



antisocial behavior and social media: a dilemma for employers

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In 2010, the National Labor Relations Board ("NLRB" or "Board") made national headlines by issuing a complaint accusing an employer of unlawfully discharging an employee for posting critical remarks about her supervisor on her personal Facebook page. Since then, the NLRB has continued its focus on social media, aggressively prosecuting cases where employees are discharged or disciplined for their use of social media and taking an active role in shaping this emerging area of the law. Two recent NLRB administrative law judge decisions, both concerning employees who were not represented by a union, and a report issued by the NLRB's Acting General Counsel highlight these issues and provide some guidance to employers.

Background

Section 7 of the National Labor Relations Act ("NLRA") protects employees who engage in "concerted activities for the purpose of collective bargaining **or other mutual aid or protection.**" Importantly, the statute's protections **are not limited to union activities** or employee conduct in a unionized environment. Rather, the Act also protects other forms of employee conduct undertaken for "mutual aid or protection," including, for example, a group of unrepresented employees talking with each other about their wages, hours, and working conditions. Section 7 protections are broad enough even to protect conduct by a single employee, if the individual employee is bringing forth group concerns or seeks to initiate, induce, or prepare for group action. On the other hand, Section 7 does not protect employee conduct that is "solely by and on behalf of the employee himself," where employee comments are "mere griping" as opposed to "group action." Moreover, employee statements may lose the protection of the Act where they are so scornful or abusive as to be deemed "opprobrious" by the Board.



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Karl Knauz Motors Decision

On September 28, 2011, an NLRB administrative law judge ("ALJ") found that Karl Knauz Motors, Inc., did not violate the NLRA when it fired a car salesman who had posted on Facebook photographs of, and made the following sarcastic comments about, an accident that had occurred at one of the employer's dealerships:

"This is what happens when a sales Person sitting in the front passenger seat (Former Sales Person, actually) allows a 13 year old boy to get behind the wheel of a 6000 lb truck built and designed to pretty much drive over anything. The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a \$50,000 truck. OOOPS!"

The employee captioned the photos "This is your car: this is your car on drugs." The ALJ found that the posting was not protected because it was posted "without any discussion with any other employee . . . and had no connection to any of the employees' terms and conditions of employment."

At the same time, the ALJ found that another Facebook posting made by the employee was protected; however, this protected posting was not found to have motivated the termination. (This second posting mocked a customer event hosted by the dealership where, according to the employee, the employer went "all out" for "the most important launch of a new BMW in years" by offering customers "small 8 oz bags of chips," a "\$2.00 cookie plate from Sam's Club," "semi fresh apples and oranges," and hot dog cart offering a customer an "over cooked wiener and a stale bun." The ALJ found this posting was protected because at work the salespersons had discussed how the "inadequacies of the food being offered at the event" could impact sales and their commissions.)

Hispanics United of Buffalo Decision

Earlier in September 2011, an ALJ found that Hispanics United of Buffalo ("HUB"), a New York nonprofit, social service organization, violated the Act by firing five unrepresented employees who had posted negative comments about their jobs on Facebook.

After learning that a co-worker had complained about the job performance of several employees and had expressed her intent to take the complaints to management, one of the discharged employees posted the following statement on her personal Facebook page:

Lydia Cruz, a coworker feels that we don't help our clients enough at HUB!. I about had it! My fellow coworkers how do u feel?

In response, several employees expressed negative opinions about Cruz and Cruz's criticisms, as well as various aspects of their jobs, including workloads and staffing. None of the employees posted their comments during work time, and none of them used a work computer. The employer discharged the employees for harassing and bullying Cruz in violation of the employer's anti-harassment policy.



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The ALJ found that the terminated employees' Facebook discussion was protected concerted activity because it involved a conversation among coworkers about their terms and conditions of employment, including job performance and staffing levels. The ALJ also found that the employees did not forfeit protection under the NLRA by virtue of the posts containing "explicit or implicit criticism of a co-worker," profanity, or sarcasm. Lastly, the ALJ rejected the employer's argument that it was merely enforcing its anti-harassment policy. The ALJ concluded that the policy, which prohibited harassment based on protected characteristics, was not violated because there was no evidence that Cruz was harassed based on any of the protected characteristics listed in the policy.

NLRB Guidance on Social Media

In August 2011, the NLRB's Office of the General Counsel (the "General Counsel") released a report analyzing fourteen social media cases prosecuted by the NLRB during the last year. Although the report does not establish bright line rules, it does provide some useful guidance for employers.

In general, the report reveals several factors the NLRB considered in evaluating whether an employee's use of social media constituted protected concerted activity:

Social media statement made with, or on behalf of, other employees. An employee's social media use is more likely to be protected if it can reasonably be found that the employee was acting with, or on behalf of, other employees, as opposed to being an individual gripe. For example, in one case, an employee posted several complaints on Facebook about his store's management. The comments were not specifically directed to fellow employees, although some coworkers posted messages of support. The General Counsel determined that the employee's posts were **not** concerted activity because he was merely complaining about his individual situation and was not attempting to induce group action.

Social media statements involving the terms and conditions of employment. Cases where the General Counsel found that an employee's online posts constituted protected concerted activity generally involved postings on topics related to the terms and conditions of employment, such as those concerning employee job performance; staffing levels; protests of supervisor actions; criticisms of employer decisions that employees believed would negatively impact their compensation; and shared employee concerns about their employer's practices.

Social media statements directed to or involving coworkers. An employee who complains about work on Facebook, but only with family, friends, or other non-coworkers, generally is not engaged in protected concerted activity. For example, in one case, the General Counsel found that a bartender who made negative comments on Facebook about his employer's tipping policy was not engaged in concerted activity because he directed his comments to his relative and only made them by and on behalf of himself.

The General Counsel's report also discusses several cases involving social media policies. In many of these cases, the employers' policies were found overbroad and unlawful because they "chilled" or discouraged protected concerted activity. According to the General Counsel, the mere existence of an overly broad social media policy may violate the NLRA even if no disciplinary action is taken against an employee. Among the



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provisions the General Counsel noted as unlawful were restrictions on online posts that could be viewed as "inappropriate," "defamatory," or "disparaging" or that could damage the "goodwill of the employer or its employees."

A complete copy of the General Counsel's report is available [HERE](#).

Given the NLRB's active stance in applying the NLRA to social media policies and the rapidly evolving law on this topic, employers are encouraged to use caution and consult experienced employment counsel before implementing such policies and before imposing social media-related disciplinary action.

If you have any questions regarding this alert, please contact the authors or any other member of our Labor & Employment Department.