

Termination for Facebook Posting Does Not Violate State Invasion of Privacy Law

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Recent court decisions related to employees' online postings have centered on whether disciplinary decisions regarding those postings may violate the National Labor Relations Act (NLRA). The NLRA protects certain employee "concerted activities" aimed at discussing or improving working conditions, and precludes interference with such communications, including online messages. However, individuals also have brought other legal causes of action against employers for so-called "Facebook firings." Recently, a Texas appeals court was asked to determine whether the firing of an employee on the basis of her Facebook comment violated that employee's state law privacy rights. The court held that it did not. *Roberts v. CareFlite*, Texas Court of Appeal 2d District, No. 02-12-00105-cv (Oct. 4, 2012).

Janis Roberts was a paramedic with CareFlite, a helicopter/ambulance service. Roberts posted on a fellow employee's Facebook wall that she "wanted to slap" a patient who had needed restraints during a transport. When a CareFlite compliance officer learned of the posting, she sent a message to Roberts—also through Facebook—reminding her that the public sees such postings, and asking her to "consider removing that post." In response, Roberts curtly stated, "Yeah, whatever," and went on to state that sometimes "a patient needs an attitude adjustment." Roberts ultimately removed the original posting, but before she did, the company's CEO was made aware of it.

Roberts was terminated for her post, and for her "unprofessional and insubordinate" response to the compliance officer. She subsequently filed a lawsuit asserting that the company's use of and reaction to her personal and private Facebook message postings invaded her privacy, asserting two state law claims: public disclosure of private facts and intrusion upon seclusion.

After the lower court dismissed both of Roberts's claims, she appealed the intrusion upon seclusion claim. However, in order to establish such a claim, Roberts would have to show an intentional intrusion on her privacy that was "highly offensive to a reasonable person." Roberts argued that the rights of employees to privately discuss issues of patients who might affect employees' safety outweighed issues of public concern (in this case, the public's confidence in the ambulance company) and therefore, the employer's intrusion into that discussion was a violation of privacy. In essence, Roberts attempted to assert the state-law equivalent of an NLRA Section 8 claim, which precludes companies from interfering in employees' work-related safety discussions. However, because Roberts's invasion of privacy claim was brought under state law tort theory, the court found that argument to be irrelevant, and it dismissed the lawsuit for lack of legal support.

While this case was brought under Texas state law, the rationale is applicable to other circumstances, as well: courts will not read an "appropriate" cause of action into a lawsuit that fails to assert it. Whether or not Roberts's allegations would have supported a cause of action for violation of the NLRA, her failure to specifically allege that claim, and her reliance on the state-law invasion of privacy claim, doomed her lawsuit. Obviously, employers should not become complaisant based upon this decision—employees' rights to communicate about the terms and conditions of their employment remain protected under federal law.

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