

Non-Union Employer Violated National Labor Relations Act By Firing Employees for Facebook Posts

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On September 2, 2011, an Administrative Law Judge (ALJ) in Hispanics United of Buffalo issued the first written decision examining an employer's termination of employees because of posts on Facebook in relation to the National Labor Relations Act (NLRA). During the past year, the National Labor Relations Board (NLRB) and unions have placed emphasis on the application of labor law to social media. Indeed, the NLRB's General Counsel requires Regional Directors to submit all "[c]ases involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter" to the General Counsel's Division of Advice because "of the absence of precedent or because they involve identified policy priorities." As such, the NLRB has reviewed over 100 charges filed against employers involving social media and has issued many complaints. One of those complaints was against Hispanics United of Buffalo - a non-union employer.

In Hispanics United of Buffalo, an employee posted a comment on her Facebook page stating that one of her coworkers was complaining that fellow employees were not doing enough and soliciting opinions from her other coworkers. Four coworkers responded, albeit with profanity and sarcasm, defending their job performance and commenting on working conditions. The employer subsequently discharged all five employees because their posts violated the company's harassment policy.

Challenging their respective discharges, the employees filed an unfair labor practice charge with the NLRB. After a hearing, the ALJ found that by firing these five employees, Hispanics United violated the employees' right to "discuss matters affecting their employment amongst themselves." According to the ALJ, it was irrelevant that the employees were "not trying to change their working conditions and that they did not communicate their concerns to [their employer]." Rather, "an employer violates [the NLRA] in disciplining or terminating employees . . . regardless of whether there is evidence that such discussions are engaged in with the object of initiating or inducing group action." In Hispanics United of Buffalo, the ALJ specifically focused on the fact that the five employees discussed their job performance and working conditions and that by terminating all five, the employer "viewed the five as a group" and thus "their activity was concerted."

Guidance for Employers

Although the ALJ's decision in Hispanics United of Buffalo does not carry the precedential weight of a decision from the NLRB or the courts, it is the first of likely many such decisions addressing this issue. Until the NLRB or courts provide guidance, employers should take extreme care when taking an adverse action against an employee for his/her usage of social media, especially where that usage relates in any way to work. Employers seeking to adopt a comprehensive social media policy addressing the several legal issues arising from social media, including its intersection with labor laws should contact qualified counsel. For more information, contact your Miller Canfield Employment + Labor attorney.