Social Media and the National Labor Relations Board

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Recent statistics suggest that employer discipline of employees for off-the-job tweets, blogs and Facebook postings is on the rise. Employers have justifiable concerns regarding loss of confidential information, as well as poor public exposure, as a result of the online rants and raves of workers. However, the National Labor Relations Board, which applies to both union and non-union employers, has provided some cover for employees who cannot resist telling their friends and the world what they think of their employer.

In *Hispanics United of Buffalo, Inc.*, a Regional Director for the NLRB issued a complaint against a non-profit organization for firing five employees after they posted critical comments about working conditions on one of the employee's Facebook pages. The postings pertained to employee complaints about workloads and staffing levels. The employer attempted to characterize the termination decision as based upon unprotected harassment of a fellow employee who was the subject of an initial Facebook posting. That posting had then drawn the responses from the five employees in question who defended their work and blamed productivity issues on staffing shortfalls. However, the postings were deemed "concerted activity" for the mutual aid and protection of workers and the terminations therefore found unlawful by the Board's general counsel.

On April 21, the Office of General Counsel for the Board issued a memorandum in another case in which the employee's use of social media was found not to be protected under the National Labor Relations Act. In *Lee Enterprises, Inc.*, a public safety reporter claimed he was fired in violation of the Act based upon protected tweets on a work-related Twitter account. The newspaper had encouraged its reporters to use Twitter and other social network tools to get

information to the public who might not otherwise read newspapers in order to encourage them to go to the newspaper's website. A reporter soon became an over-enthusiastic tweeter and his tweets poked fun at his own newspaper, as well as television reporting. He also provided offensive commentary about the downturn in homicides in Tucson with tweets such as: "What?!?!? No overnight homicide? WTF? You're slacking Tucson."

The reporter was terminated for disregarding "professional courtesy and conduct expectations." He filed an unfair labor practice charge alleging that he could not be terminated for engaging in protected activity. General Counsel determined that the Twitter postings at issue did not involve protected concerted activity since the postings "did not relate to the terms and conditions of his employment or seek to involve other employees and issues related to employment."

The reporter also argued that certain supervisory statements that the reporter would not be allowed to tweet about anything work related were also violative of the Act. However, the General Counsel determined these statements, while overbroad and violative of federal labor law, neither led to the termination nor constituted new "work rules" since they were not shared with other employees.

A lesson in both cases is that employer social media policies and enforcement cannot reach postings related to the terms and conditions of employment, especially if other employees are involved in the posting. This places employers in an extremely difficult position since employee disclosure of confidential data on social media sites is often inextricably interwoven with colorable employment concerns. However, at a minimum, any written policies for both union and non-union employers should be narrowly drawn to exclude this protected activity. In

addition, if subject to a union agreement, employers may need to bargain with the union before implementing any changes in their social media policies.