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Policing the Social Media Water Cooler: Recent NLRB Decisions Should Make Employers Think Twice Before Terminating An Employee For Comments Posted on Social Media Sites

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I. INTRODUCTION

THE POPULARITY OF SOCIAL MEDIA WEBSITES such as Facebook, Twitter, and LinkedIn are at an all-time high.[1] In light of this popularity, it is highly likely that some, if not all, employees maintain at least one type of social media account.[2] These employees may feel the need to post workplace grievances, employer criticisms, or other work related complaints on their social media accounts.[3] Frequently, these workplace complaints make their way back to the employer and the posting employee is terminated or otherwise reprimanded by the employer for posting such complaints.[4]

However, over the past two years, the National Labor Relations Board (the "NLRB" or "Board") has begun to address the issue of social media related terminations and has focused on whether the postings at issue constitute protected,

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1. *See Top 10 Social Media Websites*, http://www.experian.com/hitwise/online-trends-social-media.html (last visited Sept. 24, 2013) (noting that during the week ending on September 7, 2013, Facebook had 1,964,583,775 page visits, Twitter had 60,112,421 page visits, and LinkedIn had 38,157,947 page visits); *see also* Ashley Vance, *Facebook: The Making of 1 Billion Users*, BLOOMBERG BUSINESSWEEK (Oct. 4, 2012), http://www.businessweek.com/articles/2012-10-04/facebook-the-making-of-1-billion-users (indicating that, as of September 14, 2012, one-seventh of the earth's population was registered to Facebook).

2. *See* Spencer Hamer, *Creating an Effective Social Media Policy*, BLOOMBERG LAW, http://about.bloomberglaw.com/practitioner-contributions/creating-an-effective-workplace-social-media-policy/ (last visited Sept. 24, 2013) (indicating that 75% of employees access social media daily on the job, while 60% reported doing it multiple times per day).

3. *See generally* Memorandum OM 11-74, (First) Report of the Acting General Counsel Concerning Social Media Cases, National Labor Relations Board, Office of the General Counsel (Aug. 18, 2011) (highlighting the outcomes of various cases involving employees' use of social media sites to post work related complaints, including whether such use may be a "protected concerted activity.").

4. *See generally id.*

concerted activities under Section 7 ("Section 7") of the National Labor Relations Act (the "Act").[5] Most recently, the NLRB and/or administrative law judges ("ALJ") have issued opinions in two matters; (i) *Karl Knauz Motors, Inc.* ("*Karl Knauz Motors*");[6] and (ii) *Hispanics United of Buffalo, Inc.* ("*Hispanics United*"),[7] which shed some light on how the Board analyzes social media related terminations, and provide employers with insight as to how best handle a situation where an employee has made his/her complaints public via social media.

II. THE NLRB SETS THE BAR REGARDING WHEN SOCIAL MEDIA COMMENTS ARE DEEMED CONNECTED TO THE TERMS AND CONDITIONS OF EMPLOYMENT

In *Karl Knauz Motors,* an ALJ found that certain employee Facebook postings did not fall within the Act's definition of "protected, concerted activity," and, therefore, the employer's termination of the employee for such postings did not violate the employee's Section 7 rights.[8] In reaching this decision, the ALJ held that since certain Facebook posts at issue had "no connection to the employees' terms and conditions of employment," the posts were not protected under Section 7, and therefore the employer's decision to terminate the employee as a result of these posts did not violate the Act.[9]

The dispute at issue in *Karl Knauz Motors* began when a luxury car salesman posted several pictures and comments on his Facebook page concerning two separate events: (i) a promotional event at a BMW dealership; and (ii) a car accident at a related Land Rover dealership.[10] With respect to the promotional event, the employees and management held a meeting prior to the event during which the issue of what food to serve at the event was discussed.[11] The employees expressed their displeasure with the management's decision to provide what they deemed to be low end food options – hot dogs and chips – rather than higher end food because the employees felt that hot dogs and chips did not portray the event in the proper light.[12] As a result of the management's decision to proceed with the

5. *Protected Concerted Activity*, National Labor Relations Board, www.nlrb.gov/concerted-activity (last visited Sep. 8, 2013).

6. Karl Knauz Motors, Inc., 380 N.L.R.B. No. 164, 2012–2013 NLRB Dec. (CCH) ¶ 15620 (Sept. 28, 2012).

7. Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, 2012–2013 NLRB Dec. (CCH) ¶ 15656 (Dec. 14, 2012).

8. *Karl Knauz Motors*, 358 N.L.R.B. No. 164 at 10-11. On September 28, 2012, the NLRB affirmed the ALJ's findings, however, the NLRB's written decision only addressed the ALJ's findings with respect to whether the employer's employee handbook provisions prohibited employees from engaging in protected, concerted activity. *Id.* at 11.

9. *Id.* at 11.

10. *Id.* at 10–11.

11. *Id.* at 7.

12. *Id.*

cheaper food options, an employee proceeded to post a number of comments and pictures on his Facebook page about the event, including:

> *"I was happy to see that Knauz went "All Out" for the most important launch of a new BMW in years . . . the new 5 series. A car that will generate tens in millions of dollars in revenue for Knauz over the next few years. The small 8 oz bags of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch . . . but to top it all off . . . the Hot Dog Cart. Where our clients could attain a overcooked wiener and a stale bun."*[13] *and*
>
> *"No, that's not champagne or wine, it's 8 oz. water . . . . In this photo, Fadwa is seen coveting the rare vintages of water that were available for our guests."*[14]

Around the same time as the promotional event, a car accident occurred at a dealership owned by the same employer.[15] There a car dealer permitted the 13 year old son of a customer to get behind the wheel of a Land Rover.[16] The child accidently hit the gas, ran over his father's foot, and drove the truck over a small embankment into an adjacent pond.[17] Upon viewing this event, the same employee who posted the above statements posted pictures and comments to his Facebook page, including:

> *Pictures of the accident with the caption "This is your car: This is your car on drugs."*[18] *and*
>
> *Pictures of accident with the comment "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 6,000 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!"*[19]

13. *Id.*
14. *Id.* at 7–8.
15. *Id.* at 7.
16. *Id.*
17. *Id.*
18. *Id.* at 8.
19. *Id.*

The Facebook postings for each incident were brought to the employer's attention and the employee was terminated.[20] The employer testified before the ALJ that the employee's termination resulted from the Facebook postings regarding the Land Rover incident because the employee was making fun of a serious situation where somebody was injured.[21]

In reviewing the propriety of the termination, the ALJ focused on whether these Facebook postings fell within the Act's definition of "protected, concerted activity" under Section 7,[22] and whether the employee was truly terminated solely for his postings relating to the Land Rover incident.[23] With respect to the promotional event postings, the ALJ found that the postings constituted protected, concerted activity under Section 7 because: (i) the issue of what food was being served at the event was previously discussed at an employee meeting; and (ii) the presence of a hot dog cart at the event could potentially have had a negative effect on the employee's compensation because the employee worked on commissions and the lack of quality food options at the event could have resulted in lower sales.[24] On the other hand, the ALJ found that the postings about the Land Rover accident did not constitute protected, concerted activity because "it was posted solely by [the employee], apparently as a lark, without any discussion with any other employee . . . and had no connection to any of the employees' terms and conditions of employment."[25] Finally, the ALJ found that since the employee was terminated solely for his postings concerning the Land Rover incident, and since the Land Rover incident postings were not protected, concerted activity, his termination did not violate the Act.[26]

In reaching this decision, the ALJ made it clear that, with respect to terminations resulting from an employee's social media postings, a broad view would be taken concerning what constitutes protected, concerted activity and, if necessary, hypotheticals would be used to support the conclusion.[27] For example, even though there was no evidence that sales from the promotional event were down due to the presence of the hot dog cart, the fact that the employee's compensation could potentially have been affected, paired with the prior meeting amongst the employees regarding the food at the event, was sufficient for the ALJ to find that the posts were protected, concerted activity.[28] However, in finding that the Land Rover accident postings was not protected, concerted activity, the ALJ made it clear that

20. *Id*. at 10.
21. *Id*. at 9.
22. *Id*. at 10.
23. *Id*.
24. *Id*.
25. *Id.* at 11.
26. *Id.*
27. *See id.* at 12.
28. *Id.* at 10.

not all social media postings fall under Section 7's protection, particularly where a posting has no relation to the terms and conditions of employment.[29] Ultimately, while the ALJ found that certain of the postings were protected, concerted activity, since the employer terminated the employee for postings that were not protected, the employee's termination did not violate the Act.[30]

III. THE NLRB DEFINES THE STANDARD IT INTENDS TO USE WHEN ANALYZING SOCIAL MEDIA RELATED TERMINATIONS

In *Hispanics United*, the NLRB affirmed an ALJ's finding and ordered that the employer reinstate five workers that it previously terminated due to comments that the employees had posted on their respective Facebook pages.[31] In reaching this decision, the NLRB clearly delineated the standard that it shall apply when analyzing whether social media posts constitute protected, concerted activity under Section 7.[32]

This matter began when five employees of a non-profit organization engaged in a Facebook conversation where they complained (after work hours) about their jobs, managers, and some of their clients.[33] One co-worker learned that another co-worker was planning on informing management of her concerns regarding the job performance of her colleagues.[34] This information prompted the co-worker to commence a Facebook discussion in which she posted that "a coworker feels that we don't help our clients enough at [Employer]. I about had it! My fellow coworkers how do u feel?"[35] In response, a number of comments were posted, including:

> *What the f. .. Try doing my job I have 5 programs;*
>
> *What the Hell, we don't have a life as is, What else can we do???*
>
> *Tell her to come do mt f[***]ing job n c if I don't do enough, this is just dum; and*
>
> *Lol. I know! I think it is difficult for someone that is not at [Employer] 24-7 to really grasp and understand what we do . . . I will give her that. Clients*

29. *See id.* at 10–11.

30. *See id.* at 11. (noting that social media postings that have no connection to any of the employees' terms and conditions of employment are "obviously unprotected").

31. Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, 2012–2013 NLRB Dec. (CCH) ¶ 15656, 10 (Dec. 14, 2012).

32. *See id.* at 2 (defining "concerted activity" and providing expansions to the definition).

33. *Id.* at 1–2.

34. *Id.* at 1.

35. *Id.* at 2.

> *will complain especially when they ask for services we don't provide, like washer, dryers stove and refrigerators, I'm proud to work at [Employer] and you are all my family and I see what you do and yes, some things may fall thru the cracks, but we are all human :) love ya guys.*[36]

The co-worker who was criticized in the above posts complained to management.[37] After interviewing each of the five employees responsible for the Facebook posts, the employer terminated all five employees finding that the employees had engaged in "harassment" of their co-worker in violation of the company's anti-harassment policy.[38]

On September 2, 2011, an ALJ found that the employees' Facebook discussion was protected, concerted activity under Section 7.[39] In reaching this decision, the ALJ held that since the conversation was between co-workers about the terms and conditions of employment, the conversation constituted protected, concerted activity under Section 7.[40] Given this finding, the ALJ ordered that Hispanics United reinstate the five employees and awarded the employees back pay due to their unlawful discharge.[41]

On December 14, 2012, the NLRB affirmed the ALJ's decision and, in doing so, clearly identified how it intends to analyze cases where comments posted on social media websites are involved.[42] In reaching its decision, the NLRB looked to past precedent, specifically, its two *Meyers Industries* decisions from the 1980s.[43] In *Meyers Industries* ("*Meyers Industries I*"), the NLRB held that the discipline or discharge of an employee violates Section 8(a)(1)[44] of the Act if the following four elements are established: (1) the activity engaged in by the employee was "concerted" within the meaning of Section 7; (2) the employer knew of the concerted nature of the employee's activity; (3) the concerted activity was protected by the Act; and (4) the discipline or discharge was motivated by the employee's protected, concerted activity.[45]

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36. *Id.* at 7–8.

37. *Id.* at 8.

38. *Id.*

39. *Id.* at 3 (finding that the "Facebook comments cannot reasonably be construed as a form of harassment or bullying within the meaning of the Respondent's [harassment] policy.").

40. *Id.*

41. *Id.* at 10.

42. *See id.* at 2–3.

43. *See id.*

44. National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2006) (Section 8(a)(1) of the Act [29 U.S.C. §158(a)(1)] makes it "an unfair labor practice for an employer. . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [Section 7 of the Act]").

45. Meyers Indus., Inc., 268 N.L.R.B. 493, 497 (1984).

The NLRB in *Hispanics United* found that the first and third elements of the *Meyers Industries I* test were in dispute.[46] With respect to the first element, whether the activity was "concerted" activity, the NLRB again looked to *Meyers Industries I* where the Board defined concerted activity as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[47] This definition was further clarified by the Board in *Meyers Industries* ("*Meyers Industries II*") where the Board held that the definition includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[48] Applying these definitions to the *Hispanics United* employees, the NLRB found that the Facebook posts were concerted activity because one employee specifically solicited comments from her fellow co-workers about perceived complaints from a co-worker. The Board interpreted this solicitation as the employees taking a first step toward group action to defend themselves against accusations that they reasonably believed a co-worker was going to make to management.[49]

As for the third element, whether the concerted activity was protected under the Act, the Board found that the Facebook postings at issue are protected by the Act.[50] Specifically, the NLRB found that the comments at issue concerned the employees' job performance and that the NLRB has long held that "Section 7 protects employee discussions about their job performance."[51] For instance, the comments at issue were in direct response to perceived allegations from a co-worker that the employees were providing substandard service.[52] Given that such comments could have a negative impact on their employment, the employees "were clearly engaged in protected activity in mutual aid of each other's defense to those criticisms."[53] Therefore, since the Facebook comments at issue satisfied the *Meyers Industries* standard, and were protected, concerted activity under Section 7, the NLRB ordered that the five employees be reinstated with back pay.[54]

In reaching this decision, the NLRB has clearly signaled that it will be applying the same protections to comments made on social media websites that it has previously provided to oral statements and writings in non-electronic mediums.

46. *Hispanics United*, 359 N.L.R.B. No. 37 at 2.
47. *Id.* (quoting *Meyers Indus.*, 268 N.L.R.B. at 497).
48. *Meyers Indus.*, 281 N.L.R.B. at 887.
49. *Hispanics United*, 359 N.L.R.B. No. 37 at 2.
50. *Id.* at 3.
51. *Id.*
52. *Id.*
53. *Id.*
54. *See id.* at 2–4.

IV. BEST PRACTICES FOR HANDLING EMPLOYEE SOCIAL MEDIA POSTINGS

In light of the *Karl Knauz Motors* and *Hispanics United* decisions, the NLRB has clearly signaled that with respect to terminating employees due to social media postings, the Board will be: (i) taking an expansive view as to whether the postings can in any way be considered protected, concerted activity;[55] and (ii) applying a nearly three decade old standard when determining whether the termination violates the Act.[56] Given the NLRB's current position, it is prudent that employers take certain steps to protect themselves when faced with a situation where an employee has posted disparaging comments about the employer via social media. These steps include the following:

First, given these two decisions, it is evident that employers must take special care when deciding whether to take adverse action against an employee for postings made on an employee's social media website. This means that before rushing to judgment and terminating an employee for posts the employer deems offensive, the employer should closely scrutinize and fully investigate the posts to determine if they are in any way related to the employees' terms and conditions of employment.[57] Only if the posts are truly unrelated to the terms and conditions of employment, such as with the Land Rover incident from the *Karl Knauz Motors* matter, should the employer take adverse action.[58]

Second, if the employee has multiple offensive posts, and some of those posts address terms and conditions of employment, while others do not, the employer should make it clear that any adverse action that is taken resulted from the posts that were unrelated to the terms and conditions of employment.[59] This can be accomplished by clearly delineating, in a termination letter or otherwise, which exact posts led to the adverse action.

Third, an employer should implement a social media policy that will be deemed acceptable by the NLRB.[60] Recently, the NLRB has increased its focus on employer handbook policies and whether such policies reasonably tend to "chill" an employee's exercise of his/her Section 7 rights.[61] For instance, in the *Karl Knauz*

55. *See supra* notes 25–26, 47–49 and accompanying text.

56. *See supra* notes 42–43, 54 and accompanying text.

57. *See supra* notes 9, 25–29, 50–53 and accompanying text.

58. *See supra* notes 25–30 and accompanying text.

59. *See supra* notes 23–30 and accompanying text.

60. *See* Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, 2012–2013 NLRB Dec. (CCH) ¶ 15656, 4 (Dec. 14, 2012). (holding that an employer's termination of an employee, based on the employee's violation of the employer's social media harassment policy, was a violation of the Act because the employer's social media policy was unacceptable).

61. *See, e.g.,* Karl Knauz Motors, Inc., 380 N.L.R.B. No. 164, 2012–2013 NLRB Dec. (CCH) ¶ 15620, 1 (Sept. 28, 2012); *see generally* Memorandum OM 12-59, Report of the Acting General Counsel Concerning Social Media Cases, National Labor Relations Board, Office of the General Counsel (May 30, 2012) (highlighting the outcomes of various cases involving employers' social media policies regarding social media use and making recommendations for best practices).

Motors matter, the NLRB held that the employer's policy requiring employees to be courteous violated the Act because the policy contained a broad prohibition against "disrespectful" conduct and "language which injures the reputation or image of the Dealership."[62] The NLRB found these prohibitions overbroad because they could reasonably include employee statements that encompass Section 7 activity.[63] In light of the NLRB's focus, when drafting a social media policy employers must be careful to avoid certain overbroad prohibitions, such as discussing work or co-workers, because such broad prohibitions are more likely to be found to violate the Act.[64] With this in mind, when drafting a social media policy, employers should reference the sample social media policy approved by the NLRB, which is available on the NLRB's website.[65]

Finally, while it is important for employers to have social media and anti-harassment policies, these decisions make it clear that an employer's reliance on these policies to justify an adverse employment action is not an adequate defense.[66] For instance, in *Hispanics United*, the NLRB rejected the employer's contention that it has a strict anti-harassment policy and that the employees were terminated for violating that policy.[67] The NLRB held that while employers have a legitimate concern to prevent harassment in the workplace, an employer cannot blindly apply a policy where Section 7 rights are abridged.[68] In light of this, even if an employee's social media postings violate a handbook policy, the employer should still carefully analyze the posts to see if any of the posts constitute protected, concerted activity, and should consult with counsel before making any adverse employment decisions.

62. *Karl Knauz Motors*, 358 N.L.R.B. No. 164 at 1.

63. *See id.* at 1–2.

64. *See, e.g., id.* at 1 (holding that a "Courtesy" rule in an employee handbook violated the Act because employees would reasonably construe the rule's broad prohibition against disrespectful conduct as encompassing Section 7 activity).

65. Memorandum OM 12-59, Report of the Acting General Counsel Concerning Social Media Cases, National Labor Relations Board, Office of the General Counsel (May 30, 2012).

66. *See* Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, 2012–2013 NLRB Dec. (CCH) ¶ 15656, 4 (Dec. 14, 2012); *Karl Knauz Motors*, 358 N.L.R.B. No. 164 at 1–2.

67. *Hispanics United*, 359 N.L.R.B. No. 37 at 4.

68. *Id.* (quoting Consolidated Diesel Co., 332 NLRB 1019, 1020 (2000), *enforced* 263 F.3d 345 (4th Cir. 2001)).