Employment Law

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Social Media Update – New Employer-Friendly Ruling by the NLRB

Author: Esra Hudson

For those of you who participated in Manatt's webinar last Tuesday, September 27, 2011 – *New Rules for Social Media in the Workplace* – you may be particularly interested to hear the recent outcome of a case against a Chicago-area BMW dealership that was discussed during the webinar. On Friday, September 30, 2011, the National Labor Relations Board ("NLRB") issued a press release announcing that an NLRB Administrative Law Judge ("ALJ") ruled on Wednesday that the dealership did not wrongfully terminate an employee for his Facebook postings.

In February 2011, the NLRB issued a Complaint against the dealership asserting that it had wrongfully terminated a salesperson who posted on Facebook photographs and comments critical of the dealership. The salesperson and other employees were unhappy about hot dogs and other snacks that the dealership served to customers during its launch event for a new BMW model. They thought the poor quality of the food would negatively impact sales and their commissions as a result, and shared their concerns during a staff meeting. Following the event, the salesperson posted on his Facebook page photographs and sarcastic comments about the food and beverages served. He also posted photographs of an accident involving another salesperson in which a vehicle had been driven into a pond in front of a related dealership during a test drive. The dealership was informed of the postings and, after asking him what he was thinking by posting things that were embarrassing to the dealership, subsequently fired the salesperson.

The Complaint alleged that the Facebook postings were a "protected concerted activity" within the meaning of Section 7 of the National Labor Relations Act ("NLRA") because they involved a discussion among employees about the terms and conditions of employment, namely commissions. Section 7 of the NLRA invests employees with the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Employers who violate employees' Section 7 rights – union or nonunion – are subject to unfair labor practice charges and enforcement efforts by the NLRB. In issuing the Complaint, the NLRB rejected the dealership's explanation that the real reason it terminated the employee was for making light of a serious accident, which the dealership asserted was not a protected concerted activity.

The case was heard by an NLRB ALJ last week, who found that while the postings regarding the sales event were a protected concerted activity, the postings about the accident had nothing to do with the terms and conditions of employment and were not protected.

Newsletter Editor

Andrew L. Satenberg
Email
310.312.4312

Esra Acikalin Hudson
Email
310.312.4381

Practice Area Links

Practice Overview
Members

Author

Esra Hudson
Partner
Email
310.312.4381

Moreover, the ALJ sided with the employer, concluding that the salesperson was fired for the accident postings, and thus the termination was not unlawful. On another note, the ALJ also determined that the dealership had an overly broad social media policy with certain paragraphs that tended to chill employee rights and ordered the dealership to post a notice informing employees of their right to engage in protected concerted activities.

The NLRB has been at the forefront of social media issues in the workplace and, notwithstanding this recent decision, has tended to take employee-friendly positions. Because this is a cutting-edge and evolving area, employers should seek the advice of counsel before implementing social media policies or taking action against employees for their social media conduct.

For access to Manatt's September 27, 2011 webinar on this topic, which is available in its entirety online, please click here.

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