NLRB ALJ Rules Employer Unlawfully Terminated Non-Union Employees for Comments Made on Facebook

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In a case of first impression, an administrative law judge for the National Labor Relations Board (NLRB) concluded that an employer unlawfully terminated five non-union employees for work-related comments they made on *Facebook*.

The employees worked for Hispanics United of Buffalo, Inc. (HUB), a not-for-profit corporation that provides social services in upstate New York. After one of their co-workers became increasingly critical of their job performance and told them that she was going to raise her concerns with their supervisor, the employees posted several comments on a personal *Facebook* page. The postings began with the following statement: "[This] coworker feels that we don't help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?" The five employees each posted comments in response, including, "What the f*** . . . try doing my job I have 5 programs," and "What the hell, we don't have a life as is, what else can we do?" The comments were made on a non-work day and posted on the employees' personal computers.

The employees' supervisor subsequently notified them that their *Facebook* postings constituted bullying and harassment in violation of the employer's harassment policy, and terminated their employment. The employer did not dispute that the employees were discharged solely because of their *Facebook* comments and conceded that they would have been terminated even if their comments had been made "around the water cooler," rather than online. The terminated employees filed an unfair labor practice charge with the NLRB, alleging that their firings were unlawful under the National Labor Relations Act (NLRA).

An administrative law judge for the NLRB recently agreed that their firings were unlawful. The ALJ reasoned that employees have a protected right to discuss matters affecting their employment amongst themselves, and that explicit or implicit criticism by a co-worker of the manner in which employees perform their jobs is a subject about which employee discussion is protected by Section 7 of the NLRA. That statutory section provides, in relevant part, that employees have the right to form, join or assist labor organizations and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Here, the judge concluded that the employees' *Facebook* communications with each other, in reaction to their co-worker's criticism of their work, was protected. The ALJ also found that the employees' conduct was "concerted" because they were taking a first step towards group action to defend themselves against the accusations they could reasonably believe were going to be reported to their supervisor. Finally, the ALJ rejected the employer's contention that the employees violated its harassment policy as there was no evidence that any of the employees were harassing their co-worker on any of the bases set forth in that policy. As a result, the ALJ determined that the terminations were unlawful and ordered that the employees be reinstated with backpay.

As we have reported previously, the interplay between social media and federal labor law remains a key focal point for the NLRB. The question of whether and to what extent employee online, work-related commentary is protected under the NLRA continues to be highly divisive and fact specific. Attorneys for the employer in this case have indicated that they will appeal the ALJ's decision to the NLRB.

More Information

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