Daily Journal
December 31, 2012

Long story short: the NLRB does not 'like' Facebook firings

By Eli Kantor

The NLRB does not "like" Facebook firings. On Dec. 14, the National Labor Relations Board issued its second decision to examine firings involving Facebook postings. In *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012), the NLRB held 3 to 1 that the employer committed an unfair labor practice, violating Section 8 (a)(1) of the National Labor Relations Act by discharging five employees for responding to another employee's criticism of their work performance on Facebook. The NLRB considers social media to be a "virtual water cooler," and as such employee discussions regarding wages, hours or working conditions for "mutual aid or protection" are protected. "Although the employees' mode of communicating their workplace concerns might be novel," the board majority concluded that the employees' Facebook postings were protected, because this activity was for "mutual aid or protection" within the meaning of Section 7 of the NLRA. This protection extends to all employees, even nonunion employees.

In this case, one employee, Lydia Cruz-Moore, disparaged the work performance and productivity of another employee and her co-workers in a text message. On a non-work day, the criticized employee, Marianna Cole-Rivera, vented her frustrations on Facebook from her personal computer at home, stating, "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB. I about had it! My fellow coworkers how do you feel?" Her off-duty co-workers — who happened to be Facebook friends — responded by posting messages on her Facebook page from their personal computers objecting to the assertion that their work performance was substandard. A lively discussion filled with obscenities followed on Facebook. Cruz, the employee who had criticized the work performance of her co-workers responded: "stop with your lies about me." She then complained to her supervisor about the Facebook comments, stating that she had been slandered and defamed. The supervisor requested that she print out the all the Facebook comments. The supervisor then terminated the criticized employee, Rivera, who had posed the original question and her four co-workers who had commented on her Facebook page, stating that their remarks constituted "bullying and harassment" of a co-worker and violated the employer's "zero tolerance" policy prohibiting harassment.

> By alerting fellow employees of another employee's complaint. that they "don't help our clients enough," soliciting their opinions about this criticism, and by the other employees responding with comments of protest, the co-workers made common cause with her.

Under the Section 7 of the NLRA, when employees act in concert concerning their wages, hours and working conditions, they are protected from reprisal by their employer. The issues in this case were whether the activity was "concerted" and whether it was "protected." The board held that by alerting fellow employees of another employee's complaint that they "don't help our clients enough," soliciting their opinions about this criticism, and by the other employees responding with comments of protest, the co-workers made common cause with her. Therefore, the activity was concerted. Further, the board majority found that because the comments were made for the employees' mutual aid or protection, the comments were protected.

The dissent, written by Member Brian Hayes, stated that while "the colloquy around the Facebook 'virtual water cooler' may have been concerted, in the sense that it was actual group activity" it was not taken for "mutual aid and protection." The dissent noted that: "not all shop talk among employees — whether in-person, telephonic, or on the internet — is concerted within the meaning of Section 7 even if it focuses on a condition of employment ... there is a meaningful difference between sharing a common viewpoint and joining a common cause ... Absent evidence of a nexus to group action, such conversations are mere griping, which the Act does not protect."

ELI KANTOR
Employment lawyer

However, according to the board majority, we must look to whether a mutual aid objective is "implicitly manifest from the surrounding circumstances." Here, the board found that the Facebook communications occurred after the criticized employee learned that the disparaging employee planed to complain about her and her co-workers to management. Further, the board found that the employer's harassment policy was not violated, since it was not motivated by a protected characteristic such as race or sex.

The takeaway for employers is that even if they are nonunion, they must be very careful before terminating an employee based upon a social media comment. They will need to consult with experienced employment law counsel to determine if the conduct is prohibited by their social media policy; whether their social media policy is lawful, and also whether the conduct is "protected concerted activity" taken for "mutual aid or protection." The law in this area is constantly evolving and is employee friendly. Although under certain limited circumstances concerted activity can lose its protection, such as in the recent NLRB decision *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012), involving a BMW salesman who posted disparaging comments on Facebook about the BMW dealership, in general, the NLRB does not "like" Facebook firings.

Eli M. Kantor *has extensive experience as an attorney in private practice. He represents employers and employees in all aspects of labor,*