COLLEGE OF LABOR AND EMPLOYMENT LAWYERS
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NLRB UPDATE

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A. SOCIAL MEDIA

I. THE SEARS ADVICE MEMO

A) In a December 4, 2009 Advice Memorandum issued in Sears Holdings, Case No. 18-CA-19081, the NLRB's Division of Advice ("Advice") first addressed the intersection of the NLRA and social media.

B) In Sears, a union was seeking to organize a group of technicians who were scattered across a wide geographic area. As part of this campaign, the union created a website, and Facebook and MySpace pages. In addition, Sears technicians around the county communicated with each other using a Yahoo listserve. The listserve was not affiliated with Sears. According to the Advice Memo, listserve participants "routinely used the list to discuss the Union campaign and other work-related concerns."

C) The Sears "Social Media Policy": In June 2009, Sears issued a "Social Media Policy." In relevant part, that policy stated that "the following subjects may not be discussed by associates in any form of social media: . . . disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects."

D) Once issued, the Social Media Policy became a frequent topic of discussion among listserve participants. They wondered whether it applied to their listserve. They expressed concern that the policy infringed on their freedom of expression. Despite the policy, listserve members continued to discuss union organizing on the listserve. There was no evidence presented to Advice that Sears had disciplined any technicians for anything they said on the listserve.

E) The union filed an unfair labor practice (a "ULP") charge alleging that the Social Media Policy chilled the exercise of protected concerted activity in violation of NLRA Section 8(a)(1). The Region submitted the case to Advice.

F) There was no evidence submitted to Advice that the employer used the policy to discipline any employee for engaging in protected concerted activity, and there was no evidence before Advice that the policy was implemented in response to the union campaign, the listserve, or any other protected concerted activity.

G) Advice concluded that the charge should be dismissed because the employer's Social Media Policy "cannot reasonably be interpreted in a way that would chill Section 7 activity." How did it reach that conclusion? Relying primarily on Lutheran Heritage Village – Livonia, 343 NLRB 646 (2004), a non-social media case, Advice found that the rule did not violate the Act because:

1) The rule covered a wide variety of activities, "the vast majority of which are clearly not protected by Section 7," and thus "the Policy as a whole provides sufficient context to preclude a reasonable employee from construing the rule as a limit on Section 7 conduct";

2) The preamble to the policy explained "that it was designed to protect the employer and its employees rather than to 'restrict the flow of useful and appropriate information.'"

3) Advice claimed that the policy sufficiently apprised employees that while it prohibited online sharing of confidential and intellectual property and "egregiously inappropriate language," it did not apply to Section 7 protected activity;

4) Employees "continued to discuss the Union campaign on the . . . listserve after the Employer implemented the Policy" and were not disciplined for doing so; and

5) There was no evidence that the employer implemented the policy in response to protected activity.

II. THE NLRA MEETS FACEBOOK

A) AMERICAN MEDICAL RESPONSE OF CONNECTICUT, CASE NUMBER 34 – CA – 12576

1) The Union – Teamsters Local 443 – filed a ULP in early 2010. The NLRB issued a Complaint on October 27, 2010. The case did not go to trial but, instead, settled in February, 2011. As a result of a settlement, there is no trial, no trial transcript, no record, and no ruling by the NLRB or a Court of Appeals.

2) The employer maintained a "Blogging and Internet Posting Policy," which barred employees from "making disparaging, discriminating, or defamatory comments when discussing the Company or the employee's superiors, co-workers, and/or competitors."

3) Employee Souza "engaged in concerted activities with other employees by criticizing [a supervisor] on her Facebook page." While the complaint does not allege the specifics of Souza's Facebook post, published reports state that, on her Facebook page, Souza referred to her supervisor as a "17," which was company jargon for a psychiatric patient, and used vulgarities to mock him. Co-workers posted supportive responses, which led to more negative comments about the supervisor on Souza's Facebook page.

4) That same day, acting pursuant to Weingarten, employee Souza requested union representation in connection with an employer investigatory interview. The employer denied that request, and threatened her with discipline for making the request.

5) Three weeks later, American Medical Response, the employer, fired Souza. As alleged in the NLRB's complaint, Souza's discharge was in retaliation for her Facebook posting, "to discourage employees from engaging in these or other concerted activities," because her Facebook posting violated the employer's internet policies, and because Souza "assisted the Union."

6) The complaint alleged that the employer's conduct – including its maintenance of a "Blogging and Internet Posting Policy" – violated Sections 8(a)(1) and 8(a)(3) of the NLRA.

7) The parties settled. According to an NLRB press release, the Company agreed to "revise its overly broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours, and working conditions with co-workers and others while not at work." The press release does not mention reinstatement.

B) HISPANICS UNITED OF BUFFALO, INC., CASE NUMBER 3-CA-27872

1) Carlos Ortiz, an individual, filed a ULP in November, 2010. The NLRB issued a complaint on May 9, 2011. The ALJ decision was issued on September 2, 2011.

2) The complaint alleges that an employee "engaged in concerted activities with other employees ... by concertedly complaining on her Facebook page regarding the working conditions of Respondent's employees." Why is this allegation so important?

3) The complaint also alleges that, three days later, the employer fired the employees who engaged in that "concerted activity" because they did so, and "to discourage employees from engaging in these or other concerted activities.

4) The employee posted the following on her Facebook page: "A co-worker [Lydia Cruz] feels that we don't help our clients enough . . . I about had it! My fellow co-workers how do you u feel?" During the next twelve hours, co-workers posted a number of comments, including the following: "What the F . . . . try doing my job I have five programs"; "what the hell, we don't have a life as is, what else can we do? ? ?"; "tell her to come do mt [my] fucking job m c if I don't do enough, this is just dum." At some point, a member of the employer's Board of Directors posted the following: "Who is Lydia Cruz?" Subsequently, Lydia Cruz posted: "Mary Anna stop with you are lies about me. I'll B at hub [the name of the employer] Tuesday." Cruz complained to the employer's executive director about the Facebook posts. According to the ALJ decision, Cruz' text messages to the executive director "suggests that she was trying to get [the executive director] to terminate or at least discipline the employees who posted the comments on Facebook." Three days afterwards, the executive director fired each of the employees who made the Facebook posts at issue, telling them that those posts "constituted bullying and harassment." The executive director told each of the fired employees that Cruz-Moore had suffered a heart attack as a result of their harassment and that respondent was going to have to pay her compensation . . . . the record establishes that when [the executive director] decided to fire the five discriminatees she had no rational basis for concluding that their Facebook posts had any relationship to Cruz – Moore's health."

5) The ALJ found that the Facebook communications at issue "in reaction to a co-worker's criticism of the manner in which employees performed their jobs are protected." Citing to Aroostook County Regional Ophthalmology Center, 317 NLRB 218 (1995 enf. denied on other grounds 81 F.3d 209 (D.C. Cir. 1996), where the Board found that employee complaints to each other about schedule changes was protected activity, the ALJ found that "by analogy, I find that the discriminatees discussions about criticism about their job performance are also protected." The ALJ further explained that "the discriminatees . . . were taking a first step towards taking group action to defend themselves against the accusation they can reasonably believe Cruz-Moore was going to make to management. By discharging the discriminatees on October 12, respondent prevented them from taking any further group action *vis a vis* Cruz-Moore's criticisms. Moreover, the fact that respondent lumped the discriminatees together in terminating them, establishes that respondent viewed the five as a group, and that the activity was concerted."

6) The Judge rejected the employer's contention that the employees forfeited the protections of the Act because they engaged in misconduct during the course of otherwise protected activity, under Atlantic Steel, 245 NLRB 814 (1979).

C) KARL KNAUZ MOTORS, INC., CASE NUMBER 13 CA 46452

1) Robert Becker, an individual, filed a ULP in November, 2010. The NLRB issued a complaint on May 20, 2011, setting a July 21, 2011 trial date. The ALJ decision was issued on September 28, 2011.

2) The complaint alleged that Mr. Becker "posted on his Facebook page employees' concerted protests and concerns about Respondent's handling of a sales event which could impact their earnings;" that 8 days later, Becker was fired; that he was fired because of his Facebook posting, and that he was fired "to discourage employees from engaging in these or other concerted activities."

3) The ALJ concluded that Becker's posting concerning the sales event was protected concerted activity, but found that under Wright Line, 251 NLRB 1083 (1980), Becker was fired for a separate Facebook posting concerning an auto accident at a related Land Rover dealer, and not for the posting concerning the quality of the food at the sales

event. Thus, the Judge found that the termination was not a violation of the Act.

D) BUILD.COM SETTLEMENT

1) In Build.com, an employee filed a ULP on February 28, 2011. The ULP alleged that she was terminated in retaliation for posting comments on her Facebook page about Build.com and possible state labor law violations, which drew responses from her Facebook friends.

2) In an April 29, 2011 press release, the NLRB announced that the case was settled. The employee declined reinstatement, but was made whole for all lost earnings. The employer also agreed to post a notice stating that employees have the right to post comments about the workplace on their social media pages, and will not be terminated or otherwise punished for doing so.

E) STUDENT TRANSPORTATION OF AMERICA, CASE NUMBER 34 CA 12906.

1) SEIU Local 2001 filed a ULP against Student Transportation of America February, 2011. The charged alleged that the employer's computer, e-mail and electronic communications policies violate Section 8(a)(1) of the NLRA. There, the employer suspended an employee for her Facebook posting: "On December 13, 2010, we read disparaging remarks you had posted on Facebook. Referring to co-workers as Hippos is slang for hypocrite and violates our company policy regarding social media. For posting inappropriate comments about other employees you are suspended for one day."

2) In April, 2011, the case was settled. Had it not settled, the Board would have issued a complaint. The employee was made whole for the pay lost due to the suspension, and the employer agreed to change its handbook and do a posting.

F) WHERE DOES THAT LEAVE US WITH THE NLRB?

How do we square the Board's decision to issue a complaint in American Medial Response, Hispanics United, and Karl Knauz Motors with the Sears Advice Memo? The critical difference between Sears and these cases seems to be that in the cases, the employers discharged employees for a Facebook posting, an activity which the Board concluded was protected concerted activity. To further complicate things, in an April 12, 2011

General Counsel Memorandum, GC 11 – 11, NLRB General Counsel Lafe Solomon announced that "cases involving employer rules prohibiting, or disciplining of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter" must be submitted to the NLRB's Division Of Advice.

III. THE NLRB MEETS TWITTER

1) REUTERS, CASE NUMBER 2-CA-39682

Here, the Newspaper Guild of New York filed an ULP against Reuters. There, after a manger sent out a mass e-mail promoting an official company twitter feed and asking people to "join the conversation on making Reuters the best place to work," a union activist, in response, tweeted that "one way to make this the best place to work is to deal honestly with Guild members." The next day, a manager told the activist that her tweet violated the company's twitter policy, which barred employees from saying anything that would damage the company's reputation. After being sent to Advice, the Board authorized issuance of a complaint. Before the complaint was issued, the case was settled as part of a global settlement between Reuters and the union.

2) LEE ENTERPRISES, CASE NUMBER 28 CA 23267

Here, charging party worked as a reporter for the Arizona Daily Star, a daily newspaper published in Tucson. He was assigned to cover the crime and public safety beat. He was fired on September 30, 2010 for his Tweets. His Twitter account was linked to his MySpace page and his Facebook page. He Tweeted using his home computer. His employer provided computer, and his employer provided cell phone. The employer had no social media policy. Over a six week period, on his personal Twitter Feed, charging party posted a number of provocative Tweets, including the following: "You stay homicidal, Tuscon. See Star.net for the bloody deets."; "What?!?!?! No overnight homicide? WTF? You're slacking, Tucson."; and "I'd root for daily death if it always happens in close proximity to Gus Balon's." In response to a story on a local television station, charging party Tweeted criticism, closing with "stupid TV people." He was terminated for his Tweets.

The NLRB's Division of Advice concluded that his discharge did not violate the Act. Its reasoning was straight forward: his Tweets

"did not relate to the terms and conditions of employment or seek to involve other employees in issues related to his employment."

IV. SOME HYPOTHETICALS

A) Is a Facebook posting about work conditions protected concerted activity? What if no co-workers are "friends" with the person who posts? What if no co-workers comment?

B) If an employee's supervisor, who is her Facebook friend, peruses the employee's Facebook page, can that be unlawful surveillance in violation of Section 8(a)(1) of the NLRA?

C) Assume that a person who has co-workers as Facebook friends posts the following: "My supervisor's pants make her look fat." Is that protected concerted activity? What if a co-worker comments as follows: "And that bitch won't give me any overtime." Is that comment protected concerted activity?

D) Is friending co-workers protected concerted activity?

E) Can an employer compel applicants to provide it with access to their Facebook page? Can an employer peruse applicants' Facebook pages or Tweets? Is it unlawful surveillance to Google an applicant?

B. NLRB NOTICE POSTING

New Rule: Informing Workers of their Rights under the NLRA

I. As of January 31, 2012, the NLRB will require private sector employers (including labor unions) to notify employees of their rights under the National Labor Relations Act by posting an employee rights notice where other workplace notices are typically posted. The date was originally 11/14/11, but the government moved the date to give more time to educating employers. Employers who customarily electronically post notices to employees on a website will be required to post the NLRA rights notice as well.

II. The notice states that employees have the right to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and to refrain from any of these activities. It provides examples of unlawful employer and union conduct and instructs employees how to contact the NLRB with questions or complaints. The Notice is now available on the Board's website at www.NLRB.gov/poster.

III. Enforcement: The Rule does not provide for workplace inspection by the Agency. Therefore, enforcement will be left to employees, individuals, and

union representatives that have access to workplaces. Failure to post the notice will be treated as an unfair labor practice if charges are filed. The Board anticipates handling such charges in most cases by seeking employer compliance without the need for formal administrative action. However, if an employer knowingly and willfully fails to post the notice, the failure may be considered evidence of unlawful motive in unfair labor practice proceedings involving other charges. In addition, where an employer has failed to post the notice, the Rule allows the 6-month limitations period for filing unfair labor practice charges to be tolled for individuals filing charges under certain circumstances.

IV. In Practice: Violations of this rule might be useful in organizing campaigns, as it may generate additional unfair labor practices if charges would otherwise be outside of the 10(b) limitations period, and can provide additional evidence of anti-union animus, both in support of unfair labor practice charges and in publicity campaigns against the Employer.

V. The National Association of Manufacturers, National Right to Work Committee, and the U.S. Chamber of Commerce in South Carolina have filed lawsuits seeking to enjoin its implementation. Arguments will be held 12/19 so NLRB hopes to have a ruling on the injunction before the implementation date.