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Contrasting Cases Illustrate NLRB's Position on Discharge for Use of Social Media

By Lou DiLorenzo

Two recent cases show that whether the NLRB will issue a complaint in a case involving discharge for misusing social media may depend on the content of the "post" or "tweet." In a departure from recent aggressive enforcement activity in the realm of social media, the National Labor Relations Board's Division of Advice recently concluded that an Arizona newspaper's termination of a crime and public safety beat reporter for inappropriate and offensive "tweets" was not a violation of federal labor law. According to the Division of Advice's April 21, 2011 Advice Memorandum, *The Arizona Daily Star* had encouraged its reporters to open Twitter accounts and "tweet" on newsworthy stories to reach a greater audience and improve traffic to the newspaper's website. The reporter opened an account, identified himself as a Daily Star reporter, and began "tweeting" on various subjects and stories. After posting a sarcastic remark about his "witty and creative" editors, he was instructed by management not to air his grievances or comment about the newspaper in any public forum. Although he abided by that restriction, he went on to post several crass and controversial tweets about his public safety beat, including the following: (i) "You stay homicidal, Tucson. See Star Net for the bloody deets[;]" and (ii) "What?!?!? No overnight homicide? WTF? You're slacking Tucson." He also posted a derisive tweet about the "stupid people" at a local TV station, prompting a complaint from the station to the Daily Star.

The newspaper suspended and eventually terminated the reporter based on these tweets. The termination notice stated that he had repeatedly disregarded guidance "to refrain from using derogatory comments in any social media forums that may damage the goodwill of the company." The reporter responded by filing a charge with the Board, alleging that his termination violated his right to engage in protected "concerted activity for the purpose of...mutual aid and protection" under Section 7 of the National Labor Relations Act, which can include speech about the terms and conditions of employment. The case was submitted to the General Counsel's Division of Advice for an opinion as to whether the termination had violated the Act.

In its Advice Memorandum, the Division of Advice found no violation because the reporter was terminated "for writing inappropriate and offensive Twitter postings that did not involve protected concerted activity." In finding the tweets to be neither protected nor concerted, the Division noted they neither dealt with the terms and conditions of employment nor attempted to involve others in any employment-related issues. Significantly, the Division acknowledged that several warnings by management to the reporter against making negative public comments about the newspaper *could be* interpreted as unlawfully restricting Section 7 rights. The statements did not rise to the level of "orally promulgated, overbroad rules", however, because they were communicated solely to the complaining reporter in the context of discipline and in response to specific misconduct, and were not communicated to other employees or published as new rules. In contrast, earlier this month, the Board's Regional Director for Region 3 issued a complaint against a not-for-profit organization, Hispanics United of Buffalo, Inc., in a case where several workers were allegedly discharged for postings made on one of the worker's *Facebook* pages. There, unlike the *Arizona Daily Star* case, the communication at issue apparently contained direct references to employee terms and conditions of employment. According to a public statement about the case issued by the Board, one employee posted on her *Facebook* page a co-worker's comments which were critical of employee performance generally. Other employees then responded to that post with comments which complained about workload and staffing issues. The employer discharged those employees, contending their comments were harassment of the co-worker mentioned in the initial post. The complaint alleges that the postings were protected concerted activity under Section 7 of the NLRA because they involved communications between co-workers about their terms and conditions of employment, including job performance and staffing levels.

As these two cases show, the application of federal labor law to employer-promulgated social media policies and rules is a new and rapidly evolving area of law. In fact, the Board's Acting General Counsel recently issued a memorandum instructing all Regional Directors to submit all cases involving employer social media policies to the Division before taking any action because of the absence of precedent in the area and the policy issues involved. Given the Board's heightened interest in safeguarding employees' Section 7 rights against overbroad social media policies and the relatively uncharted territory at play, employers should seek the assistance of counsel before implementing or disciplining employees under such policies.

Be Careful Out There!

Lou DiLorenzo

Mr. DiLorenzo is a senior partner at Bond, Schoeneck & King, PLLC and Chair of its Labor & Employment, Employee Benefits & Executive Compensation and Immigration Practice Group. He is also Managing Partner of the Firm's New York City and Long Island Offices. He divides his time between the Syracuse and New York City offices.

Carol Waters