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NLRB Issues Pair of Decisions Limiting Employer Discipline and Policies Regarding Social Media

The National Labor Relations Board (NLRB) recently issued a pair of decisions helping to clarify the limits on employers' ability to (1) discipline employees for their social media activities and (2) implement confidentiality and social media-related policies. The Board's decisions, as well as a recent Administrative Law Judge (ALJ) decision, fell largely in line with the NLRB General Counsel's three social media reports issued in 2011 and 2012.

Costco Wholesale Corporation *and* United Food and Commercial Workers Union, Local 371 (34-CA-012421). In this case, the NLRB considered a number of provisions of an employee handbook. The first rule prohibited employees from discussing "private matters of… other employees… includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc." Another rule barred sharing "payroll" information, and a third prohibited employees from electronically posting statements that "damage the company… or damage any person's reputation."

Largely affirming the ruling of the ALJ below, the NLRB found that all three provisions violated Section 8(a)(1) of the NLRA. Section 8(a)(1) bars employers from interfering with the NLRA Section 7 rights of all employees (whether unionized or not). Section 7 gives employees the right to "engage in… concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The NLRB explained that in determining whether a work rule violates Section 8(a)(1), the Board considers whether the rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). If a rule does not explicitly restrict Section 7 rights, it may still violate 8(a)(1) if "employees would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

In affirming that the first two handbook provisions violated 8(a)(1), the Board agreed with the ALJ that employees are permitted to share information about sick leave, FMLA issues, ADA accommodations, wages, and other terms and conditions of employment. It also noted that employees are free, within limits, to criticize the employer or its agents. Statements that "damage the Company, defame any individual or damage any person's reputation" include protected communications protesting an employer's treatment of its employees. For this reason, the third rule also violated Section 8(a)(1).

Notably, the NLRB stated that a rule barring "verbal abuse," "abusive or profane language," and "harassment" would be permissible, as "malicious, abusive, [and] unlawful" conduct falls outside the NLRA's protections. And it affirmed the ALJ's ruling that a handbook provision requiring employees to use "appropriate business decorum" when communicating with others did not violate Section 8(a)(1).

Hispanics United of Buffalo, Inc. *and* Carlos Ortiz (03-CA-027872). In this case, an employer terminated five employees who posted comments on Facebook outside of work in response to a co-worker's criticism of their job performance. The co-worker complained about the Facebook comments to a superior, and the five employees were discharged for violating the company's "zero tolerance" policy prohibiting "bullying and harassment."

The NLRB found that the Facebook postings were "concerted [activity] for the 'purpose of mutual aid or protection'" and were thus protected conduct under Section 7. The activity was concerted both because the employees were making "common cause" with each other and because they were taking a "first step towards taking group action to defend themselves" against the complaining employee's accusations. The Board pointed out that the "object or goal" of initiating the group action does not have to be clearly stated for conduct to receive protection under the NLRA.

The employees' concerted activity was protected because they were discussing issues of job performance, which falls "well within" the protections of the NLRA. As a result, the Board found that the employer violated Section 8(a)(1) when it terminated the employees for their Facebook postings and affirmed the ALJ's order of reinstatement with backpay and interest.

The NLRB also pointed out that its "zero tolerance" bullying policy did not protect the employer. Quoting *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), it stated that "legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to… discipline on the basis of the subjective reactions of others to their protected activity." The Board emphasized that employers may not lawfully apply anti-bullying policies that contravene Board law.

Quicken Loans, Inc. *and* Lydia E. Garza (28-CA-75857). In another recent case, an ALJ from the NLRB's New York Branch Office considered two employee handbook policies. The first required employees to keep strictly confidential all "non-public information relating to… the Company's business… all personnel lists, personal information of co-workers… [and] personnel information such as home phone numbers, cell phone numbers, addresses and email addresses." The ALJ stated that these restrictions would "substantially hinder employees in the exercise of their Section 7 rights." Because employees could not discuss information regarding wages, benefits, and contact information with other employees, this provision violated Section 8(a)(1).

The second provision required employees to not "publicly criticize, ridicule, disparage or defame the Company or its products, services, policies… through any written or oral statement or image (including… any statements made via websites, blogs, [and] postings to the internet)." The ALJ noted that within limits, employees are permitted to criticize their employer and its products, including while appealing to fellow employees to gain their support. As a reasonable employee could understand this provision as barring this protected activity, the ALJ held that it also violated Section 8(a)(1).

Key Takeaways. The NLRB is treating social media as the modern "water cooler," and these decisions demonstrate its intention to limit employer restrictions on electronic communications. Employers should pay particular attention to the *Hispanics United* decision, as it signals that employers should exercise significant caution when disciplining employees based on their discussions of work-related issues via social media. While employers are generally permitted

to enforce their anti-discrimination and anti-harassment policies online, they are not always free to impose discipline for comments they consider inappropriate or unkind.

Additionally, employers should be careful when setting limits on the types of information they bar employees from discussing. Employees can be required to keep many work-related topics confidential, including trade secrets, personal health information, credit card numbers, social security numbers and other business information. But employers may not prevent employees from discussing issues that relate to the terms and conditions of their employment, including job performance and wage and benefit information.

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