Another Update on Social Media and Employee Discipline

August 11, 2011 by Adam Santucci

We previously reported, the National Labor Relations Board (Board) has been very active in the are of employee social media use. Recently, the Board's Office of General Counsel issued three (3) Advice Memorandums directing the dismissal of charges, which challenged discipline issued to employees based on the employees' social media activity. This latest action, or inaction, by the Board offers us an opportunity to provide another update on social media and employee discipline.

The National Labor Relations Act (NLRA) protects employees who engage in concerted activity from discipline. Board precedent defines concerted activity as (1) group action or action on behalf of other employees; (2) activity seeking to initiate or prepare for group activity, or (3) bringing a group complaint to the attention of management. The recent announcements by the Board's Office of General Counsel shed light on the limits of the protections afforded to employees by the NLRA.

For example, in a July 7, 2011 Advice Memorandum, the Associate General Counsel (AGC) directed dismissal of a charge involving a bartender discharged via Facebook message! That's right, the bar owner actually discharged the employee via Facebook message. The bartender had complained to his step-sister on Facebook about the fact that he had not received a pay raise and about the bar's tipping policy. The bartender also made derogatory comments about the bar's customers. The AGC found that the bartender had not engaged in concerted activity because while the post did address the terms and conditions of his employment, the bartender was not discussing these issues with his coworkers and there was no attempt to initiate group action.

In another case, the AGC directed dismissal of a case involving the discipline of a Wal-Mart employee who posted negative comments about his supervisor because the supervisor had criticized his work performance. Even though the employee's post was commented on by his coworkers, the AGC found that the employee was merely griping, which is not concerted activity.

In a July 19, 2011 Advice Memorandum, the AGC directed dismissal of a charge challenging the discharge of an employee who made comments on Facebook, while at work, that mocked the mentally ill patients to whom the employee was supposed to be providing care. The AGC found no concerted activity because the employee was not communicating with coworkers, she was not discussing the terms and conditions of employment, and because she was merely having a personal conversation with a friend.

These decisions reflect that the NLRA does have limits and it will not shield all employee social media activity from discipline. Furthermore, it is important to note that in some cases, employee activity may be so inappropriate that it loses the protection of the NLRA, even if it was protected concerted activity. The Advice Memorandums summarized above did not have to address this issue because the social media activity was not protected.

While these decisions do provide some clarification for employers, they also highlight the fact-intensive nature of the analysis used to determine whether an employee has engaged in protected activity under the NLRA. Therefore, employers are still advised to seek counsel when considering possible disciplinary action for an employee based on the employee's social media activity.