NLRB BEGINS TO DEFINE THE CONTOURS OF ITS SOCIAL MEDIA LAW IN ALJ DECISIONS CONCERNING NON-UNION EMPLOYERS

Social media is a developing, and in many ways still a murky area of the law, particularly in the employment context. Use of Facebook, Twitter, Google+ and the myriad other social media by employees both at and away from the workplace is rapidly increasing and also beginning to blur the line between personal and professional activities. Faced with potential liability under anti-harassment and discrimination laws as well as FTC guidelines on employee endorsements and testimonials, employers cannot completely ignore employee social media activity. Nonetheless, the line between private and professional social media activity is not always clearly defined in the law, forcing employers to make difficult disciplinary decisions concerning employee social media activity.

The National Labor Relations Board (the "Board") has recently begun to define the contours of permissible employer disciplinary action under the National Labor Relations Act (the "NLRA") for employee social media activity. The Board's Office of the General Counsel published a report on social media cases within the last year that provides insight on the Board's view on social media and the contexts in which issues can arise. Although none of the cases discussed in the report reached the Board level, two recent Administrative Law Judge rulings - *Hispanics United of Buffalo, Inc. v. Carlos Ortiz*, 3-CA-27872 and *Karl Knauz Motors, Inc. v. Robert Becker*, 13-CA-46452 - provide contrast between protected and unprotected employee speech via social media under the National Labor Relations Act ("NLRA"). An important fact in both decisions is that they concerned non-unionized workplaces, highlighting that the NLRA applies in both the union and non-union context.

Non-Union Employees' Criticisms of a Co-Worker Protected Concerted Activity Under the NLRA

In the first ruling of its kind, Administrative Law Judge ("ALJ") Arthur Amchan concluded in *Hispanics United of Buffalo, Inc. ("HUB")*, that HUB - a non-union employer - committed an unfair labor practice when it terminated five employees over postings they made on Facebook that were critical of a co-worker. The facts, as determined by ALJ Amchan, are as follows: The posts at issue began on Saturday, October 9 - not a workday for the employees - by Mariana Cole-Rivera on her Facebook account stating "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?" This post generated a fair amount of responding posts from HUB employees, which were read by Lydia Cruz-Moore (the subject of the posts). Cruz-Moore contacted HUB Executive Director, Lourdes Iglesias, and suggested that Iglesias should terminate, or at least discipline, the five employees. On Tuesday, October 12, 2010, Iglesias met with the five employees individually about the Facebook posts and fired each of them. Iglesias explained that the Facebook posts constituted bullying and harassment in violation of HUB's policy on harassment. Iglesias also stated that Cruz-Moore suffered a heart attack as a result of the postings and HUB would have to pay her compensation (though the ALJ noted there was no evidence in the record establishing a causal connection between Cruz-Moore's health and the posts).

Carlos Ortiz, one of the five terminated employees, filed an unfair labor practice charge with the Board, alleging that HUB violated Section 8(a)(1) of the NLRA, which makes it an unfair labor practice for an employer to interfere with employees' rights under Section 7 of the NLRA. Section 7 provides that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

HUB conceded that the five discriminatees were discharged solely because of the October 9th Facebook postings. Therefore, the ALJ's analysis focused on two main issues: First, whether the terminated employees' Facebook posts were protected concerted activities, and second, whether the posts constituted misconduct so egregious as to lose protection under the NLRA.

ALJ Amchan held that the Facebook communications amongst the five employees were protected concerted activities. The ALJ first found that because the Facebook posts, initiated by Cole-Rivera, sought to enlist the support of fellow employees they were indeed concerted activities. Further, the ALJ noted that HUB "lumped the discriminatees together in terminating them, establish[ing] that [it] viewed the five as a group and that their activity was concerted." ALJ Amchan then went on to conclude that the concerted activities were indeed protected, even though they were not trying to change their working conditions, because the employees "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management." The ALJ went on to explain that "[e]xplicit or implicit criticism by a co-worker of the manner in which [employees] are performing their jobs is a subject about which employee discussion is protected by Section 7. That is particularly true . . . where at least some of the [employees] had an expectation that Lydia Cruz-Moore might take her criticisms to management."

Because HUB alleged that the employees' Facebook postings violated HUB's employee policy on harassment, the ALJ next considered whether the employees' actions became so opprobrious as to lose protection under the NLRA, based on the factors the Board set out in *Atlantic Steel Co.*, 245 NLRB 814 (1979). ALJ Amchan explained that because (i) the Facebook posts were not made at work or during working hours, (ii) the subject matter concerned a protected communication, *i.e.*, a co-worker's criticism of job performance, and (iii) the discriminatees did not engage in any type of outburst, the employees did not lose protection under the NLRA. Further, ALJ Amchan determined that nothing in the record suggested that the employees violated any company policy or procedure.

Judge Amchan ordered HUB to offer the five discriminatees reinstatement to their former jobs, or a substantially equivalent position, and back pay with interest. Further, any reference to the unlawful discharges must be removed from the five employees' personnel files and the discharges may not be used against them in any way.

Non-Union Employee Lawfully Terminated For Facebook Post Unrelated to Terms and Conditions of Employment

In *Knauz BMW*, ALJ Joel P. Biblowitz concluded that non-union employer Knauz Motors, Inc. ("Knauz") lawfully terminated employee Robert Becker for a Facebook post about an accident that occurred at a company-owned dealership. At issue in this decision were two series of posts by Becker on his personal Facebook page. According to the decision, in the first series of postings, Becker posted pictures from a sales event hosted by the employer's BMW dealership at which Becker worked, which included comments by

Becker that were critical of the food selection at a luxury car sales event. The second set of posts included pictures and commentary regarding an accident at a Land Rover dealership owned by the employer in which a customer's 13-year-old son was allowed to sit behind the wheel of a truck, while the customer was standing beside the truck and the salesperson was in the passenger seat with the door open. Ultimately, the son ran over the customer's foot, drove the truck into a pond, and the salesperson was thrown in the water. The pictures were captioned: "This is your car: This is your car on drugs." Becker then commented, "I love this one...The kid's pulling his hair out...Du, what did I do? Oh no, is Mom gonna give me a time out?" Becker was terminated shortly after the postings. Becker's managers stated the termination was solely based upon the Land Rover postings and that the luxury car sales event "really had no bearing whatever...."

Becker filed an unfair labor practice charge, alleging that his termination violated Section 8(a)(1) of the NLRA because it interfered with his rights under Section 7. ALJ Biblowitz assessed both sets of Facebook postings and concluded that the first set, related to the luxury sales event, was protected concerted activity for several reasons. First, Becker and a fellow employee had vocalized their concerns about the food selection at a meeting with superiors prior to the postings, and the subject was further discussed by salespersons after the meeting. Additionally, because the food "inadequacies" could have potentially had an effect upon Becker's compensation should customers have been turned off by the food selection, the postings fell within the realm of protected concerted communications.

With little discussion, the ALJ found that Becker was terminated solely for the second set of postings related to the accident, which the ALJ concluded were far from protected concerted activity. According to ALJ Biblowitz, the pictures and comments about the accident were posted "...as a lark, without any discussion with any other employee of the Respondent [Knauz Motors, Inc.], and had no connection to any of the employees' terms and conditions of employment." Therefore, the ALJ concluded that Knauz did not wrongfully terminate Becker.

The two decisions highlight that employers in both the union and non-union context need to consider protections afforded under the NLRA before taking action against employees for social media activity. Further, New York employers should also consider employee protections under Article 7, Section 201(D) of the New York Labor Laws, often referred to as the "Legal Activities" law, which prohibits employers from discriminating against employees or potential employees based upon protected activities that occur away from the employer's place of business and outside of work hours. These protected activities include: political activities, legal recreational activities, legal use of consumable products, and membership or participation in a union. It could be argued that employee social media activity would fall within the sphere of these protections.

This post was authored by Matt Lampe, Joseph Bernasky, and Michele Bradley of Jones Day. The views and opinions expressed herein are those of the authors and do not necessarily reflect the views of Jones Day or the New York State Bar Association.

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