Employers Association of New Jersey

John J. Sarno, Esq.

For general information purposes only

Employer Liable for Firing Employees Using Facebook

In the first ruling of its kind, a National Labor Relations Board (NLRB) Administrative Law Judge (ALJ) has found that a Buffalo nonprofit organization unlawfully discharged five employees after they posted comments on Facebook concerning working conditions, including work load and staffing issues.

The NLRB has received an increasing number of charges related to social media in the past year and the Office of General Counsel has filed charges of unfair labor practices against several employers but this is the first case involving Facebook to have resulted in an ALJ decision following a hearing.

The case involves an employee of Hispanics United of Buffalo, which provides social services to low-income clients. After hearing a co-worker criticize other employees for not doing enough to help the organization's clients, the employee posted those allegations to her Facebook page. The initial post generated responses from other employees who defended their job performance and criticized working conditions, including work load and staffing issues. Hispanics United later discharged the five employees who participated, claiming that their comments constituted harassment of the employee originally mentioned in the post.

The case was heard by Administrative Law Judge Arthur Amchan on July 13-15, 2011, based on a complaint that issued May 9 by Rhonda Ley, NLRB Regional Director in Buffalo, New York.

Judge Amchan issued his decision on September 2, finding that the employees' Facebook discussion was protected concerted activity within the meaning of section 7 of the National Labor Relations Act (Act) because it involved a conversation among co-workers about their terms and conditions of employment, including their job performance and staffing levels. The judge also found that the employees did not engage in any conduct that forfeited their protection under the Act.

Judge Amchan ordered that Hispanics United reinstate the five employees and awarded the employees back pay because they were unlawfully discharged. The judge's decision also requires that Hispanics United post a notice at its Buffalo facility concerning employee rights under the Act and the violations found. Hispanics United has the right to appeal the decision to the NLRA in Washington, D.C. but it is clear that the regional directors are on the lookout for other cases to bring.

In July, 2011 the NLRB's Office of General Counsel issued three Advice Memoranda in

rapid succession that provide some guidance for employers trying to navigate the intersection of social media and labor law. Two of the Advice Memoranda draw the same bright line rule: an employee who communicates about work through Facebook but only with family or friends cannot invoke the protections of the Act to avoid dismissal. In one of these two cases, an employee of a residential home for homeless individuals with significant mental illness posted facetious comments about residents on her Facebook wall. Only a personal friend responded to the Facebook posts, and none of the employee's coworkers were her Facebook friends. The General Counsel concluded that the employee's Facebook posts were not protected because the employee was merely communicating with personal friends about work. In addition: (a) her posts did not relate to the terms or conditions of employment; (b) the employee did not discuss her posts with coworkers, and no coworkers responded to them; and (c) the employee was not seeking to induce collective action and her posts were not an outgrowth of collective concerns.

The second case was a slightly tougher one. There, a bartender complained through Facebook to his step-sister about this employer's policy barring him from sharing in tips given to servers even though the bartenders helped to serve food. The General Counsel concluded that the bartender could not rely on the NLRA to reverse his firing, even though the post related to the terms of employment, for the same reasons that the employee of the residential home could not do so – the employee did not discuss his post with coworkers and the employee was not seeking to induce collective actions.

The third case provides the most useful guidance, drawing the line between individual gripes (unprotected) and collective activity (protected). In that case, the employee made the following comments about her store's Assistant Manager:

I swear if this tyranny doesn't end in this store, they are about to get a wakeup call because lots are about to quit…

[The Assistant Manager] is being a super mega pita! Its retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price . . . . I'm talking to [Store Manager] about this shit because if it don't change [Company] can kiss my royal white ass.

The General Counsel concluded that the employer could lawfully fire the employee because the posts expressed only an individual gripe, i.e., the employee's own "frustration regarding his individual dispute with the Assistant Manager over mispriced or misplaced sale items." The General Counsel also concluded that the responses to the posts by the employee's co-workers did not convert these individual gripes into collective action because those comments reflected the co-workers' understanding that the employee was speaking only on behalf of himself. One co-worker laughed ("hahaha"); one co-worker asked why the employee was so "wound up;" and a third expressed only emotional support (i.e., "hang in there").

In each of the three Advice Memoranda, the General Counsel referred to the same or similar legal standards. These standards also provide useful guidance and include the following:

- Protected: When the employee "acting with or the authority of" coworkers (a) "seeks to initiate, induce or prepare for group action," or (b) "brings truly group complaints to the attention of management."

- Protected: The employee's activities are "the logical outgrowth of concerns expressed by the employees collectively."
- Unprotected: The employee is engaging in activity "solely by and on behalf of the employee himself."
- Unprotected: The employee's comments are "mere griping" as opposed to "group action."

While these guidelines and the Advice Memoranda obviously do not address the full range of Facebook conduct that intersects with the workplace, they do at least provide some guideposts for employers when deciding whether to discipline or fire an employee based on his or her obnoxious or offensive Facebook post.

November, 2011