A Timely Analysis of Legal Developments

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December 27, 2012

NLRB Rules Employer's Termination of Non-Union Employees for Facebook Posts Violated NLRA

By Alan Levins

In another decision that affects non-union as well as union employers, the National Labor Relations Board recently ruled that comments posted on Facebook are protected in the same manner and to the same extent as comments made at the "water cooler." In *Hispanics United of Buffalo,* 359 NLRB No. 37 (Dec. 14, 2012), the Board found that a non-union employer's termination of five employees for Facebook postings was unlawful, awarding the employees full reinstatement and backpay.

The controversy began when one employee – Lydia – criticized the work of five of her co-workers. One of the criticized employees – Marianna – sent this message from her personal computer at home to the other four employees:

> "Lydia . . . feels that we don't help our clients enough . . . . I about had it! My fellow coworkers how do u feel?"

The employees were not amused and, while off duty, posted messages on Marianna's Facebook page making that clear. Lydia also responded on the same Facebook page, demanding that the four "stop with ur lies about me." She then complained to her supervisor that the postings violated the employer's "zero tolerance" policy against "bullying and harassment." The employer investigated and, agreeing with Lydia that its policy had been violated, fired Lydia's five co-workers.

The NLRB upheld an administrative law judge's decision that the terminations violated the National Labor Relations Act (the "Act"), even though no union was involved. The Board concluded that whether the comments were made on line, by way of social media, or "around the water cooler" was irrelevant to the analysis. Instead, the Board focused on whether the postings were:

- "Concerted" activity under the Act;
- Known to be concerted by the employer's supervisor, who was shown the postings;
- "Protected" under the Act; and
- The motivation for the terminations.

The second and fourth elements were undisputed.[1] On the first and third elements, the Board, with Member Hayes dissenting, found against the employer. The postings were concerted, the Board

1 There was no dispute that the employer knew of the postings because Lydia gave her supervisor a copy of them. There was also no dispute that the postings were the basis for the employees' termination.

concluded, because it was "implicitly manifest" that the co-workers' postings had the "clear 'mutual aid' objective of preparing [the] coworkers for a group defense to [Lydia's] complaints." As to the third element, the Board considered the postings protected because they related to the employees' job performance and objectively could not be considered "bullying" or "harassing." The dissent objected to the majority's reasoning, finding there was "insufficient evidence that either the original posting or the views expressed in response to it were for mutual aid or protection." Specifically, Member Hayes emphasized, "the mere fact that the subject of discussion involved an aspect of employment — *i.e.*, job performance — is not enough to find concerted activity for mutual aid and protection. There is a meaningful distinction between sharing a common viewpoint and joining in a common cause."

The decision is yet another by the NLRB that is directed to non-union employers in addition to employers whose employees are represented by a union. In the last year, the NLRB has invalidated the mandatory arbitration agreement of a non-union employer[2] and terms in non-union employers' employee handbooks.[3] It has also struck down a provision in a company's at-will employment agreement that prohibited employees from disclosing "confidential information," including "personnel information," to individuals "outside the organization."[4] There is little reason to believe this trend will abate or even slow in the coming year.

A first key lesson to be learned from this and other recent cases is the importance for all employers, whether union or non-union, of reviewing all employee-related policies with an experienced labor attorney who is familiar with the NLRB and the National Labor Relations Act. A good starting place would be the employer's social media policy, followed by a review of any arbitration agreements and the employee handbook.

Second, all employers should be cautious when basing employment decisions on Facebook or other social media postings. In addition to the issues raised in *Hispanics United of Buffalo,* there are privacy issues that can arise. Employers should consider postings, such as those in *Hispanics United of Buffalo,* to be analogous to conversations on non-work time at the "water cooler." Despite the potential for social media "discussions" to be played and replayed to an extremely wide audience, the NLRB will analyze their protected nature the same way that it analyzes a whispered conversation in the employee lunch room or parking lot.

Finally, whenever employer discipline or other adverse employment actions are based on employee communications, employers should consult counsel to make certain the speech is not "concerted, protected" speech under the Act.

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2 *D.R. Horton*, 357 NLRB No. 184 (Jan. 3 2012). *See also* Henry Lederman, Gavin Appleby, and William Emmanuel, *NLRB Strikes Down Arbitral Class Action Waiver*, Littler ASAP (Jan. 9, 2012).

3 *TT&W Farm Products, Inc.*, 358 NLRB No. 125 (Sept. 11, 2012); *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept 7, 2012). *See also* Chip McWilliams, Philip Gordon, and Kathryn Siegel, *Social Media Policies in the NLRB's Crosshairs*, Littler ASAP (Oct. 9, 2012).

4 *Flex Frac Logistics, LLC,* 358 NLRB No. 127 (Sept. 11, 2012).