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Finally... An NLRB Social Media Decision that Doesn't Give Employers Heartburn!

Those of you who have been following the saga regarding the National Labor Relations Board's (NLRB) new inroad into both non-unionized and unionized workplaces through finding that their work rules and social media policies, both on their face and as applied, violate Section 7 of the National Labor Relations Act by chilling concerted activity will be at least somewhat relieved to hear about the latest NLRB Administrative Law Judge (ALJ) opinion, Karl Knauz Motors, Inc.

This case was referenced as the most ghastly example of the NLRB's exercise of power among all of those referenced in the Board's General Counsel's recent press release in our September 8 alert (click here for the alert).

Specifically, the facts of Karl Knauz Motors, Inc. involved a salesman at a luxury car dealership posting harsh criticisms of a customer event which was put on by his employer on his personal Facebook page. Along with the posts, he also attached pictures of one of his employer's cars which had accidentally been driven into a nearby pond the day before the event. These pictures had nothing to do with the event itself, the employee "just thought they were funny."

The employer, who was obviously embarrassed by the posts after they were brought to its attention by a competing car dealer, terminated the salesman for "being disloyal."

The NLRB alleged that this termination was unlawful because the car salesman's Facebook posts constituted "concerted activity" which was protected by the National Labor Relations Act (NLRA). The Board's basis for this position was that "other salesmen shared the terminated employee's negative opinion of the sales event," "this opinion had been shared with management during a staff meeting following the event," and "because the salesmen worked purely on commission, a sales event they found to be 'subpar' constituted a 'term and condition' of their employment, because the event could negatively affect their sales/commissions."

And now for the good news. . .

In the second "social media" case to reach the NLRB ALJ stage, the ALJ upheld the termination of the car salesman! [Insert cheers and applause here!]

The ALJ's basis for this decision was the employer's explanation that its sole basis for the termination was the salesman's post of the embarrassing "car into a pond" picture, not his critical remarks regarding the customer sales event. The ALJ found that these photos did not constitute "protected, concerted activity" and thus formed a valid basis for the salesman's termination.

Lest we start celebrating too quickly, however, as part of the NLRB's investigation of the circumstances giving rise to this salesman's termination, it requested and reviewed a copy of the employer's employee handbook. It found that work rules requiring "professional courtesy," and prohibiting employees from participating in "any unauthorized interviews" or responding to "any outside inquiries regarding other employees" violated the NLRA.

The ALJ upheld this portion of the complaint and required the employer to post a notice "in a conspicuous place among all its employees [even at other dealerships]" for sixty (60) days stating that it had "violated federal law," "was rescinding the violating work rules," and "will not in any like or related manner interfere with, restrainor coerce employees in the exercise of their rights guaranteed in Section 7 of the Act."

Accordingly, we cannot emphasize enough to seek legal counsel (1) before terminating or otherwise taking any disciplinary action against any employee based on social media communications and (2) in preparing your social media policies and work rules. Again, the law in this area is changing literally DAILY! So, just because you had your social media policy reviewed six months ago, etc. does not make you "safe" from the NLRB's grasp.

For assistance and direction in this ever-evolving area, please feel free to contact Bill Trumpeter or any member of our Labor Relations Practice Group.

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