Bender's Labor & Employment Bulletin

February 2013
VOLUME 13 • ISSUE NO. 2

Inside This Issue

LexisNexis™
Matthew Bender®

Board Acts to Protect Employee Rights to Access Social Media

By Bryan M. O'Keefe

Introduction

Few topics have generated as much interest at the National Labor Relations Board ("Board") over the past two years as the right of an employee to engage in protected concerted activity on social media. Several complaints have been issued which have resulted in hearings before administrative law judges. The Board's General Counsel has also released three lengthy memorandums scrutinizing employer social media policies for possible violations of the National Labor Relations Act ("Act").[1]

The subject has important consequences for employers. In today's competitive economic environment, an employer's reputation matters now more than ever before. The Board has long recognized the right of an employee to engage in protected concerted activity, even when employee complaints are exaggerated or misleading. When such complaints were confined to the shop floor, any reputational harm was contained. Social media, however, changes that landscape. Now, a misleading post can go viral in minutes and become part of the internet vernacular overnight. This has set up an inevitable collision course between employee rights and the right of an employer to protect its reputation.

In the latest case to consider this conflict, *Hispanics United of Buffalo*[2], the Board has, again, come down on the side of protecting an employee's Section 7 right to engage in protected concerted activity. This case makes clear that an employee has the right to engage in protected concerted activity on social media platforms, even when the activity is directed towards another co-worker and involves profanity and vulgarity. In this way, *Hispanics United of Buffalo* is a trailblazing case in that it takes a long-standing Board doctrine—"protected concerted activity"—and extends it to the modern way that employees communicate. For employers, however, *Hispanics United of Buffalo*, will make it harder, or even impossible, to discipline

[1] National Labor Relations Board, Office of the General Counsel, Memorandum OM 12-59, Report of the Acting General Counsel Concerning Social Media Cases (May 2012); National Labor Relations Board, Office of the General Counsel, Memorandum OM 12-31, Report of the Acting General Counsel Concerning Social Media Cases (January 2012); National Labor Relations Board, Office of the General Counsel, Memorandum OM 11-74, Report of the Acting General Counsel Concerning Social Media Cases (August 2011).

[2] 359 N.L.R.B. No. 37, 2012 NLRB LEXIS 852 (2012).

continued on page 43

Board Acts to Protect Employee Rights to Access Social Media
By Bryan M. O'Keefe

(text continued from page 41)

employees for social media posts about work without facing possible Board litigation.

Background

Hispanics United of Buffalo ("HUB'') is a social service organization, primarily serving the needs of Buffalo's low-income Hispanic population.[3] The organization employed Lydia Cruz-Moore in a position where she assisted victims of domestic violence. Cruz-Moore frequently criticized other HUB employees who she felt did not provide timely and adequate assistance to the organization's clients.[4] On October 9, 2010, Ms. Moore sent a text-message to another employee, Marianna Cole-Rivera, stating that she intended to discuss her concerns about poor employee performance with the organization's Executive Director.[5]

Ms. Cole-Rivera took to Facebook about Ms. Moore's complaint. The first Facebook message stated:

> Lydia Cruz, a coworker feels that we don't help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?[6]

Four other co-workers – all off-duty – chimed in to the initial message and posted their own messages about Ms. Moore and her complaint. Some of the more controversial messages are included below:

- Damicela Rodriguez: What the **f**... Try doing my job I have 5 programs
- Ludimar Rodriguez: What the Hell, we don't have a life as is, What else can we do???
- Yaritza Campos: Tell her to come do [my] **f**... job n c if I don't do enough, this is just dum
- Carlos Ortiz de Jesus: I think we should give our paychecks to our clients so they can "pay'' the rent, also we can take them to their Dr's appts, and served as translators (oh! We do that). Also we can clean their houses, we can go to DSS for them and we can run all their errands and they can spend their day in their house watching tv, and also we can go to do their grocery shop and organized the food in their house pantries ... (insert sarcasm here now)[7]

Cruz-Moore was upset with these attacks and reported them to the Executive Director. At the Executive Director's request, she printed all of the Facebook comments. On the first workday after the Facebook postings, the five co-workers were terminated, with HUB stating that the remarks constituted "bullying and harassment of a co-worker and violated HUB's zero tolerance policy prohibiting such conduct.''[8]

In bringing a complaint, the General Counsel claimed that the discipline violated an employees' right to engage in protected concerted activity. This doctrine traces itself back to the portion of Section 7 which protects an employees' right "to engage in other concerted activities for the purpose of ... mutual aid or protection.''[9] Over the years, the Board and federal courts have interpreted the doctrine very broadly. For example, in *Eastex, Inc. v. NLRB*,[10] the Supreme Court found that employee conduct is "protected'' under the Act if it is intended to improve terms and conditions of employment, even when employees "seek ... channels outside the immediate employee-employer relationship.'' An activity is clearly "concerted'' if it involves two or more employees. However, even a single employee can engage in concerted activity if the employee acts "with or on the authority of other employees and not solely by and on behalf of the employee himself'' or an "individual employee seek[s] to initiate or to induce or to prepare for group action.''[11] Concerns expressed by an individual are also protected when they are "logical outgrowths of the concerns expressed by [a] group.''[12] The Supreme Court, in *NLRB v. Washington Aluminum Co.,*[13] also found that "protected concerted activity'' is one of the rare NLRA provisions that applies to non-union employers.

NLRB: Employee Remarks Constituted Protected Concerted Activity

In a 2-1 decision, the Board found that the remarks constituted protected concerted activity under this doctrine and the discharge violated the Act. The Board found that, in

---

[3] 2012 NLRB LEXIS 852, at *24.
[4] 2012 NLRB LEXIS 852, at *30-31.
[5] 2012 NLRB LEXIS 852, at *30.
[6] 2012 NLRB LEXIS 852, at *31.
[7] 2012 NLRB LEXIS 852, at *31-32.
[8] 2012 NLRB LEXIS 852, at *34.
[9] 29 U.S.C. § 157.
[10] Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 563-70 (1978).
[11] Myers Industries, 268 N.L.R.B. 493, 497 (1984) ("*Myers I*''); Myers Industries, 281 N.L.R.B. 882 (1986) ("*Myers II*'').
[12] Salisbury Hotel, 283 N.L.R.B. 686-87 (1987).
[13] NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

this context, discipline or discharge of an employee violates Section 8(a)(1) of the Act if four elements are met: (1) if the activity is concerted within the meaning of Section 7; (2) the employer knew of the concerted nature of the employee's activity; (3) the concerted activity was protected by the Act; and (4) the discipline or discharge was motivated by the employee's protected activity.[14] Here, there was no question that HUB knew of the activity and that the discharges were motivated by the employees' activity. Thus, the only litigated issue was if the activity was protected and concerted.

As for the protected prong, the Board concluded that the activity falls "well within the Act's protections" because the Facebook posts concerned discussions about the employees' "job performance."[15] It went on to say that the employees were responding to Moore's allegations and that:

> Given the negative impact such criticisms could have on their employment, the five employees were clearly engaged in protected activity in mutual aid of each other's defense to those criticisms.[16]

The Board was not persuaded by the employer's claims that the remarks constituted "harassment," noting that the "comments cannot reasonably be construed as a form of harassment."[17] Beyond that, even if the remarks were a form of harassment, the Board concluded that the policy was applied "without reference to Board law."[18] HUB essentially applied its policy without considering the Act and based its application on Cruz-Moore's "subjective claims."[19] The Board held that "discipline imposed on this basis violates Section 8(a)(1)."

As for the concerted element, the Board held that the activity was concerted because the original poster, Cole-Rivera, was "solicit[ing] her co-workers views about [Cruz-Moore's] criticism" and, "by responding to this solicitation with comments of protest, Cole-Rivera's four co-workers made common cause with her."[20] Alternatively, the Board found that the activity was concerted because it was the "first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management."[21] Thus, because all four elements of the protected concerted activity doctrine were met, the discharge of the five employees violated Section 8(a)(1).

Dissenting Opinion

In dissent, Board Member Brian Hayes found no violation because he did not believe that the the employee activity was "concerted."[22] Hayes clarified that, in his view, there is a "meaningful distinction between sharing a common viewpoint and joining in a common cause" and that "only the latter" is protected concerted activity.[23] Hayes concluded that the "employees did not suggest or implicitly contemplate doing anything in response" to Cruz-Moore's criticism; the employees "were simply venting to one another" and "this does not constitute concerted activity."[24]

Responding to the majority's alternative rationale, Hayes also disagreed with the finding that the activity was the first step towards defending themselves against the accusations. Hayes relied on the fact that, in her first Facebook post, Cole-Rivera made no mention that Cruz-Moore was going to voice her complaint to the Executive Director. Hayes said the case would be different if Cole-Rivera had informed her co-workers that Cruz-Moore intended to discuss her complaints with management, but, that on the record before him, "there is no evidence that these employees were preparing for group action."[25]

In reply, the Board majority said that Cole-Rivera was not required to discuss her "object" with her co-workers or "tell them it was made necessary by Cruz-Moore's impending visit" with the Executive Director.[26] The majority found that Cole-Rivera's "mutual aid" objective was "implicitly manifest from the surrounding circumstances."[27]

Conclusion

Overall, the Board's second "Facebook case" shows that the Board is not afraid of taking something "old"—protected concerted activity—and applying it to something "new"—Facebook. In that way, future protected concerted activity cases involving social media will be analyzed just like any other *Washington Aluminum* case—if the activity is protected and concerted, discipline or discharge for the activity usually violates the Act.

---

[14] 2012 NLRB LEXIS 852, at *7.
[15] 2012 NLRB LEXIS 852, at *12.
[16] 2012 NLRB LEXIS 852, at *12.
[17] 2012 NLRB LEXIS 852, at *13.
[18] 2012 NLRB LEXIS 852, at *13.
[19] 2012 NLRB LEXIS 852, at *14.
[20] 2012 NLRB LEXIS 852, at *8.
[21] 2012 NLRB LEXIS 852, at *9.
[22] 2012 NLRB LEXIS 852, at *22-23.
[23] 2012 NLRB LEXIS 852, at *18.
[24] 2012 NLRB LEXIS 852, at *19.
[25] 2012 NLRB LEXIS 852, at *20.
[26] 2012 NLRB LEXIS 852, at *11.
[27] 2012 NLRB LEXIS 852, at *11.

This decision and the first Facebook case, *Karl Knauz BMW*[28], have left many employers in the lurch, feeling as if employees now have an unlimited right to criticize them on social media and face no consequences for doing so. Employers fear that reputations will be tarnished and good corporate names ruined at the hands of cantankerous and unhappy employees, spreading half-truths and exaggerations about their businesses. While it remains to be seen if federal appellate courts will adopt this expansive view of protected concerted activity, for now, the Board is clearly on the side of the employee.

As a result, the final message should be simple for employers: Comments about work that were always lawful around the ''old school'' water cooler are now also lawful around the "virtual water coolers'' of Facebook, Twitter, and other social media platforms.

Bryan M. O'Keefe is an associate at Shawe Rosenthal, a management-side labor and employment law firm in Baltimore, MD.

[28] 358 N.L.R.B. No. 164, 2012 NLRB LEXIS 679 (Sep. 28, 2011).