

## NLRB Targets “Facebook Firings” and Social Media Policies

The National Labor Relations Board (NLRB), the agency that recently filed an unfair labor practice complaint against Boeing Co. for deciding to build 787 Dreamliners in South Carolina, has also drawn attention for prosecuting complaints against employers that took action against employees for negative Facebook posts.

Employers are disciplining workers over misuse of social media. According to a survey released May 2, 2011, 42 percent of corporate compliance officers who responded reported that their organizations have disciplined employees for activities on Facebook, Twitter, or LinkedIn; 31 percent said their employer has adopted policies specifically addressing the use of social media sites outside of work.

At issue in the NLRB’s “Facebook Firing” cases is whether terminating employees for making disparaging online posts, and having policies prohibiting such posts, violates the National Labor Relations Act (NLRA). The NLRA guarantees both union and non-union employees the right to “engage in ... concerted activities for the purpose of ... mutual aid or protection,” including the right to complain about terms and conditions of employment.

The NLRB’s most recent complaint was filed May 20, 2011, against Karl Knauz Motors, Inc., which operates a Chicago-area BMW dealership. The dealership terminated car salesman Robert Becker for allegedly writing posts on his own Facebook page that criticized the dealership for offering customers hot dogs and bottled water at an event promoting a new BMW model. Other employees had access to Becker’s Facebook page, and they were also concerned that the quality of food and beverages provided at the event could have a negative effect on sales and their commissions.

When management asked Becker to remove the posts, he complied, but his employment was terminated a few days later. The NLRB alleges the dealership fired him to discourage other employees from engaging in similar discussions about their pay and other terms and conditions of employment—a violation of the NLRA.

In a similar complaint filed May 9, 2011, the NLRB alleges that Hispanics United of Buffalo Inc., a non-profit organization, violated the NLRA by firing five employees for criticizing their working conditions in a Facebook discussion. One of the employees wrote on her personal Facebook page that a co-worker stated employees did not do enough to help the organization. Four other employees commented on the page, defending their performance and criticizing staffing levels and workloads at the organization.

Hispanics United fired the five employees, claiming their online statements constituted harassment of the co-worker who stated employees did not do enough to help the organization. The NLRB contends the firings violate the NLRA.

The Knauz Motors and Hispanics United cases are currently pending, but earlier this year the NLRB settled a “Facebook Firing” case against ambulance service provider American Medical Response of Connecticut, Inc. (AMR). The NLRB alleged the company violated the NLRA by terminating an employee after she wrote on her personal Facebook page, using her home computer, that her supervisor was a “17,” AMR’s code for psychiatric patient, a “dick,” and a “scumbag.” Her co-workers then chimed in with posts supportive of the employee.

AMR noted the employee violated its Blogging and Internet Posting Policy, which, like the policies of many employers, prohibited employees from “making disparaging, discriminatory or defamatory comments when discussing the Company or the employee’s supervisors, co-workers and/or competitors.” The policy also prohibited employees from depicting the company in any way on the Internet without its permission. According to the NLRB, AMR’s policy violated the NLRA because it constituted interference with employees in their right to engage in protected concerted activity.

The AMR case settled in February 2011 when the company agreed to revise its policy to ensure it does not restrict employees from discussing wages, hours, and working conditions with co-workers and others while not at work.

These cases show the NLRB, as presently constituted, aims to make it easier for employees to use social media for alleged concerted activity. The NLRB will consider many online comments to be protected even if they are disparaging and disrespectful to the employer and supervisors.

Some lessons for employers from the NLRB’s “Facebook Firing” cases are 1) when disciplining an employee for social media activities, seek legal advice; and 2) review social media policies to make sure they comply with the NLRA and other legal requirements.

*This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.*

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