OF THE CASE**

On June 27, 2014, former TPCC banquet server Audelia "Silvia" Santiago and three coworkers – Xaverie Benedict, Cody Bridges, and Sandra Sana – took numerous selfies during an unpaid meal break in a non-public hallway. During that same break, Benedict posted one of the photos on Santiago's private Facebook page<sup>2</sup> with the comment, "No phones at work" and tagged<sup>3</sup> his coworkers. Multiple people commented on the post, including Santiago who posted in part "I was the only one working like an (sic) slave [;] you guys were taking selfies with my own phone and posting them on my wall lol."<sup>4</sup>

After her shift, Santiago posted another picture on her Facebook page of employees congregated in the hallway, with the comment "That's how we work at TPCC." According to Santiago, the photo sarcastically showed them not working, when actually they had just worked ten hours straight without a break. Multiple people commented on this post, including co-worker Bridges who commented on their pay.

<sup>1</sup> **SELFIE** | *noun* | self-ie | \ˈsel-fē\; an image of oneself taken by oneself using a digital camera especially for posting on social media. *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com/dictionary/selfie>.

<sup>2</sup> At the time of the decision, Santiago's Facebook privacy settings were set so only her Facebook friends, ten of whom are coworkers of hers, could see her page and the described posts.

<sup>3</sup> **TAGGING**: a tag links a person, Page or place to something you post, like a status update or a photo. For example, you can tag a photo to say who's in the photo or post a status update and say who you're with. *Facebook Glossary of Terms*, <https://www.facebook.com/help/glossary/>.

<sup>4</sup> **LOL**: acronym for laugh out loud or laughing out loud used in Internet slang. *Dictionary.com*, <http://dictionary.reference.com/browse/LOL>.

Bridges also defended the photo by noting that he and his coworkers worked hard and taking a minute to pose for a “team building photo” was not a bad thing.

TPCC’s policy on disloyalty banned “making or publishing false or malicious statements” about the company. Furthermore, TPCC’s cell phone policies and procedures banned “unauthorized use of [the] telephone . . . for personal business” while at work. The policy also prohibited cell phone use during “work hours” or “during any paid break times,” and mandated that employees turn off their phone while on duty.

On July 3, 2014, Santiago was terminated. Her discharge letter stated that she was fired for “using her cell phone while on duty,” posting pictures on Facebook “that depict the company in an unfavorable light,” and making “derogatory comments” about the company.

### **WHAT THIS MEANS FOR EMPLOYERS**

Section 7 of the NLRA provides all employees, union and non-union, the right to engage in “protected, concerted activities.” *See* 29 U.S.C. § 157. Protected activities, which include discussing terms and conditions of employment, have now been extended to social media platforms such as Facebook. In this age of smartphones, *selfies* and social media, this means there will be restrictions on what employers can do to limit employees’ activities. Consider the following:

- **Be careful in drafting policies and work rules.** The Board has taken aggressive positions on the types of policies or work rules they consider to be unlawful restrictions of employees’ rights to engage in protected, concerted activities. Specifically, prohibitions against disloyalty and disparagement must be narrowly tailored to avoid overbroad language that would discourage employees from exercising their rights.
- **Don’t restrict employee activity on non-work time and in non-work areas.** The decision in *Tinley* is a reminder of the Board’s previous rule as it applies to the digital context. Use of cellphones and social media on break times may not be prohibited by employers if they are in non-customer/non-public areas. Employers that prohibit this type of activity in their written policies or in practice are in *per se* violation of the NLRA.
- **Be extremely cautious when considering disciplinary action for employee activity on social media. Get all the facts!** The Board believes the exercise of Section 7 rights on Facebook is protected. Accordingly, conversations on social media between two or more employees may constitute *concerted* activity between coworkers. An employee’s simple act of “liking”<sup>5</sup> a coworker’s post about a supervisor or working conditions may be protected as well. Even singular comments by employees, without any participation by coworkers, may be protected if done for the collective good.

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<sup>5</sup> **LIKE:** Clicking Like is a way to give positive feedback and connect with things you are about. *Facebook Glossary of Terms*, <https://www.facebook.com/help/glossary/>.

Note, however, that the Board's decisions on protected, concerted activities and social media are *not* the "final word" on the subject. The Board's decisions have been challenged. Employers will need to keep watch as these issues make their way through the federal courts.