First NLRB Administrative Law Judge Opinion On Employee Discipline For Social Media Use

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On September 6, 2011, the National Labor Relations Board (Board) announced that a Board Administrative Law Judge (ALJ) had issued the first decision involving employee social media use. We previously reported that the Board has been very active in this area, issuing complaints and guidance, but this is the first actual decision from a Board ALJ. In the decision, Hispanics United of Buffalo (PDF), the ALJ ruled that the non-profit employer unlawfully discharged five employees after the employees posted comments on Facebook.

The ALJ first found that the small non-profit organization (which after the terminations at issue had only 25 employees) was covered by the National Labor Relations Act (NLRA), even though the organization operated only in the Buffalo, New York area. The ALJ went on to hold that the employees' Facebook comments amounted to concerted protected activity under the NLRA, and as such, their comments were shielded from discipline. The ALJ concluded that the terminations were therefore unlawful, and ordered the employees reinstated with back pay.

The facts are as follows:

An employee of Hispanics United of Buffalo, Inc. (HUB), who we will call the “Targeted Employee,” was repeatedly critical of her coworkers, because she believed that the coworkers did not provide adequate services to HUB’s clients. In October 2010, one of the criticized employees complained about the Targeted Employee on Facebook, and several of her coworkers commented on the post, which used the Targeted Employee’s name. Different people will likely have different views of the Facebook posts, but there is no dispute that the comments included vulgar language, sarcasm, and in my opinion, inappropriate comments that were critical of HUB’s clients.

The Targeted Employee sent a text message to HUB’s Executive Director complaining about the Facebook posts, which she believed constituted “cyber-bullying.” A few days later, the Executive Director terminated the five employees that were involved in the Facebook discussion. The Executive Director determined that the comments violated the HUB’s harassment policy.

After a hearing, the ALJ concluded that the Facebook discussion was concerted protected activity under the NLRA. The ALJ found that the discussion involved the terms and conditions of employment, specifically, job performance and staffing levels (even

though there was no mention of inadequate staffing and none of the employees claimed that they actually performed there jobs satisfactorily).

The ALJ also found that the vulgar language and sarcastic remarks were not sufficiently inappropriate to lose the protection of the NLRA. The ALJ held that the some of the employees did not use the Targeted Employee's name, that the posts were not made from HUB computers, and that the comments were not really in violation of the HUB harassment policy.

The ALJ commented that "regardless of whether the comments and actions of the five terminated employees took place on Facebook, or 'around the water cooler' the result would be the same." But interestingly, the ALJ held that because the comments were not made in the workplace, even though they were viewed by several coworkers and a member of HUB's board of directors, they were less egregious. Some might argue that posts on the Internet can be far more detrimental to an organization than passing comments "around the water cooler," since the posts may be viewed by anyone, such as clients, customers, and board members, and the posts may remain available for viewing for a long period of time.

Nonetheless, the ALJ concluded that the employees were unlawfully terminated for engaging in concerted protected activity, and therefore, he ordered all five employees reinstated with back pay and interest.

This first ALJ decision is important because it serves as a reminder that the Board has broad jurisdiction to enforce the NLRA, which covers both union and non-union employers, and both for-profit and non-profit employers in some cases. All employers, whether unionized or not, must be sure to conduct a thorough investigation before issuing disciplinary action, particularly if that disciplinary action will be based on an employee's social media use. The investigation should document exactly what was said, who said it, when it was said, who may have viewed the posts, and whether or not the comments involved "terms and conditions of employment." As this case illustrates, that phrase may be interpreted broadly.