



Legal Alert: Ford & Harrison Lawyers Obtain NLRB Judge's Order Upholding Termination for Offensive Facebook Posts

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Executive Summary: A NLRB administrative law judge has ruled that a Chicago-area luxury car dealership did not violate federal labor law when it terminated a salesman who posted pictures and caustic comments about an accident on his Facebook page. The judge rejected the NLRB's argument that the termination was motivated by other Facebook postings by the employee related to a customer driving event. **Background** Robert Becker was a salesman for Knauz BMW. In June 2010, Knauz BMW was preparing for its BMW Ultimate Drive Event, including the launch of the redesigned BMW 5-Series. At a pre-Event meeting, the sales manager informed the sales force that the dealership was bringing out a hot dog cart in case customers got hungry. At least two salespeople, including Becker, griped that the dealership should offer better food for the Event. During the Event, Becker took pictures of the hot dog cart and posted them on his Facebook page along with some sarcastic comments a few days later. Knauz BMW is located in an autopark next to Knauz Land Rover. A few days after the BMW Event, there was an accident at the Land Rover dealership. Apparently, a customer's son hit the accelerator during a demo, and the vehicle rolled down an embankment into a shallow pond. When Becker heard what happened, he quickly grabbed his camera and took pictures of the accident. On the same day that he posted the Event pictures on his Facebook page, he also posted his pictures of the accident along with some caustic comments. Knauz learned about Becker's Facebook postings the next day, and soon after terminated him for the accident-related postings. Becker filed an unfair labor practice charge alleging that he was fired for engaging in protected concerted activity under the National Labor Relations Act. The NLRB General Counsel claimed that Becker's Event-related posts about the hot dog cart represented employee complaints related to their compensation. One component of salesperson compensation was customer satisfaction, and the General Counsel's theory was that the dealership's choice of food could have a negative customer impact. Therefore, according to the General Counsel, terminating Becker for his Event-related posts was retaliation for protected concerted activity. **Administrative Law Judge Rules For Dealership** The case was tried before a NLRB administrative law judge in July 2011. Lead counsel James F. Hendricks, Jr., and Brian Kurtz represented Knauz BMW. The judge found that the credible testimony of Knauz BMW's witnesses and the trial exhibits proved what Knauz BMW had argued all along – that Becker was fired because of his offensive, unprotected accident-related Facebook postings. The judge did, however,

conclude that Becker's Event-related postings constituted protected concerted activity. This finding was disappointing considering that there was no evidence in the record that Knauz BMW had any way of knowing that complaints about hot dogs were actually complaints about commissions. Should the General Counsel appeal the judge's decision, the company may revisit this issue. **The Bottom Line** Knauz BMW prevailed because it was able to demonstrate through credible testimony and accurate documentation that it terminated Becker for his unprotected accident-related Facebook posting – not the Event-related postings. In this respect, this case is no different than any other NLRB discharge case that turns on the employer's motivation for firing someone. The disturbing aspect of this case is the NLRB General Counsel's apparent zeal to expand the scope of protected concerted activity, particularly in the area of social media. Knauz BMW is a non-union luxury car dealership; not exactly the type of employer that comes to mind when one thinks about labor relations. Employers, especially non-union employers, must be mindful of the concept of protected concerted activity before taking adverse action against an employee. Also, employer policies and practices need to keep pace with emerging technology, including social media. This remains a largely uncharted area of the law. If one of your employees publishes something offensive or confidential on Facebook, Twitter, or YouTube, proceed with caution before taking action. If you have any questions regarding the Knauz BMW decision, protected concerted activity, or the NLRB's handling of social media cases, feel free to contact Jim Hendricks, jhendricks@fordharrison.com, or Brian Kurtz, bkurtz@fordharrison.com, or the Ford & Harrison attorney with whom you usually work. A copy of the decision is available [here](#).