



## **The Facebook Firings: Co-Worker “Harassment” Protected by the NLRA**

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It is not uncommon for one employee to complain about a co-worker and, increasingly, these gripes are aired on social media websites such as Facebook. At the same time, employers are implementing policies prohibiting harassment and struggling with how to enforce those policies when they are violated by employees during non-working time using personal equipment. It was only a matter of time before the National Labor Relations Board (“NLRB”) jumped into the fray. On September 2, 2011, a NLRB Administrative Law Judge issued a decision finding that the employer committed an unfair labor practice when it discharged 5 employees for a series of Facebook postings attacking a co-worker who complained about her colleagues’ work ethic (or lack thereof).

The employer (“HUB”) is a not-for-profit corporation that provides social services for individuals in Buffalo, NY. One employee posted on his personal Facebook page, during non-working hours, that another co-worker voiced an opinion that some employees were providing poor service to the employer’s clients. The response was a string of responses by 5 co-workers, some of which included profanity, taking issue with the co-worker’s complaint. The next week at work, the 5 employees that posted on Facebook were terminated under HUB’s harassment policy.

After a trial, the ALJ found that HUB unlawfully discharged employees who were engaged in “protected, concerted activity” because their Facebook posts discussed the “terms and conditions of their employment.” It was irrelevant to the ALJ that the employees were not attempting to change their working conditions or never previously complained to their employer. Instead, simply responding to criticism made by a co-worker regarding their job performance was protected, concerted activity – even when that response included harassing and intimidating language in violation of the employers’ harassment policy. This decision should be disturbing to employers because it seemingly undermines employer harassment policies, substantially broadens the definition of “terms and conditions of employment” and could shield a myriad of employee actions not previously thought to have been protected. The ALJ also found that because HUB discharged all 5 employees, the employer viewed them as a group and, therefore, their activity was “concerted.” Under this ALJ’s rationale, anytime an employer discharges more than 1 employee, the employees are engaged in concerted activity... a stretch indeed.

The ALJ ordered HUB to reinstate the 5 discharged employees with back pay. No doubt the ALJ’s decision will be reviewed by the NLRB, and then a federal court. In the meantime, however, all employers, union and non-union, need to realize that: discharging employees for discussing “terms and conditions of employment” on social media websites constitutes a violation of the NLRA according to the NLRB. The question remains how far “terms and conditions of employment” will be extended. When an employer is contemplating taking disciplinary action in response to an employee’s social media posting, the employer is well-advised to seek competent employment law counsel.

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