NLRB Concludes Terminations for Facebook Postings Violates the NLRA

By Tracy A. Leahy / May 29, 2014

In yet another decision demonstrating its commitment to enforcing the rights of all employees to engage in concerted and protected activity, the National Labor Relations Board (NLRB) concluded that an employer violated the National Labor Relations Act (NLRA) by discharging five non-union employees for comments they posted on Facebook. *Hispanics United of Buffalo, Inc* ., Case 03-CA-027872.

The firings occurred following communications between Hispanic United non-union employees, Lydia and Marianna. The two had frequent communications by telephone and text. During many of those communications, Lydia criticized employees in the housing department, claiming they failed to provide timely and adequate assistance to clients. The criticism escalated when Lydia informed Marianna via text, that she was going to discuss her concerns regarding employee performance with the Executive Director. After receiving Lydia's text, Marianna posted the following message on her Facebook page:

Lydia, a co-worker, feels that we don't help our clients enough. I about had it! My fellow co-workers how do you feel?

Four non-union employees responded to Marianna's posting objecting to the assertion that their work performance was substandard. Lydia responded by posting a comment on Marianna's Facebook page demanding that Marianna "stop with ur lies about me." Lydia also complained to the Executive Director that the Facebook comments slandered and defamed her. After reviewing printout copies of the Facebook postings, the Executive Director fired Marianna and her four co-workers for "bullying and harassment" a violation of the employer's "zero tolerance" policy.

The NLRB affirmed an administrative law judge's decision that the firings violated the NLRA. In doing so, the Board stated that discipline or discharge of an employee violates the Act if the following elements are established: (1) the employee engaged in concerted activity; (2) the employer knew of the concerted activity; (3) the concerted activity was protected; and (4) the discipline or discharge was motivated by the employee's protected, concerted activity.

The Board stated that only the first and third elements were in dispute as the employer was aware of the Facebook comments and the five employees were terminated for the content of those postings.

Analyzing the first element, whether the activity was concerted, the Board noted its decision in *Meyers I* , which defined "concerted activity" as any activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The Board also referenced its expanded definition of "concerted activity" in *Meyers II* , which defined concerted activity to include "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."

Applying both definitions, the Board found that the employees' activity was concerted. By responding to Marianna's solicitation with comments of protest about Lydia's criticism of their work performance, the four co-workers made common cause with Marianna and together their actions were concerted within the definition of *Meyers I* , because they were undertaken with other employees. The actions were also concerted under the expanded definition in *Meyers II* , because they had taken a first step toward taking group action to defend themselves against complaints they reasonably believed Lydia would report to management. According to the Board, it "mattered not" that the five co-workers had not taken their concerns to management because their discussions with co-workers "were indispensable initial steps along the way to possible group action." The Board was also not concerned with the fact that Marianna had not informed her fellow employees that Lydia planned to complain to management. The Board stated that the "'mutual aid' object of preparing her co-workers for group action was "implicitly manifest from the surrounding circumstances."

As to the third element, whether the employees' concerted activity was protected, the Board stated that it had long held that the Act protects discussions about job performance. The Board easily found that the employees had engaged in protected activity where they were directly responding to allegations about their substandard service.

The Board rejected the employer's argument that the Facebook postings were not protected because they constituted bullying and harassment in violation of the employer's zero tolerance policy. The Board stated that the comments could not reasonably be construed as harassment or bullying within the meaning of the employer's policy. Assuming the comments were covered by the employer's policy, the Board stated that the employer could not lawfully apply policies "that discourage the free exercise of Section 7 rights by subjecting employees to discipline on the basis of the subjective reactions of others to their protected activity." According to the Board, Lydia's subjective claim that she felt offended by the Facebook postings, was a "wholly subjective notice of harassment," "unknown to the Act."

The *Hispanics United* decision is yet another example of the Board's desire to enforce rights guaranteed to all employees under the NLRA, regardless of whether the employee is a member of a union, and irrespective of whether the conduct occurs behind the water cooler or in a social media posting. The *Hispanics United* decision also demonstrates the fact intensive inquiry that employers should engage in before terminating employees for social media postings.

If you have any questions regarding the NLRB's decision in Hispanics United contact Tracy A. Leahy at (313) 965-8533 or tleahy@clarkhill.com or another

member of Clark Hill's Labor and Employment Practice Group.