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labor and employment alert

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September 2011

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New NLRB Guidance on Disciplining for Facebook Postings, Twitter Tweets and Blogs

An important managerial prerogative is the ability to prescribe and enforce workplace rules designed to maintain decorum in the workplace. Recent developments at the National Labor Relations Board (NLRB) have highlighted emerging issues regarding the tension between this prerogative and concerted, protected activity under the National Labor Relations Act (NLRA), which provides workers – regardless of whether they belong to a union – with a protected right to engage in concerted, or group, activity for purposes of collective bargaining or "other mutual aid or protection." The tension has been dramatized by the increasing use by employees of social media such as Facebook, Twitter, and blogs to voice workplace gripes, often in inappropriate and sometime vulgar ways. Some employers seeking to punish such behavior, however, have learned the hard way that such commentary may be protected even though the audience includes nonemployees, or that the policies they are seeking to enforce are overbroad and infringe on an employee's rights protected under the NLRA.

It has long been the case that employees engaged in protected concerted activity are permitted some leeway for impulsive and intemperate behavior, including sometimes behavior resulting from "animal exuberance." Still, not all comments by employees, even if concerted, are protected; and the protection of the NLRA can be lost if the conduct is sufficiently "opprobrious." *Atl. Steel Co.*, 245 NLRB 814, 816 (1979).

The leeway afforded employees may be seem appalling at times. For instance, in *Plaza Auto Center, Inc.* (Aug. 2010), an employee was called into a meeting with the company's owner after making several negative comments about compensation and other employment conditions, including compensation, in employee group meetings. The owner told the employee he should not discuss pay and that, if he did not trust the company, the employee should work elsewhere. The employee became upset and responded by calling the owner a "f***ing crook" and "an a**hole," adding that the owner was stupid, unliked, and talked about behind his back. The employee was fired. The NLRB concluded his firing was illegal, noting in particular that the employee's conduct was not sufficiently opprobrious to render it unprotected because it was provoked by the employer. *See also Kiewit Power Constructors Co. v. NLRB*, No. 10-1289 (D.C. Cir. Aug. 3, 2011) (comments by employees in response to warnings about excessive break time that things would "get ugly" if they were disciplined and that the supervisor should bring his boxing gloves were not physical threats but protected, though intemperate, comments).

American Medical Response (AMR), the notorious Facebook case, applied these principles to social media postings whose audience included nonemployees as well as employees. The case involved a complaint filed by the NLRB against AMR, an ambulance service, in October 2010 alleging unlawfully terminated an employee for posting negative remarks about her boss on Facebook and that AMR's Internet use policy overbroadly prohibited employees from making negative comments about the company. Ultimately, the case settled with AMR agreeing to revise its rules and not to discipline employees for engaging in protected discussions. AMR, as it turns out, is merely one of over 100 such cases filed by the NLRB since last Fall.

Cognizant of the growing scope of the issues regarding the legitimate and protected use of social and other media, the Acting General Counsel of the NLRB recently released a report discussing unfair labor practice claims involving social media. The report provides very helpful guidance for employers. For example, the NLRB report discusses the following findings in particular cases:

- Employees were unlawfully discharged for responding to the Facebook posting of a coworker discussing working conditions, even though the employee who initiated the cyber conversation considered her co-workers' comments to be cyber bullying and harassment.
- A policy that prohibited employees from posting pictures of themselves depicting their company in any way, including uniforms, corporate logos, or vehicles, was overbroad because it could be interpreted to prohibit employees from posting pictures of themselves engaged in concerted protected activity, such as picketing or other protests against their employer.
- A bartender who complained on Facebook to his stepsister, a nonemployee, that he hadn't had a raise in five years, said he was doing "waitress" work without tips, and called the customers rednecks who he hoped they "choked on glass as they drove home drunk" was lawfully fired because the employee did not discuss the posting with his co-workers and there was no evidence that any co-workers responded to it.
- An employee was lawfully discharged after posting profane comments on Facebook critical of store management because the employee's postings were merely an expression of individual gripes as opposed to protected concerted activity. In this case, at least two co-workers responded to the posting; however, their messages reflected that the posting was individual and not group activity.
- A policy prohibiting employees from making disparaging comments when discussing the company or its supervisors was unlawful because the policy did not make clear that it did not prohibit protected concerted activity.

- The discharge of a recovery specialist in a residential facility for homeless individuals who posted demeaning comments concerning her employer's clientele was lawful because there was no evidence of protected concerted activity. The comments did not mention any terms or conditions of employment, the posting was not discussed with any co-workers, and the comments were not for the purpose of inducing group activity or an outgrowth of collective concerns of the employee or her co-workers.

Even as the law in this area continues to evolve, the NLRB's recent guidance make several points clear:

- Communications that are not concerted are generally not protected. However, the cases highlight that a finding of concerted activity may turn on evidence not readily available to employers, so that caution is warranted.
- Communications that are concerted (i.e., that are not an individual gripe) on matters of mutual concern to employees are likely to be found to be protected by the NLRA.
- Communications that are protected do not become unprotected simply because the comments are communicated via the Internet and may be seen by nonemployees.
- Communications that are protected do not become unprotected simply because they contain some objectionable language.
- A work rule that, reasonably interpreted, would tend to "chill" employees in the exercise of their rights under the NLRA is likely to be found unlawful by the NLRB if challenged. Such "chilling" exists if a rule explicitly restricts protected activities or, if not, if employees would reasonably construe the rule to prohibit protected activity, the rule was promulgated in response to union activity, or the rule has been actually applied to restrict protected activity.

The spate of cases filed by the NLRB and its recent guidance in this area demonstrate the need for employers: (1) to review their policies to ensure that they are not overbroad and constitute potential unfair labor practices by themselves (e.g., a written policy stating that compensation is private and may not be discussed with coworkers); and (2) to proceed cautiously when determining whether to discipline an employee because of his or her comments in postings on Facebook, Twitter, or other social media in order to avoid potential claims under the NLRA and other employment laws.

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