NLRB Administrative Law Judge Issues Another Social Media Decision

November 8, 2011 by Adam Santucci

On September 28, 2011, a National Labor Relations Board (Board) Administrative Law Judge (ALJ) found that an employee who was discharged for posts he made on his Facebook page was not discharged in violation of the National Labor Relations Act (NLRA). In *Knauz Motors, Inc.*, Case No. 13-CA-46452 (pdf), the ALJ found that the employee's Facebook posts contained both protected and non-protected activity, but that the employee was terminated for only the non-protected activity. As a result, the ALJ refused to find that the employee's discharge was unlawful.

The decision involved two different threads on the employee's Facebook page. The first included "mocking and sarcastic" pictures and comments about a sales event at the car dealership where the employee worked. The employee was dissatisfied with the food selection for the event, which included hotdogs among other things. The employee expressed his displeasure about the food selection at a meeting prior to the event, and another employee voiced a similar complaint. The ALJ found that since more than one employee complained about the food, the complaints constituted "concerted" activity.

The employee later testified that he believed that the food selection would impact his compensation, a term and condition of employment, because the dealership was a luxury car dealership and serving hotdogs might offend customers. However, the employee never mentioned any connection to compensation in his complaint during the meeting or on Facebook. Nonetheless, the ALJ found that the food selection at the event, even though "not likely," could have had an effect on compensation. As such, the ALJ concluded that the employee's complaints and the Facebook pictures and comments about the sales event constituted protected activity under the NLRA.

However, the second Facebook thread, which contained pictures and comments regarding an accident at a related dealership, was not protected activity.

The accident occurred when a salesperson at the related dealership let a 13-year-old boy sit in the driver seat of a new vehicle, and the vehicle eventually began moving and crashed into a pond. The employee took pictures of the accident and posted the pictures on Facebook with commentary. The ALJ found that these posts did not constitute concerted protected activity because there was no discussion with other employees about the accident and no connection to the employee's terms and conditions of employment.

Even though the employee argued that he was terminated due to his protected activity with regard to the sales event, the ALJ concluded that the employee's termination was lawful because he was terminated for the posts regarding the accident, and not the posts regarding the sales event.

Interestingly, when the terminated employee was confronted by management with the Facebook posts, the employee reacted as many employees may react. He stated that his Facebook page was "none of [their] business." However, while the Board may go to great lengths to protect employee social media activity, as with the posts regarding the sales event, not all employee social media activity is protected by the NLRA. Some posts may, in fact, be an employer's business.

The ALJ also evaluated four of the employer's policies, which the Board's General Counsel argued were overly broad in violation of the NLRA. The ALJ found that two of the policies, Unauthorized Interviews and Outside Inquiries Concerning Employees, restricted NLRA protected activity on their face and therefore, were unlawful. The ALJ found that a third policy, titled Courtesy, which stated that "[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership," could reasonably be construed by employees as restricting their rights under the NLRA. The ALJ found that the fourth policy, titled Bad Attitude, could not reasonably be construed to prohibit NLRA protected activity and therefore, was lawful. This part of the ALJ's analysis is a reminder that employers must be careful that their policies, and not just their social media policies, do not restrict protected activity.