JOURNAL OF INTERNET LAW
VOLUME 18
NUMBER 2
AUGUST 2014
EDITED BY DLA PIPER

The NLRB's Continued Regulation of Social Media in the Workplace

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Virtually every major employer in the United States uses social media for business or promotional purposes, and millions of employees will take to Facebook or Twitter this year to discuss their personal and professional lives. Due to the increasing popularity of social media Web sites, employers have had to implement policies to delineate how employees may use social media in connection with their employment. In fact, more than 80 percent of businesses now have formal social media policies governing employee use of social media at work—an increase of 20 percent since just last year.[1] Given that employee use of social media shows no sign of slowing, the questions of: (i) when employers may use employee social media posts to justify adverse employment actions; and (ii) how employers should construct and enforce their social media policies, are ones that most employers will be forced to answer.

However, employers are not alone in determining how to deal with the foregoing questions. In fact, over the past few years, the National Labor Relations Board (NLRB or the Board) has issued a number of decisions addressing both terminations relating to social media posts and the lawfulness of employer social media policies. As discussed herein, recent Board decisions (which some employers may feel are overbroad and/or too restrictive in some instances) do provide employers with the insight and guidance they need to make employment-related decisions based on social media use and to implement effective social media policies.

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Wolters Kluwer
Law & Business

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EMPLOYER USE OF SOCIAL MEDIA IN TAKING ADVERSE EMPLOYMENT ACTIONS AGAINST EMPLOYEES

In late 2012, the NLRB issued decisions in the matters of *Karl Knauz Motors*[2] and *Hispanics United of Buffalo*,[3] in which the Board delineated what constitutes protected concerted employee activity under Section 7 of the National Relations Labor Act (NLRA) with respect to employee postings on social media Web sites. These decisions provide the basic framework for how to analyze the propriety of adverse employment actions resulting from employee social media posts. In *Karl Knauz Motors*, an NLRB Administrative Law Judge (ALJ) held that certain employee Facebook postings did not constitute protected, concerted activities under Section 7 when such postings had "no connection to any of the employees' terms and conditions of employment."[4] In reaching this decision, the ALJ clearly indicated that adverse employment actions related to social media posts will be deemed to be unlawful only when the postings in some way address the terms and conditions of the employee's employment.

On the other hand, in *Hispanics United*, the NLRB ordered the employer to reinstate five workers who were terminated because of their Facebook posts.[5] In reaching this decision, the NLRB outlined the standard that it will use when determining whether social media posts constitute protected, concerted activity under Section 7, namely: (1) whether the activity engaged in by the employee was "concerted" within the meaning of Section 7; (2) whether the employer knew of the concerted nature of the employee's activity; (3) whether the concerted activity was protected by the NLRA; and (4) whether the discipline or discharge was motivated by the employee's protected, concerted activity.[6] The NLRB 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,"[7] including "circumstances where individual employees seek to initiate or to induce or prepare for group action, as well as where individual employees bring group complaints to the attention of management."[8]

Following the decisions in *Karl Knauz Motors* and *Hispanics United*, the NLRB has continued to analyze terminations related to social media postings under the same framework and, in doing so, the NLRB has made it clear that: (1) employees have wide latitude to discuss their working conditions and the terms of their employment on social media sites, regardless of how critical such postings are of their employer; and (2) an employer's purported justifications for terminations will be scrutinized by the NLRB for pretext.

For instance, in the matter of *Metro-West Ambulance Service*,[9] the NLRB held that an ambulance services company improperly took an adverse employment action against an employee after learning that the employee had created a pro-union Facebook page. In this matter, the employee was placed on a probationary performance improvement plan (PIP) because of a complaint filed by a patient on January 24.[10] However, the complaint did not trigger any discipline from the employer until March 7, a delay "in excess of 1 month."[11] This delay suggested to the Board that the driving reason for the adverse employment action was "animus against [the employee's] union activities."[12] In fact, the NLRB noted that both the employee's "managers and supervisors were aware" of the Facebook page.[13] Given this, the Board concluded that the burden shifted to the employer to demonstrate that the PIP would have been imposed even absent any pro-union activity by the employee.[14]

In an effort to justify the PIP, and to show that the employer did not take the adverse employment action as a result of the Facebook page, the employer pointed to several mistakes on the job by the employee over the course of the past year.[15] However, the Board found that because these supposed errors were not subject to "contemporaneous discipline," because other similarly situated employees made similar errors and were not punished, and because some of the employer's descriptions of the employee's mistakes seemed to be "false or exaggerated," the PIP was merely pretext for punishing the employee for his pro-union Facebook page.[16]

Similarly, in the matter of *Design Technology Group*,[17] the NLRB found that employee Facebook conversations constituted protected, concerted activity and, therefore, the termination of the employees for having such conversations was unlawful. The *Design Technology Group* employees made a number

of comments and complaints on Facebook concerning their employment, including: (1) their managers' apparent refusal to address their concerns about the safety of the neighborhood; (2) the general conduct of the supervisor; and (3) that they should "look[] at a book about the rights of workers in California" so that they could determine whether their employer was violating federal labor laws.[18] The NLRB found that terminating the employees was unlawful under the NLRA because the posts were made for the "mutual aid and protection" of the employees and were therefore protected Section 7 activity.[19] In reaching this decision, the ALJ made it clear that he was not persuaded by the employer's "nonsensical" claim that the employees conspired to entrap the employer into committing a Section 7 violation by concocting an elaborate plan to goad their supervisors into terminating them, finding that "[e]ven if the employees were acting in the hope that they would be discharged for their Facebook postings," their behavior still would have been protected by the NLRA.[20]

Additionally, the ALJ in *Design Technology* ruled that the company improperly terminated another employee, even though she was only a "minor participant in the Facebook conversation" that led to the discharge of her co-workers and arguably was not even engaging in protected Section 7 activity at all.[21] This employee authored only one post which, on its face, was "innocuous."[22] However, the employee's supervisor linked this employee with the other terminated employees and the supervisor "disapproved of their continued association."[23] The ALJ ruled that the employer violated the NLRA by terminating the employee because the termination was based on the employer's belief that the employee was joining online conversations pertaining to workplace conditions and was associated with the other group of employees.[24] In reaching this decision, the ALJ again gave no weight to the employer's purported justification for the termination (tardiness), finding that tardiness was common amongst the employee's co-workers, and they were rarely punished for it.[25] Stated simply, the employer's purported justification was deemed to be pretext.

Finally, in *Butler Medical Transport*,[26] the NLRB found that the termination of two employees who took Facebook to complain about working conditions was unlawful. In this matter, one of the employees posted on her personal Facebook page that she had been terminated unfairly:

> Well no longer a butler employee … Gotta love the fact a "professional" company is going to go off what a dementia pt says and hangs up on you when you are in the middle of asking a question.[27]

In response to Facebook posts from a coworker about the nature of the patient's complaint, as well as several sympathetic responses from both friends and coworkers, the same employee soon wrote another Facebook post:

> Yeah ur telling me! The pt said I told her that they never fix anything on the units … Yeah i no that pt I'm not dumb enough to tell her let alone any pt how [bad] those units are they see it all on their own.[28]

At that point, a coworker advised the employee via Facebook post that he was "[s]orry to hear" about her situation, adding that "you may think about getting a lawyer and taking them to court" and "[y]ou could contact the labor board too."[29] Shortly thereafter, the employee who made these recommendations was terminated on the grounds that he had tarnished the company image.[30]

In ruling that the termination was unlawful under the NLRA, the ALJ held that the terminated employee had made a "common cause" with employee who was initially terminated, finding that it was significant that the employee had responded specifically to a post complaining about workplace conditions and decisionmaking by the company's management.[31] The ALJ further held that it was irrelevant to the analysis of the propriety of the termination that the Facebook posts were accessible to both the Facebook friends of each individual and to "customers or others outside Butler Medical."[32]

However, while the ALJ ultimately found that the termination was unlawful, the ALJ did pause to consider situations in which terminations related to posts on social media Web sites would be lawful under the NLRA. For instance, the ALJ reasoned that had the employees' posts been particularly "disloyal, reckless, or maliciously untrue," they would have fallen outside of the NLRA's protections because

such statements have been ruled to be unprotected when they were made "at a critical time in the initiation of [a] company's business and where they constitute a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."[33] The ALJ noted that because of concerns that this limitation might chill employees' lawful interest in airing grievances about their employers, the NLRB takes pains to "distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues" by insisting that, to lose protections, disloyal statements must also have a malicious motive.[34] To demonstrate maliciousness, however, it is insufficient for employers to simply demonstrate that employees made false statements about the company, or even that the employees acted negligently in failing to verify their false statements before making them. Instead, employers must show that the statements were made with knowledge of their falsity, or with reckless disregard for their truth or falsity—the same high bar that applies to defamation actions between public-figure plaintiffs and private media defendants.

In sum, as evidenced by the foregoing decisions, the NLRB has continued to take a restrictive view of when an employer may take an adverse employment action against an employee related to social media postings. Based on these decisions, it is evident that employers must carefully scrutinize the posts at issue to determine if they are related to the employees' terms and conditions of employment. If the social media posts are related to the terms and conditions of employment, and such posts could be considered concerted activity under Section 7, employers should refrain from taking adverse action against that employee because, in doing so, the employer may be in violation of the NLRA.

EMPLOYER SOCIAL MEDIA POLICIES AND SECTION 7 VIOLATIONS

In addition to focusing on adverse employment actions related to social media posts, the NLRB also has consistently reviewed the propriety of employment/handbook policies that seek to regulate social media use by employees. Thus, as the NLRB continues to define the contours of what social media policy restrictions are lawful and which infringe on an employee's Section 7 rights, employers should take heed of the recent decisions by the NLRB on this issue.

For instance, in *Professional Electrical Contractors of Connecticut*,[35] the ALJ closely reviewed the social media policy of an electrical services company. The social media policy provided a set of guidelines for employee behavior and prohibited, among other things, "[i]nitiating or participating in the distribution of chain letters, sending communications or posting information, on or off duty, or using personal computers in any manner that may adversely affect company business interests or reputation."[36] The ALJ held that the policy was overbroad and therefore invalid because, absent any "accompanying language that would tend to restrict its application," it is unlawful to prohibit online postings simply because they cause some indeterminate damage to the company or its reputation.[37]

Likewise, in *Butler Medical*, the ALJ found that Butler Medical's policy requiring employees to "refrain from using social networking sites which could discredit [the company] or damages [sic] its image" was unlawful because it infringed on employee Section 7 rights.[38] Even though Butler Medical argued that this rule was simply a "bullet point" in a handbook distributed to employees, as opposed to a formal policy, the ALJ found that this distinction did not amount to a substantive or meaningful difference.[39] In fact, the ALJ found that because "employees would reasonably construe [the] language [of the policy] to prohibit Section 7 activity … [t]he rule on its face is broad enough to prohibit posting and distribution [of information] … regarding wages, hours, and other working conditions."[40]

Finally, an overly broad social media policy also was at issue in the recent case *The Kroger Co. of Michigan*.[41] In deciding that Kroger's social media policy infringed on employee Section 7 rights, the ALJ first noted that social media policies can violate Section 7, even if they have never been applied to a specific employee, because of the chilling effect that unlawful policies can have on protected speech.[42] The ALJ cited precedent that unless a social media policy explicitly restricts Section 7 rights (in which case it constitutes a *per se* violation of the NLRA),

the policy would still be unlawful upon a showing that: (i) employees would reasonably see the policy as prohibiting Section 7 activity; (ii) the policy was promulgated as a response to union activity; or (iii) the policy has been applied specifically to restrict Section 7 rights.[43] The ALJ further discussed that the intent of the employer in promulgating the social media policy is unimportant because if the policy reasonably chills protected speech, it is unlawful.[44]

With these basic principles in mind, the ALJ first addressed whether the social media policy's mandatory disclaimer provision was lawful. The provision provided that:

> If you identify yourself as an associate of the Company and publish any work-related information online, you must use this disclaimer: "The postings on this site are my own and don't necessarily represent the positions, strategies or opinions of The Kroger Co. family of stores."
>
> You need to be familiar with all [Employer] policies involving confidential or proprietary information or information found in this Employee Handbook and others available on Starbase. Any comments directly or indirectly relating to [Employer] must include the following disclaimer: "The postings on this site are my own and do not represent [Employer's] positions, strategies or opinions."[45]

In analyzing whether the disclaimer was lawful, the ALJ weighed the workers' well-established Section 7 rights with Kroger's legitimate interest in avoiding consumer confusion, protecting its brand, and maintaining consistent publicrelations and consumer-facing positions. Despite recognizing Kroger's legitimate business concerns, the ALJ concluded that the disclaimer was unlawful because it was "manifestly broader than [Kroger's] legitimate interest." In that connection, the ALJ found that it would be quite unlikely that an employee's views would ever really be confused with the official views of Kroger. Likewise, the ALJ reasoned that the policy could reasonably be read to require workers to use a disclaimer whenever posting a comment on Facebook, or each time they wrote a note on a message board concerning their employment.

After finding that the disclaimer requirement was unlawful, the ALJ next turned to another provision in the Kroger manual, as well as an older version of the same policy, which provided that:

> Confidential and proprietary information should not be discussed in any public has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. *Do not comment on rumors or speculation related to the Company's business plans*. (June 2011 Policy)
>
> Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. Do not comment on rumors, speculation or personnel matters. (February 2011 policy)[46]

The ALJ found that the prohibition in the February policy against commenting on "personnel matters" was unlawful on its face, based on an array of precedent finding that discussions of wage and workplace conditions fall under the umbrella of "personnel matters."[47] The ALJ also found that the June policy was no better, finding that "speculation" related to "business plans" could reasonably be read to prohibit protected speech about a variety of workplace issues, such as "potential shutdowns, closures, [or] layoffs."[48]

Finally, the ALJ turned to a final section of the Kroger policy (and the prior version of the same policy):

> When online, do not engage in behavior that would be inappropriate at work and that will reflect a negative or inaccurate depiction of our Company. (February 2011 Policy)
>
> When online, do not engage in behavior that would be inappropriate at work—including, but not limited to, disparagement of the Company's (or competitors') products, services, executive leadership, employees, strategy and business prospects. (June 2011 Policy)

Both policies, the ALJ ruled, were "unlawfully overbroad" because they did not include enough specificity to clearly disabuse employees of the notion that they proscribed Section 7 activity.[49] Absent sufficient specificity, such rules against disloyal or inappropriate behavior are generally overbroad.

As is evidenced by the foregoing decisions, the NLRB is continuing its review of social media policies and will not hesitate to strike down policies as unlawful if the Board deems the policies to be overbroad or an infringement on employee Section 7 rights.

CONCLUSION

As detailed in recent decisions of the NLRB, the Board appears to be continuing its aggressive review of social media related terminations and the appropriateness of employer social media policies.[50] As such, it is best practice for all employers, before making an adverse employment action related to a social media posting or implementing a social media policy, to ensure that such actions do not infringe in any way on employee Section 7 rights.

NOTES

1. Dan Pontefract, "Social Media in the Workplace is Going Backwards," *Huffington Post* (May 6, 2014, 6:05 PM), *http://www.huffingtonpost.com/dan-pontefract/social-media-in-the-workp_1_b_5270543.html.*
2. Karl Knauz Motors, 358 N.L.R.B. No. 164, 2012–2013 (Sept. 28, 2012).
3. Hispanics United of Buffalo, 359 N.L.R.B. No. 37, 2012–2013 (Dec. 14, 2012).
4. *Karl Knauz Motors*, 358 N.L.R.B. No. 167 at 18.
5. *Hispanics United*, 359 NLRB No. 37 at 16.
6. *Hispanics United* , 359 NLRB No. 37 at 2 (*quoting* Meyers Indus., 268 NLRB 493 (1983)).
7. *Id.* (*quoting Meyers Indus.*, 268 NLRB at 497).
8. *Id.* (*quoting Meyers Indus.*, 281 NLRB 882 (1986)).
9. Metro-West Ambulance Serv., 360 N.L.R.B. No. 124 (May 30, 2014).
10. *Id.* at 1.
11. *Id.*
12. *Id.* at 2.
13. *Id.* at 1.
14. *Id.* at 2.
15. *Id.*
16. *Id.* at 2.
17. Design Tech. Group, 359 N.L.R.B. No. 96, 2013–2014 (Apr. 19, 2013).
18. *Id.* at 1.
19. *Id.*
20. *Id.*
21. *Id.* at 2.
22. *Id.*
23. *Id.*
24. *Id.* ("It is plain that the Respondent believed that [the employee] was linked with … protected activity").
25. *Id.* (noting that tardiness was "widespread" among employees, yet rules concerning tardiness were only "sporadically and arbitrarily" enforced).
26. Butler Med. Transport, 2013 WL 4761153 (Sept. 4, 2013).
27. *Id.* at *1.
28. *Id.*
29. *Id.*
30. *Id.* (noting that employee was told he had violated his "promise to refrain from using social networking sights [sic] which could discredit Butler Medical Transport or damages it image," which was a rule at the workplace).
31. *Id.* (finding it significant that the "common cause" related to a "matter of concern to more than one employee").
32. *Id.* ("It is not a defense to the unfair labor practice allegation that [the posts] were accessible to customers or others outside Butler Medical Transport.") (*citing Valley Hosp. Med. Center*, 351 NLRB 1250, 1252 (2007)).
33. *Id.* (*citing* Mountain Shadows Golf Resort, 3 30 N.L.R.B. 1238, 1240 (2000)).
34. *Id.* (*quoting* Richboro Cmty. Mental Health Council, 242 N.L.R.B. 1267, 1268 (1979)).
35. 2014 WL 2547548 (June 4, 2014).
36. *Id.*
37. *Id.* (*quoting* Costco Wholesale Corp., 358 N.L.R.B. No. 106, (2012)).
38. *Butler Med.*, 2013 WL 4761153, at *1.
39. *Id.*
40. *Id.*
41. The Kroger Co. of Michigan, 2014 WL 1620730 (Apr. 22, 2014).
42. *Id.* at *1 (noting that the goal of the NLRA is to "prevent[] employees from being chilled in the exercise of their Section 7 rights … instead of waiting until that chill is manifest") (*quoting* Flex Frac Logistics, LLC, 358 N.L.R.B. No. 127, slip op. at 2 (2012)).
43. *Id.* (*citing* Lutheran Heritage, 343 N.L.R.B. 646, 646 (2004)).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. Given the Supreme Court's recent decision in NLRB v. Noel Canning, No. 12–1281 (June 26, 2014), in which the Court found that President Obama's recess appointments to the NLRB were improper, certain of the NLRB decisions discussed herein may have to be revisited by the NLRB because they were issued without the requisite quorum. In light of the uncertainty arising out the Supreme Court's decision, employers should watch closely to *see* if the *Noel Canning* decision has any effect on the Board's position towards regulating social media in the workplace.