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A Virtual Minefield: The NLRB and Social Media

Article By:

Amy L. Bess

Contrary to what some people might think—especially those who purchase smartphones with dedicated “status update” buttons—the Declaration of Independence did not proclaim that among our unalienable rights is the right to post status updates on Facebook. However, there are limitations on what employers can do about employees who post derogatory messages about the companies for which they work, or the supervisors to whom they report. A recent flurry of activity at the National Labor Relations Board (NLRB) makes clear that online communications enjoy the same protections as any other protected concerted activity, and that the NLRB is ready and willing to take up the cause of those employees disciplined because of what they posted on Facebook or tweeted on Twitter. As a result, any employer rolling out a social media policy or issuing discipline in response to a social media post needs to understand the rules of the virtual road.

By way of background, the National Labor Relations Act (NLRA) provides employees—both union and nonunion—with the right to engage in concerted activities for the purpose of their mutual aid or protection. These protected concerted activities, also referred to as Section 7 rights, can involve two or more employees taking action on their own behalf regarding the terms and conditions of their employment, or a single employee taking action for the aid or protection of other employees. The definition of “terms and conditions of employment” is broadly construed, and includes such concepts as wages, safety, unfair or biased supervisors, and other workplace issues. Employers are prohibited from taking an adverse employment action against an employee who engages in an activity that is protected and concerted. If an employee believes that he or she was disciplined and/or discharged for taking part in protected concerted activity, the employee can file an Unfair Labor Practices (ULP) Charge with the NLRB, asserting a violation of their Section 7 rights.

Until recently it was not entirely clear how far the NLRB would extend the protections afforded by Section 7 to comments made on social media sites. With more than 125 cases coming before the NLRB for review over the past two years, the answer has been clear and unmistakable: while the medium may be different, the protections afforded to employees who speak out on workplace issues that concern more than just themselves remain the same. In an effort to illustrate the factors considered by the NLRB when evaluating employee charges, this article will discuss a handful of cases where the NLRB took action and several where it did not. The article concludes with a series of recommendations for employers seeking to stay off the NLRB’s radar.

The NLRB Takes Action

· In the first decision of its kind, an NLRB administrative law judge (ALJ) ruled on September 6, 2011, that Hispanics United, a Buffalo, New York nonprofit organization, unlawfully terminated five employees for complaining about working conditions on their Facebook pages. The discussion started when one employee posted a coworker's allegation that employees did not do enough to help their clients. This post generated responses from other employees who defended their jobs and criticized working conditions. Hispanics United terminated the five employees from their posts. The ALJ found that it was of no consequence that the terminated employees were trying to neither change their working conditions nor to communicate their concerns to their employer. The ALJ emphasized that "[e]mployees have a protected right to discuss matters affecting their employment amongst themselves." Having found a violation of the NLRA, the ALJ ordered Hispanics United to reinstate the five employees and post a notice concerning employee rights and the violations found; he also awarded the five employees back pay.

· *Karl Knauz Motors, Inc. d/b/a Knauz BMW*, No. 13-CA-46452 (Sept. 2011). On September 28, 2011, another NLRB ALJ issued a decision finding that a Chicago area luxury car dealership *did not*violate Section 7 by terminating a car salesman because he posted information on Facebook that his employer deemed harmful to its reputation. The salesman posted two separate messages (both with accompanying photos) regarding the dealership, one criticizing the food and beverages served at a customer event and the other detailing how a salesperson at another Knauz dealership caused a Land Rover to end up in a pond on the property. Significantly, the ALJ concluded that the post regarding the customer event constituted a protected concerted activity because it related to a series of shared concerns raised by salespeople that the poor quality of the food and drinks might harm sales and thus impact their commissions. The ALJ, however, found no violation because he credited the dealership's explanation that the employee was discharged because of the mocking Land Rover post, not the customer event post. Although he found in favor of the dealership with respect to the discharge, the ALJ nevertheless found that a number of policies promulgated by the dealership requiring employees to be respectful, and prohibiting them from participating in unauthorized interviews or responding to outside inquiries, violated the Act. As a result, the ALJ ordered the dealership to post a notice and notify employees electronically that the offending policies had been rescinded.

· *American Medical Response, Inc.*(Oct. 2010). The company fired an employee who posted critical comments about her supervisor, and then continued to denigrate him in response to messages posted by her coworkers, going so far as to refer to him with a crude term in one post. Despite this, the NLRB alleged that the employee's posts constituted protected concerted activity and that American Medical Response (AMR) violated section 7 of the NLRA by discharging her. The matter was settled prior to hearing, after AMR agreed to revise what the NLRB described as its "overly broad" social media policy.

No Action Is Taken

· On April 21, 2011, the NLRB's General Counsel concluded, in an Advice Memorandum, that the *Arizona Daily Star* did not violate the NLRA when it discharged a reporter who posted a number of inappropriate and offensive tweets, several of which reflected poorly on the newspaper and the City of Tucson. *Lee Enterprises, Inc., d/b/a Arizona Daily Star*, Case No. 28-CA-23267 (Apr. 21, 2011). After tweeting: "The *Arizona Daily Star*'s copy editors are the most witty and creative people in the world. Or at least they think they are," the reporter was told to refrain from airing his grievances or commenting about the paper in a public forum. He continued tweeting, however, shifting his attention to issues pertaining to his area of responsibility—namely, crime in Tucson—posting comments such as: "You stay homicidal, Tucson. See Star Net for the bloody deets," and "What?!?! No

overnight homicide? WTF? You're slacking Tucson."

· *JT's Porch Saloon & Eatery, Ltd.*, No. 13-CA-46689 (July 7, 2011). An employee complained about his pay and disparaged customers on Facebook in response to a general question about his day. The General Counsel issued an Advice Memorandum concluding that while the post related to the employee's terms and conditions of employment, it did not grow out of prior conversations with coworkers about the pay policy, and there was no evidence of concerted activity. The Advice memo found that the employee was merely responding to a question from his stepsister about his day.

· *Wal-Mart Distribution Center 6018*, No. 26-CA-24000 (charge dismissed June 30, 2011). The NLRB dismissed an employee's charge that he was demoted in retaliation for protected concerted activity on his Facebook account. The employer discussed recent earthquakes with the employee on his Facebook page. During the conversation, the employee said he wanted the building to collapse while certain members of management were inside. The NLRB noted that the Facebook comments were such as to cause the employee to lose protection of the Act "inasmuch as the statements could reasonably be considered to be disloyal and unrelated to working conditions."

Lessons Learned

What an employee does or says on a social media site is not per se objectionable simply because it is said online, nor is it inherently protected because it is published in a public forum. If the posting involves work rules or issues related to compensation, discipline and the like, it is most likely protected regardless of how and where it is communicated. At the same time, if the message does not pertain to such issues that impact others beyond the author, employers can seek to curtail such postings or discipline the employee who posted them. Keep in mind, however, that firing someone because of a tweet or a Facebook post may garner far more attention for the underlying issue than ignoring the original posting ever would.

At a minimum, your organization should draft and issue a social media policy that clearly sets out what is expected of employees who use social media. You should be careful, however, not to cast too wide a net. Having an overly restrictive policy, particularly one that could be read as impinging on employees' rights to engage in discussions about the terms and conditions of their employment, will likely face strict scrutiny from the NLRB and could result in the filing of a complaint and the attendant publicity described in this article.

The flurry of NLRB complaints, however, does not mean that employers are powerless to act in the face of online comments that cross the line from protected concerted activity to improper unprotected conduct. The NLRB has, in past decisions, recognized that the failure to follow established procedures in an orderly manner is not protected; just as resorting to personal attacks and obnoxious obscenities will often lead to a forfeit of protection. Thus, the manner in which an employee exercises his or her rights may strip him or her of the protection of the NLRA. Still, the preceding examples indicate that the current incarnation of the NLRB is more likely to fall on the side of the employee if there is any arguable basis to find that his or her online comments are protected.

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