EMPLOYER SOCIAL MEDIA POLICIES AND THE NATIONAL LABOR RELATIONS ACT:

WALKING THE FINE LINE BETWEEN PROHIBITED DISPARAGEMENT AND PROTECTED EMPLOYEE SPEECH

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Over the course of the past year, the National Labor Relations Board (NLRB) has signaled that employers can find themselves in legal trouble if they try to silence employees' expressions on social media sites such as Facebook and Twitter. Recently, the three-member panel of the NLRB issued a precedential decision solidifying what had previously been simply advisory guidance from the NLRB's acting general counsel and administrative law judges: employer social media policies that are so broad that they can be read as a ban on protesting a company's treatment of its employees run afoul of the National Labor Relations Act (NLRA).

With this decision, the NLRB took a broad view of what constitutes protected employee speech in the social media realm, and has placed new limits on what employers can do to regulate employees' social media communications. However, the NLRB's position does not mean that employers must scrap their social media policies and ignore all employee social media conduct that is damaging or disparaging. Rather, based on the NLRB's guidance, and keeping in mind that employers have a duty under the law to prevent and correct discriminatory and harassing conduct (including conduct that occurs on social media sites), employers can apply the lessons learned from the NLRB to develop policies that carefully balance the employer's interests in preventing and correcting discrimination and in protecting its business reputation with employees' rights to engage in activities protected under the NLRA.

The Hot Dog Case: Karl Knauz BMW, Knauz Auto Group, NLRB Case No. 13-CA-046452

In a decision issued in September 2011, by an administrative law judge for a regional office of the NLRB, the NLRB's position on employer social media policies began to take shape. In this case, the Knauz BMW Dealership in Lake Bluff, Illinois, held an "Ultimate Driving Event," designed to showcase the newly redesigned BMW 5 Series. At a planning meeting for the event, attended by the general manager of sales and other sales people, the manager revealed that the dealership planned to have a hot dog cart on site to serve the customers hot dogs, as well as cookies and chips. There was some discussion at the meeting and afterward, amongst the salespeople, that hot dogs and chips did not suit an event for a luxury auto brand such as BMW.

On the day of the event, despite several complaints from the salespeople, the dealership served hot dogs from a hot dog cart, bags of Doritos, cookies and bowls of apples and oranges. During the event, one employee, Robert Becker, took pictures of the salespeople holding hot dogs, water and Doritos and told them he was going to post them on his Facebook page.

A few days later, there was an incident at the Land Rover dealership next door (also owned by Knauz): a salesperson showing a customer a car allowed the customer's 13-year-old son to sit in the driver's seat while the salesperson was in the passenger seat. The customer's son stepped on the gas pedal, sending the car down a small embankment, over another customer's foot, and into an adjacent pond, throwing the salesperson into the water. Becker also took pictures of this incident.

Several days later, Becker posted the event pictures on his Facebook page in an album titled "BMW 2011 5 Series Soiree." Beneath the pictures of the event, Becker wrote that he "was happy to see that Knauz went 'All Out' for the most important launch of a new BMW in years ...." He further wrote that "[t]he small 8 oz bags of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch ... but to top it all off ... the Hot Dog Cart. Where our clients could attain a [sic] over cooked wiener and a stale bun." Importantly, the pictures depicted several of Becker's coworkers, and there were various comments on these photos from Becker's friends and relatives.

Becker also posted the pictures of the Land Rover accident, with a caption on one picture stating "This is your car on drugs." On another picture depicting the injured parties in the accident, Becker wrote:

> This is what happens when a sales Person sitting in the front passenger seat (Former Sales Person, actually) allows a 13 year old boy to get behind the wheel of a 6000 lb truck built and designed to pretty much drive over anything. The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a $50,000 truck. OOOPS!

After the dealership learned of the posts, its managers promptly called a meeting with Becker, asked him what he was thinking, and terminated his employment several days later.

In deciding whether Knauz violated the NLRA's prohibition against discipline and terminations for employee "protected concerted activity," the administrative law judge decided that the Facebook posts about the event and the hot dogs did constitute a protected concerted activity, even though the posts clearly disparaged the dealership. The judge found that the posts were the "logical outgrowth" of the criticisms by Becker and his coworker about an aspect of their working conditions and, as such, discipline or termination for such activities is prohibited, regardless of whether or not the speech was mocking, sarcastic, satirical, ironic, demeaning or even degrading to the employer.

When addressing the Land Rover post, however, the judge found that this post about the serious and potentially deadly Land Rover incident was not a "protected concerted activity" because "... it was posted solely by Becker … without any discussion with any other employee," and "… had no connection to any other employees' terms and conditions of employment." The judge further found that because it was the Land Rover incident that actually triggered the termination decision, the termination of Becker's employment was lawful.[1]

Note that the NLRA applied and afforded the employee protection in this case even though the employer was not unionized. The alarming aspect of this case is that many employers' social media policies contain blanket prohibitions against employee social media statements that are disparaging or potentially harmful to the employer. This case makes it clear that while employees cannot act with impunity on social media sites, employers cannot per se prohibit disparaging speech by employees in the social media realm. In 2011-2012, the NLRB's acting general counsel issued several non-precedential reports adopting this same principle.

New Precedent from the NLRB Confirms the NLRB's Prior Advisory Position: Costco Wholesale Corporation, NLRB Case No. 34-CA-012421

On September 7, 2012, the NLRB issued its first precedential decision confirming that broad social media policies that can be read as a ban on protected concerted activity, violate the NLRA. In the Costco case, Costco had a social media policy that banned workers from posting statements online that "… damage the Company ... or damage any person's reputation." The NLRB found this policy ran afoul of the NLRA because the prohibition "… clearly encompasses concerted communications protesting [Costco's] treatment of its employees." The NLRB further explained that,"employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (i.e. those that are critical of [Costco] or its agents.)" With this decision, the NLRB solidified its position that broad social media policies generally prohibiting disparaging comments violate the NLRA.

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How Employers Can Comply and Still Protect Their Business

The NLRB offered some guidance in the Costco opinion as to how an employer can maintain a social media policy and still remain in compliance with the NLRA. Specifically, the NLRB stated that Costco's policy was in violation because, "there [was] nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule." This suggests that a savings clause or a disclaimer in a social media policy stating that it is not meant to prevent protected concerted activity under the NLRA may be helpful. Additionally, the NLRB's acting general counsel has advised in his reports that employers should remove any generalized language forbidding employees from making critical remarks, and instead give specific examples of the types of conduct prohibited under the policy.

It is important to remember that employers still have a duty under federal and state anti-discrimination laws to prevent and correct discrimination and harassment in the workplace, and their social media policies should, at a minimum, prohibit illegal discriminatory and harassing conduct by employees on social media sites.

While the state of the law in this area is in flux, it has become apparent that the current NLRB is taking a broad view of what constitutes protected employee speech in the social media realm, and employers must carefully examine their policies to ensure they walk the fine line between preventing and correcting discrimination or harassment, protecting the employer's business and reputation, and allowing employees to engage in protected concerted activities permitted under the NLRA.

1 On September 28, 2012, the NLRB affirmed the administrative law judge's finding that Knauz did not violate the NLRA for terminating Becker's employment for his postings about the Land Rover incident. However, the board did not address whether the posts about the Ultimate Driving Event amounted to protected, concerted activity safeguarded by the NLRA. Hence, this decision did not provide any additional precedential guidance for employers on where the NLRB draws the line between prohibited disparagement and protected employee speech.

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