Daily Journal
December 11, 2012

NLRB provides clarification of an acceptable social media policy

By Eli M. Kantor

Can an employer have a social media policy that does not violate the National Labor Relations Act? According to the National Labor Relations Board's Division of Advice the answer is, yes. On Oct. 19, the NLRB issued an advice memorandum in *Cox Communications*, No. 17-CA-087612, clarifying the issue. The NLRB's general counsel had previously issued three separate advice memoranda attempting to clarify what is acceptable for a social media policy to say, leaving employers and their counsel confused as to what is and is not lawful. Significantly, even seemingly neutral polices were found to have violated employee's Section 7 rights. However, now in upholding Cox Communications' social media policy, the NLRB has finally provided some clarity to this constantly changing field.

Cox Communications terminated an employee after discovering lewd and vulgar comments posted to his Google + account relating to a confrontation with a customer. The employee was a technical support representative. He was responsible for troubleshooting customer complaints about their service. A customer called experiencing problems with his cable television service. The employee determined that there was a scheduled maintenance that caused the problem and assured the customer that his problem would be resolved shortly. The customer was not pleased and called the employee a "fagot." The employee then accessed his Google + account and made the following post: "Just because you are having problems with your TV service does not mean you should call me a faggot!F### Y##." One co-worker responded sarcastically as follows: "Doesn't it? I thought that entertainment was the single most important thing ever! How can anyone take away someone's Jersey Shore and Real Housewives ... without being a raging bassoon?"

A supervisor who saw the employee's post reported it to management. The employee was put on a paid suspension, pending a determination of the appropriate form of discipline. The employer commenced an investigation, which disclosed previous posts containing lewd language disparaging customers. The employee was terminated for violating the employer's social media policy. He then filed a charge alleging that his termination violated Section 8(a)(1) of the NLRA because the employer maintained a facially unlawful social media policy and also that he was unlawfully discharged because of comments that he had made on his social media account.

The employer's social media policy started with a "savings clause":

"Nothing in Cox's social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment. Cox Employees have the right to engage in or refrain from such activities."

> The NLRB found that this social media policy was lawful because it met its two step analysis in determining whether the maintenance of a work rule would "reasonable tend to chill employees in the exercise of their Section 7 rights."

It went on to list specific examples of prohibited conduct stating:

"DO NOT make comments or otherwise communicate about customers, coworkers, supervisors, the Company, or Cox vendors or suppliers in a manner that is vulgar, obscene, threatening, intimidating, harassing, libelous, or discriminatory on the basis of age, race, religion, sex ... or any other legally recognized protected basis."

The NLRB found that this social media policy was lawful because it met its two step analysis in determining whether the maintenance of a work rule would "reasonable tend to chill employees in the exercise of their Section 7 rights." A rule is clearly unlawful if it restricts Section 7 protected activities. Second, the rule is examined to determine if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Significantly, the NLRB has found that: " Rules that are ambiguous regarding their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that they do not restrict their Section 7 rights, are unlawful."

Here, the NLRB found that the social media policy was lawful because employees would not reasonably construe the policy to prohibit Section 7 activity. In making this determination, the NLRB focused upon the "context" of the prohibitions. Since the rules clarified their scope by including examples of plainly egregious conduct, it was clear to employees that they do not restrict protected rights. Further, the "savings clause" ensured that employees would not interpret ambiguous provisions in a way that would restrict Section 7 activity.

Finally, the NLRB found that the employer lawfully discharged the employee for violating its social media policy, because his post on Google + was not "concerted activity for mutual aid and protection." Rather, his posting was directed at a customer, not his co-workers, and vented in vulgar terms his anger at the customer. Further, the only coworker who responded to the post, responded with a sarcastic comment, and did not treat it as a discussion about mutual concerns regarding wages, hours or working conditions.

In conclusion, the important points to take away from the advice memo are:

- Social media policies apply to all employees, even in the nonunion workplace;
- A "savings clause" at the beginning of the policy similar to the one in this case is critical for employers to have;
- The more detail the better in explicitly describing what conduct is prohibited by the policy; and
- Before deciding what disciplinary action to take for violation of a social media policy, an employer should conduct an investigation to determine: what was said; who said it; were other employees involved, and whether it related to wages hours and working conditions.

Eli M. Kantor *has extensive experience as an attorney in private practice. He represents employers and employees in all aspects of labor, employment and immigration law. He can be reached at (310) 274-8216 or at ekantor@beverlyhillsemploymentlaw.com.*