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Social Media Firings: The Continuing Saga

This is something I've kept up with for a while now. Especially because its something that is tremendously important for non-profits. For those who haven't kept up with the saga (though you'd essentially have to have had your head in a Peruvian mountain not to) there has been a proliferation of cases brought before the NLRB dealing with employees fired behind something they've written on Facebook, Twitter, etc. (I've written about it before here and here).

I've discussed what the legal aspects of these cases are before so I won't go back down that road. But Labor Relations Update recently covered two more cases that I thought would be of interest that add a little more to the discussion.

Posts Must Deal With "Terms and Conditions"

I always thought the discussions about "concerted activity" and "union activity" were a bit confusing and hard to translate. I like the way the judge here approached it. He made very clear that posts must deal with the "terms and conditions" of employment. So contrary to popular belief, posting that your boss smells like salami and sleeps on the job is not going to cut it. Because at the end of the day, these cases don't hinge on freedom of speech. They deal with a federal employment statute; the NLRA. Consequently, employees must be able to prove that their employment was directly impacted, and that others shared their sentiments.

What Your Employee Handbook Should Say

What I really liked about the BMW opinion was the direction that was given to employers with regard to their employee handbooks. Provisions non-profits will want to pay particular attention to are:

- Unauthorized Interview/Media provisions
- Provisions that restrict an employee from being able to discuss their wages
- Outside Inquiry provisions that direct where questions regarding employees may go
- Provisions that require courtesy to colleagues and refrain from being disrespectful

because they could be interpreted as violating provisions in the National Labor Relations Act (NLRA). What is the test for this you ask? When the provisions aren't expressly in violation, the Board looks at:

". . . one of the following: (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."

In this case, the Courtesy, Outside Inquiry and Unauthorized Media provisions were found unlawful as they could be construed to prohibit one from being able to discuss workplace conditions and disputes. The Board claims they've implemented a balancing act to ensure that employers are able to operate and control their workforce while also protecting the rights of employees. But I gotta say, that balance doesn't look like its quite there yet. Not being able to tell your employees to be courteous seems like a pretty tough pill to swallow. Nevertheless, these are things your organization will want to be aware of. And at least cases are starting to come down where the employer reigns as victor.