National Labor Relations Board Guidelines for Social Media

By Terry Ann Morgan

In late 2010—that's right, less than three years ago—the National Labor Relations Board garnered national media attention when Acting General Counsel Lafe Solomon announced that the regional director in Connecticut had issued a complaint against an employer, alleging it violated the National Labor Relations Act by discharging an employee after she posted online comments critical of her supervisor.[1] During the ensuing media coverage, the acting general counsel articulated his position that the employee's use of social media to vent her workplace complaints to coworkers was not unlike a conversation at the proverbial water cooler. Since then, it has become clear that there are significant differences between online discussions and more traditional employee discussions. Perhaps the most significant difference is that water-cooler discussions rarely take place in front of the employer and rarely amount to anything more than blowing off steam with supportive coworkers, while social media discussions are permanent and available for any "friend" to read even after the matter is no longer a primary concern of the employees.

An employer who responds to these postings with discipline or discharge may be asked to defend its actions in the context of an unfair labor practice investigation. Since the very first social-media case settled before trial, it set no precedent other than to establish the acting general counsel's position that the protections of the act extend to employees' online activities. Typing "social media" and "NLRB" into any legal research database now produces a significant number of results. Since 2010, the Board's decisions make it clear: employees have the right to use social media to voice

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To withstand scrutiny by the Board, work rules restricting online and social media should provide employees with context and examples of both acceptable and proscribed conduct.

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workplace concerns as long as those concerns are based on "concerted activities" and "mutual aid and protection." Employees who raise individual concerns or do not engage with coworkers in their online activities risk losing the protection of the act.

For employers wishing to successfully limit employees' online comments about the workplace, doing so requires a nuanced understanding of Board law. In some circumstances, the protected activities are clear and the employer's response predictably unlawful. For instance, in *Design Technology Group, LLC d/b/a Bettie Page Clothing,*[2] the employer violated the National Labor Relations Act when it fired employees shortly after they used Facebook to discuss concerns for their safety when leaving work each night. In other situations, determining whether employees' conduct is protected is much more difficult. For example, in *Hispanics United of Buffalo, Incorporated,*[3] five employees posted remarks on a coworker's Facebook page critical of her characterization of their commitment to their work. The employer, which immediately discharged the five employees, determined the online remarks constituted "bullying and harassment" of a coworker, which violated its zero-tolerance policy prohibiting such conduct. The Board determined the postings by the discharged employees constituted protected activities, and the employer was ordered to reinstate all five workers.

Employers attempting to restrict employees' online conduct by establishing workplace policies addressing this conduct must consider the implications of imposing overly broad rules. The acting general counsel, recognizing employers have limited legal precedent to guide them, issued his *Report of the Acting General Counsel Concerning Social Media Cases.*[4] Rules addressing online conduct are evaluated under the same standards as other work rules. An employer violates the act through maintenance of a work rule if that rule "would reasonably tend to chill employees in the exercise of their Section 7 rights."[5] The Board uses a two-step inquiry to determine if a work rule would have such an effect. First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. Second, if the rule does not explicitly restrict protected activities, it will violate Section 8(a)(1) only upon a showing that (a) employees would reasonably construe the language to prohibit Section 7 activity, (b) the rule was promulgated in response to union activity, or (c) the rule has been applied to restrict the exercise of Section 7 rights.[6]

A recent National Labor Relations Board decision also addressed the validity of work rules addressing the use of social media. In *Costco Wholesale Corporation,* the Board found that the company violated the act by maintaining a rule that provided, "Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment."[7]

The advice memorandum issued in *The Boeing Company*[8] discusses whether the company's code of conduct unlawfully interfered with employees' rights. Applying the Board's holdings in *Lutheran Heritage Village*[9] cautioning against reading work-rule phrases in isolation, the acting general counsel's Division of Advice determined that, as a whole, Boeing's code of conduct, which includes context and clarifications of potentially ambiguous or restrictive provisions, did not violate the act. Contrast Boeing's policies with the work rule at issue in *Karl Knauz Motors, Incorporated,*[10] which simply provided, "Courtesy is the responsibility of every employee. Everyone is expected to be courteous…No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." The Board found this rule unlawful because employees would reasonably construe its broad prohibition against "disrespectful" conduct and "language which injures the image or reputation of the Dealership" as encompassing Section 7 activity, such as employees' protected statements—whether to coworkers, supervisors, managers, or third parties who deal with the respondent.

An employee who uses profanity or other inappropriate comments in online postings does not necessarily lose the protection of the act. If the topic of the posts or online discussions relate to wages, hours, other shared concerns about working conditions, or postings calling for or contemplating group action, the case will be evaluated under the four factors set out in *Atlantic Steel:*[11] (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice. For instance, online comments about wages posted by an employee during nonwork time that also include insulting comments about an employer's supervisor will be considered protected under the act as long as the employee's insults directed toward the supervisor are not "so opprobrious as to lose the protection of the Act."[12]

Of course, not all online conduct is protected, and employers do not violate the act for taking adverse action in response to such conduct. The employee at the center of the decision in *Karl Knauz Motors, Incorporated*[13] who posted derisive comments about the employer's business operations was not engaged in protected activities. Recently in *Tasker Healthcare Group, d/b/a Skinsmart Dermatology*[14] the employer discharged an employee in response to her Facebook postings. After discussing nonwork issues with a private group of 10 current and former coworkers, the employee turned the conversation to work and wrote: "They [the employer] are full of s**t…They seem to be staying away

from me, you know I don't bite my [tongue] anymore, F***…FIRE ME…Make my day…"[15] No one from the group responded to this posting. The following day, after reading the posting provided by a member of the Facebook group, the employer terminated the employee, stating it was "obvious" she was no longer interested in working there and the employer was concerned about having the employee work with customers given her feelings about her job. The Division of Advice determined the employee did not engage in protected concerted activity and, therefore, the employer did not violate the act when it terminated her employment. While the employee's postings referenced her work situation, her comments amounted to nothing more than individual griping rather than any shared concerns about working conditions.

In *The Continental Group, Incorporated*[16] the Board outlined limits to the application of the rule set out in *Double Eagle Hotel & Casino,*[17] holding that discipline imposed under an unlawfully overbroad rule violates the act only if an employee violated the rule by (1) engaging in protected conduct (e.g., concerted solicitation, distribution, or discussion of terms and conditions of employment); or (2) engaging in conduct that "implicates the concerns underlying Section 7 of the Act" (e.g., conduct that seeks higher wages) but is not protected by the act because it is not concerted. In *Schulte, Roth & Zabel*[18] the employer dismissed the individual charging party because he violated its electronic communications usage policy. The Division of Advice applied the holdings of *The Continental Group* and determined that the "joke" posted by the charging party was neither protected concerted activity nor conduct that implicated concerns protected by Section 7 of the act.

Clearly this area of Board law is evolving quickly. As the novelty of the online water cooler becomes the norm, the evaluation of employees' online conduct and employers' reactions to those activities will become more routine and the Board's body of cases arising in the context of traditional protected concerted activity will be modified to address the online world. The one certainty is that the use of social media and online venues will only increase.

I would like to note that all the case materials and memos I've referenced, including the advice memos, are available to the public at the National Labor Relations Board's website, http://www.NLRB.gov. I encourage readers to visit the site for these and other resources. ■

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ENDNOTES

1. NLRB News Release, *Complaint alleges Connecticut company illegally fired employee over Facebook comments* (November 2, 2010), available at <http://www.employerlawreport.com/uploads/file/NLRB%20Press%20Release.pdf> (accessed August 4, 2013).
2. *Design Technology Group, LLC d/b/a Bettie Page Clothing,* 359 NLRB No 96 (April 23, 2013).
3. *Hispanics United of Buffalo, Inc,* 359 NLRB No 37 (December 14, 2012).
4. NLRB, *Report of the Acting General Counsel Concerning Social Media Cases,* Memorandum OM 12-59 (May 30, 2012).
5. See *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd *Lafayette Park Hotel v NLRB,* 340 US App DC 182; 203 F3d 52 (1999).
6. *Lutheran Heritage Village—Livonia,* 343 NLRB 646, 647 (2004).
7. *Costco Wholesale Corp,* 358 NLRB No 106, slip op at 1–2 (September 7, 2012).
8. *The Boeing Co,* 19-CA-088157 (February 28, 2013).
9. *Lutheran Heritage,* n 6 *supra* at 646–647.
10. *Karl Knauz Motors, Inc,* 358 NLRB No 164 (September 28, 2012).
11. *Atlantic Steel,* 245 NLRB 814, 816 (1979).
12. *Noble Metal Processing, Inc,* 346 NLRB 795, n 2 (March 30, 2006).
13. *Karl Knauz Motors,* n 10 *supra* slip op at 10.
14. *Tasker Healthcare Group, d/b/a Skinsmart Dermatology,* 04-CA-094222 (May 8, 2013).
15. *Id.*
16. *The Continental Group, Inc,* 357 NLRB No 39, slip op at 3–4 (August 11, 2011).
17. *Double Eagle Hotel & Casino,* 341 NLRB 112 (2004), enfd *Double Eagle Hotel & Casino v NLRB,* 414 F3d 1249 (CA 10, 2005).
18. *Schulte, Roth & Zabel,* Advice Memo 02-CA-060476 (October 13, 2011).