

NLRB: Discharging Non-Union Employee's for Facebook Posts Violated NLRA

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In September 2011, we alerted you to the decision in *Hispanics United of Buffalo*, a decision by a National Labor Relations Board (NLRB) Administrative Law Judge (ALJ) examining an employer's termination of employees because of posts about their employment on Facebook under the National Labor Relations Act (NLRA). The ALJ's decision was subsequently appealed and on December 14, 2012, the NLRB issued its decision, affirming the ALJ's rulings.

Hispanics United of Buffalo is the third opinion from the NLRB since September 2012 concerning application of traditional labor laws to employer regulation of employee use of social media. In one of the prior opinions, the NLRB examined the extent to which employer policies "chill" employee rights to engage in protected concerted activity under the NLRA. *Hispanics United of Buffalo* provides guidance on how the NLRB defines protected concerted activity in this social media era. The NLRB expressly stated that it will treat employee activity on social media using the same "analytical framework" that has been in place for nearly thirty years. In other words, the NLRB will not treat social media any differently than other ways in which employees may engage in protected concerted activity.

The employer in *Hispanics United of Buffalo*, a non-union employer, discharged five employees after the employees made negative comments on Facebook – while off-duty and via their personal computers – about one of their coworkers. The dispute arose after 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 discharged all five employees pursuant to its "zero tolerance" harassment policy.

Guidance for Employers

The *Hispanics United of Buffalo* decision carries precedential value and is the first to signal that the NLRB will not sway from long standing precedent simply because social media is a new form of communication – a "virtual water cooler." Employers must also keep in mind that the NLRA applies to non-unionized employers and that employees can engage in protected concerted activity during non-business hours and off premises. Finally, an employer's overly broad policy will not trump the protections afforded by the NLRA.

In adopting the recommendations of an ALJ, the NLRB found that by firing the employees, the employer violated the employees' right to engage in protected concerted activity. The NLRB held that the posts were protected by the NLRA because the employees were discussing their job performance. In reaching this conclusion, the NLRB reasoned that when the employee stated her concerns and solicited her coworkers views, which were subsequently provided, the employees were "taking the first step towards taking group action to defend themselves against the [coworker's] accusation [that they were not doing enough]." Whether the original employee intended to voice her complaints was irrelevant, found the NLRB, because the Facebook posts had the clear "mutual aid" objective of preparing coworkers to defend against the complaints. Finally, the NLRB rejected the employer's argument that its "zero tolerance" anti-harassment policy applied, noting that the comments could "not reasonably be construed as a form of harassment or bullying" under the policy, and even if it did, it could not apply the policy "without reference to Board law." Accordingly, by discharging the five employees for their Facebook posts, the employer violated the NLRA.

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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. Experts in Miller Canfield's Employment + Labor Group are available to assist employers respond to these issues as they continue to develop and evolve.