Blitman&King LLP

Twenty-Second Annual

LABOR AND EMPLOYMENT LAW SEMINAR
March 26, 2012

CONCERTED/PROTECTED ACTIVITY AND NEW SOCIAL MEDIA

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I. INTRODUCTION

Social Media—Twitter, Facebook, and other means of internet type communications—have become ubiquitous. For those who have embraced the speed and spontaneity of such means of communication they are a boon. Their use in connection with the workplace can be a trap for both the unwary employee and employer. This paper outlines the latest pronouncements of the National Labor Relations concerning employer applications of rules restricting employee use of Social Media, which are generally measured against the rights contained in Section 7 of the National Labor Relations Act. Section 7 provides that employees not only have the right to join a labor organization and bargain through representatives of their choosing, but also have the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." [1] Concerted protected activities can occur in the absence of any labor organization. In order to obtain the protections of the NLRA, employee action must be both concerted and protected.

Outlined immediately below is a short history of the National Labor Relations Act, and summary of the processes and jurisdiction of the National Labor Relations Board, the agency with primary authority to enforce the NLRA. Following thereafter is a primer on concerted/protected activities. The paper then discusses the application of the concerted/protected activity law to the new area of social media. Several cases are briefly discussed with analysis of the holdings of each situation.

Finally outlined is the NLRB's treatment of employer rules adopted in response to the burgeoning use of employees of social media. As will be seen, these rules are often overbroad and restrictive to employee rights under Section 7 of the NLRA.

[1] Specifically, that Section states: "Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring members in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

A. HISTORY OF THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act ("NLRA"), signed into law in 1935 by President Roosevelt, is often referred to as the "Wagner Act", in recognition of Senator Robert Wagner of New York. The original bills were introduced by Senator Wagner in 1934 and 1935 to provide federal support for employee organizations in collective bargaining.

A driving motivation of the NLRA was to provide a mechanism for enforcing labor laws. Previous labor legislation such as the National Industrial Relations Act, 38 Stat. 198 (1933), set forth the rights of employees, unions, and employers, but contained no enforcement mechanisms. The NLRA contained enforcement mechanisms. The purpose of the NLRA as set forth in 29 U.S.C. § 141 is to promote employees joining labor organizations and for the labor organizations to engage in collective bargaining with the employers.

The Wagner Act established the National Labor Relations Board, ("NLRB" or "Board"), and consisted of three members appointed by the President and confirmed by the Senate. That Act provided and guaranteed employees the right to:

> [F]orm, join or assist labor organizations, to bargain collectively through representatives of their own choosing.

The Wagner Act also defined "unfair labor practices", certain acts of employers (but not unions) that were declared illegal under the law. The Board was empowered to issue complaints against employers, hold hearings and issue orders which required persons to cease and desist from engaging in unfair labor practices and to take affirmative action to remedy those illegal acts, including reinstatement of employees with or without back pay. The Wagner Act did not, as noted above, restrict union activities: there were no union "unfair labor practices" defined under the Act.

In 1947, Congress passed the Labor Management Relations Act. That law was not a separate piece of labor legislation, but rather consisted of amendments to the NLRA. These amendments are often referred to as the "Taft-Hartley Amendments." The Taft-Hartley Amendments increased the membership of the Board from three to five and established the position of the general counsel, who also is appointed by the President and confirmed by the Senate. The General Counsel has the authority to investigate charges of unfair labor practices and to prosecute those charges for the Board. Among other changes, the Taft-Hartley Act amended Section 7 of the NLRA to provide:

> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring members in a labor organization as a condition of employment as authorized in Section 8(a)(3).

The NLRA was amended once again in 1959 with passage of the Labor-Management Reporting and Disclosure Act of 1959. The only other amendment to the National Labor Relations Act occurred in 1974 which required notification of intent to strike a health care institution and excluding employees with religious convictions from mandatory union membership. The latter provision, however, was ruled to be unconstitutional.

B. PROCESSES OF THE NLRB

The Board has two basic functions: it processes petitions for elections either to "certify" or "decertify" representatives of groups of employees; and it processes unfair labor practice charges. It is the processing of unfair labor practice charges that is most germane to the employment lawyer.

As noted above, the Act contains provisions to address both employer and labor organization (Union) unfair labor practice charges. The process is commenced by the filing of an unfair labor practice charge ("charge"). A copy of a charge form is attached to this paper as exhibit "A". A charge can be filed by any "person" as that term is broadly defined in the Act. Once filed a charge is assigned to a Board Agent, i.e., field examiner or attorney. The agent collects evidence, documents and statements in affidavit form from charging party and any witnesses whose names are provided by the charging party. Once the evidence in support of the charge is obtained from the charging party, the "respondent" is notified by the Board agent and generally advised of the evidence that has been collected by the Board. The agent invites the respondent to provide evidence or witnesses that can support respondent's position.

Once the agent has gathered all of the information and evidence concerning the charge, a meeting or "agenda" is held which includes among others the regional director, the regional attorney, the supervisor of the investigating agent and the agent. At the agenda, all of the information and evidence concerning the charge is reviewed and a decision is made whether to dismiss the charge, or issue a complaint and notice of hearing. If the charge is dismissed, the charging party may file an appeal of the dismissal with the

Office of Appeals in Washington, D.C. However, less than 2% of such appeals are granted. If the appeal is denied, there is no further appeal.

If a complaint is issued, a hearing is held before an Administrative Law Judge ("ALJ") who issues findings of fact, conclusions of law and sets forth a recommended order. The unsuccessful party may appeal the ruling of the ALJ to the Board in Washington, D.C. The Board can adopt the findings of fact and conclusions of law of the ALJ and the recommended order; it can overrule the decision, or remand the case to the ALJ for additional proceedings. A party dissatisfied with the ruling of the Board may appeal to the United States Court of Appeals for the District of Columbia Circuit where the Board is headquartered, the Circuit where the alleged unfair labor practice took place, or in the case of an employer, any Circuit where the Respondent (employer) operates its business. Obviously, a party unhappy with the decision of the Court of Appeals can seek a writ of certiorari in the Supreme Court.

C. GLOSSARY OF TERMS

The Board

1. Is the quasi-judicial body composed of five Members appointed by the President and confirmed by the Senate. No more than three Members can be from the political party of the President. The term of each Member is five years. Normally, decisions are made by panels consisting of three Members.

2. The Executive Secretary is the chief administrative officer at the Board who is responsible for assigning and monitoring cases, docketing documents and other administrative duties.

3. Information Division is responsible for press releases, public announcements and the publication of a weekly summary of Board Decisions.

4. The Solicitor is the chief legal officer to the Board.

5. The Division of Judges are the triers of fact in unfair labor practice proceedings; the Administrative Law Judges render Decisions containing findings of fact, conclusions of law and recommended disposition of the case. Board Orders are not self- enforcing.

The General Counsel

1. The General Counsel exercises general supervision over all attorneys employed by the Board (except ALJs and staff to the

Board Members), and all officers and employees in the Regional Offices, has final authority on behalf of the Board to investigate charges, issue and prosecute complaints, handle appeals, seek 10(j) injunctions, the supervision of all activities concerning representation petitions and other duties prescribed by the Board. The term of the General Counsel is four years.

2. Division of Advice gives advice to the Regional offices concerning new or novel issues of law.

3. Division of Enforcement Litigation is responsible for litigation to enforce or defend orders of the NLRB.

4. Division of Operations Management is responsible for supervising the field operations.

5. Regional Offices have a Regional Director, Regional Attorney, field attorneys, field examiners and other personnel.

Person is defined in Section 2(1) to include any individual, labor organization, partnership, association, corporation, legal representative, trustee or receiver.

Employer is defined in Section 2(2) to include any person acting as an agent of an employer, directly or indirectly, but does not include the U.S. government, or any state or political subdivision thereof, any person subject to the Railway Labor Act or any labor organization (other than when acting as an employer) or anyone acting as an officer or agent of such labor organization.

Employee is defined to include any employee not limited to any employees of a particular employer, unless the Act explicitly states otherwise and shall include any individual whose work has ceased as a consequence of, or in conjunction with any labor dispute or because of any unfair labor practice and who has not obtained substantially equivalent employment. The term "employee" does not include: any individual employed as an agricultural laborer; or in the domestic service of any family or person at his home; or individual employed by his parent or spouse; or any individual having the status of independent contractor; or any individual employed as a supervisor; or any individual employed by an employer subject to the Railway Labor Act; or by any person who is not an employer as defined under the NLRA.

Representative is defined in Section 2(4) to include any individual or labor organization.

Labor Organization is defined in Section 2(5) to mean any organization of any kind, or agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, in dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Commerce is defined in Section 2(6) to mean trade, traffic, commerce, transportation or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or within the District of Columbia, or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Affecting Commerce is defined in Section 2(7) to mean commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Supervisor is defined in Section 2(11) to mean any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

D. JURISDICTION IN LABOR MATTERS

1. NLRB

The National Labor Relations Board has jurisdiction to resolve questions concerning representation and unfair labor practice charges, seek injunctions for unfair labor practice charges and secondary activities. The NLRB does not have jurisdiction over religious institutions. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Nor does the NLRB have jurisdiction over employees in a foreign country even if they were hired in the United States, paid from the United States and returned to the United States at the end of their employment. *RCA Oms*, 202 NLRB 228 (1973).

2. Federal Courts

The Federal Courts do not have jurisdiction and cannot interfere with lawful primary labor disputes, but they can entertain injunctive actions and claims for damages arising out of secondary boycotts.

Claims concerning violation of a collective bargaining agreement, or to enforce the terms of a collective bargaining agreement are exclusively within the jurisdiction of the federal courts. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); *Charles Dowd Box v. Courtney*, 368 U.S. 502 (1962). Federal Courts can issue injunctions sought by the NLRB in cases of unfair labor practices, secondary activities, or where a labor organization is picketing for recognition beyond the permissible thirty days. (Sections 10(j) and 10(l)). (Injunctions can only be sought by the NLRB in such cases). Persons affected by the secondary activities can themselves make claims for damages.

3. Preemption

Many claims sought to be made by employees against their employer or their union may be pre-empted by federal labor law. In those situations, state law cannot be applied to determine the claim or provide a remedy.

One of the lead cases in the area of preemption is *Building Trades Council (San Diego) v. Garmon*, 359 U.S. 236 (1959). There, the Supreme Court held that states are preempted by the NLRA from exercising jurisdiction in cases where the activity is regulated by the NLRA. States may exercise jurisdiction only where the activity complained of is merely of peripheral concern of the NLRA, or the conduct touches interests "deeply rooted in local feeling." Claims that are arguably protected or prohibited by the NLRA are preempted. *Id.* Thus, claims for damages arising out of unlawful peaceful activity are preempted by Section 303 that provides for damage actions. However, claims concerning violence or mass picketing may be prosecuted under state law.

A second test was added by the Supreme Court in *Machinists Lodge 76 v. Wisconsin Employment Relations Comm.*, 427 U.S. 132 (1976). The additional test was whether the conduct was left unregulated so that it may be "controlled by the free play of economic forces." *Id.* at 140. This test has been utilized in cases involving the award of unemployment compensation benefits to strikers, misrepresentation and breach of contract claims as applied to striker replacements, and where a state has attempted to prevent state monies paid on a contract to a private employer from being used to engage in a campaign against union organizing.

E. CONCERTED PROTECTED ACTIVITY

As noted above, Section 7 of the NLRA provides that employees not only have the right to join a labor organization and bargain through representatives of their choosing, but employees also have the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Concerted protected activities can occur in the absence of any labor organization. In order to obtain the protections of the NLRA, employee action act must be both concerted and protected.

1. Concerted Activity

Generally, to find an employee's activity to be "concerted," it must be engaged in, with or on the authority of other employees and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 N.L.R.B. 493, 497 (1984) (Meyers I). The definition of concerted activity includes those circumstances where an individual employee seeks to initiate or to induce or to prepare for group action as well as individual employees taking group complaints to management. *Meyers Industries*, 281 N.L.R.B. 882, 887 (Meyers II). See also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964). For example, if an employee approaches his or her supervisor with a complaint concerning wages, hours or other terms and conditions of employment on behalf of him or herself, and other employees, that employee is engaging in concerted protected activity. Thus, if the employees discuss at lunch the fact that they are unhappy with their wage rate, and following lunch one of the employees who had been in the discussion approaches management about the fact that he, as well as other employees are unhappy with their wage rate, that employee although acting alone is engaging in concerted protected activity.

Concerted activity also includes concerns that are expressed by an individual which are a "logical outgrowth" of concerns that had been expressed by a group. *Mike Yurosek & Son, Inc.*, 306 N.L.R.B. 1037, 1038 (1992) (four employees who individually refuse to work overtime were found to have engaged in concerted activities as their refusal was a logical outgrowth of a prior concerted protest regarding a reduction in schedule); *Salisbury Hotel*, 283 N.L.R.B. 685, 687 (1987) (an employee who contacted the Department of Labor regarding her employer's lunch time policy was engaged in concerted activity as the call was a continuation of efforts initiated by a group of employees, despite the fact that there was no evidence that the employees agreed to act together; however, they agreed they had a grievance that they should take up with management); *see also*

Amelio's, 307 N.L.R.B. 182, n.4 (1991) and *Compuware Corporation*, 320 N.L.R.B. 101 (1995). In order to constitute concerted activity, other employees do not have to accept the "invitation" to participate in the activity. *Whittaker Corp.*, 289 N.L.R.B. 933, 934 (1988).

The standard for judging whether an activity is concerted is objective, not subjective. Thus, employee opinions concerning another employee's motives have little bearing on whether the conduct was in fact concerted. *Circle K Corp.*, 305 N.L.R.B. 932, 933 (1962); *Aroostik County Regional Ophthalmology Center*, 317 N.L.R.B. 218, 219 (1995). Additionally, there can be an implied consent to engage in concerted activity. An employee engaged in concerted activity when she circulated a petition among employees seeking the termination of two managers for misuse of funds. *FiveCAP, Inc. v NLRB*, 294 F.3d 768 (6th Cir. 2002).

Several factors were used by the Sixth Circuit in *FiveCap, Inc., supra*, in determining that an employee who was terminated after being overheard saying that if the employee had a union he would be treated better. The employer argued that the employee's statement was a matter of a personal dispute and therefore not concerted activity. In holding there was concerted activity, the Sixth Circuit considered the facts that the employee was making the statement to another employee, there was no personal dispute and the employee had engaged in concerted activity in the past. *NLRB v. Main St. Terrace Care Center*, 218 F.3d 531 (6th Cir. 2000).

In *Georgia Farm Bureau Mutual Ins. Co.*, 333 NLRB 850 (2001), four insurance agents notified the claims department and the state insurance commissioner that their manager had fraudulently handled claims. The Board found concerted activity as the four employees sought to address a serious work concern and thus their activity was protected by Section 7.

An employee who on his own wrote a letter to the local newspaper criticizing the employer was found to be engaging in concerted activity because the letter was intended to elicit community support for a strike. *Alaska Pulp Corp.*, 296 N.L.R.B. 1260 (1989). An employee's action in aid of a fellow employee's attempt to obtain unemployment compensation benefits is concerted activity. *S&R Sundries, Inc.*, 272 N.L.R.B. 1352 (1984). Similarly, an employee was found to have engaged in concerted activities when the employee distributed a flyer urging a consumer boycott of a hospital by patrons and its employees because the hospital's electrical

subcontractor did not provide health care benefits for its employees' families.

The NLRB has failed to find concerted activity in a case where an employee who had been placed on probation asked a co-worker if that person had ever been placed on probation. The first employee was not engaged in concerted activity as the employee did not seek to initiate, induce or prepare for group action. The employee was solely concerned with his own situation of being place on probation. *Adelphi Inst.*, 287 N.L.R.B. 1073 (1988).

Filing an individual unemployment compensation claim has been held not to constitute concerted activity. *Bearden & Co.*, 272 N.L.R.B. 931 (1984). Nor is an employee engaged in concerted activity when he acts with a supervisor or other non-employee. *Capital Times Co.*, 234 N.L.R.B. 309 (1978).

An employee's refusal to perform an assignment based on his belief that the equipment was unsafe is not concerted activity where the employee acted alone and no other employee had complained. *Goodyear Tire & Rubber Co.*, 269 N.L.R.B. 881 (1984). An interesting case is *Williams v. Watkins Motor Lines*, 310 F.3d 1070 (8th Cir. 2002). In that case, the husband of a husband-wife driving team refused to make a delivery that he claimed exceeded the Missouri weight limit. The employer sought to have the lawsuit dismissed claiming that the wife had given "implicit approval" thus making the actions of the husband concerted activity. The court disagreed, holding that there was no concerted activity as the husband and wife operated as a single unit for purposes of their employment.

2. Protected Activities

In order to obtain the protections of the NLRA, an activity, in addition to being concerted, must be "protected." Protected activities are those where employees seek to improve their terms and conditions of employment or otherwise improve their lot as employees by using means other than immediate employer-employee relationship.

Examples of protected activity include the right to express sympathy for striking employees of another employer, *NLRB v. J.G. Boswell Co.*, 136 F.2d 585 (9th Cir. 1943); the right to publish support for a cooperative association of dairy farmers that had called a milk strike, *NLRB v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.2d 503 (2d Cir. 1942); the right to assist in organizing another

employer's employees, *Fort Wayne Corrugated Paper Co. v. NLRB*, 111 F.2d 869 (7th Cir. 1940); and wearing a T-shirt with statement "Just Say No to Drug Testing," *NLRB v. Motorola, Inc.*, 991 F.2d 278 (5th Cir. 1993).

If an employee delivery driver refuses to make a delivery where he would have to cross a picket line, he is engaging in a protected activity and may not be discharged in the absence of "legitimate business considerations of an overriding nature." *Cooper Thermometer*, 154 N.L.R.B. 502, 506 (1965).

In *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26 (D.C. Cir. 2001), the Court held that the actions of unions in objecting to construction permits sought by non-union contractors and developers were concerted protected activities. The unions sought to have permitting agencies require the employer to provide employees with a living wage including health insurance and other benefits, and to "meet their responsibilities to the communities and the environment." When contractors refused to use the employer subject to the protests, the employer filed a lawsuit against the unions that it was the subject of an unlawful boycott. The employer argued that the unions did not have the protections of the NLRA including Section 7 rights. The Court held that it would be a "curious and myopic" reading of the NLRA to hold that although employees are free to join unions so as to engage in activities for mutual aid and protection, the unions they join and who represent them should not enjoy these same rights.

Examples where protected activity was not found would be where employees contacted the state department of health to report excessive heat in the employer's nursing home as the nurses were concerned about patients, not employment conditions, *Waters of Orchard Park*, 341 N.L.R.B. No. 93 (2004); an employee's solicitation of a co-worker to be a witness in support of her sex harassment claim that had been filed with the state agency was not protected as it was done solely to advance the employee's own cause, *Holling Press*, 343 N.L.R.B. No. 45 (2004). Similarly, in *Tradesmen International, Inc. v. NLRB*, 275 F.3d 1137 (D.C. Cir. 2002), the court held that a union organizer who appeared before a city agency and unsuccessfully lobbied to require an employer to have to file a bond for work performed by the employer for the city was not engaged in concerted protected activity. The holding was based on the fact that the union organizer (who the employer refused to hire) was not trying to improve the terms and conditions of employees of the employer.

Even where protected concerted activity is found, there are limits to what activities are protected by the safe harbor of Section 7.

See, for example a case where on a television news program a nurse claimed that her employer hospital was jeopardizing the health of newborns by changing the schedules of nurses working in the labor and delivery area. While the Board found the conduct to be protected, the court did not. According to the court, the statements of the nurse were materially false and thus not protected. The court held that when an employee falsely and publicly disparages her employer or its products or services, the employee loses the protections of the Act.

In *North American Refractories Co.*, 331 NLRB 1640 (2000), the Board ruled that an employee who protested working conditions to his supervisor using vulgar and profane language, lost the protections of the Act. The lead case in this area is *NLRB v. Electrical Workers (IBEW) Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953). In that case, the Court held that an employee's disloyalty to the employer by disparaging his product or service was unprotected activity for which the employee could lawfully be terminated.

Abell Engineering & Mfg.,Inc., 338 NLRB 434 (2002) is an interesting case. There an employee solicited a co-worker to leave his employment and go to work for a unionized employer. When the employee declined, the employee kept talking to the co-worker about unions. The co-worker employee reported the matter to his supervisor and the employee who had been soliciting was terminated for "disloyalty". The NLRB found the termination lawful as the employee exceeded the protections of the Act when he attempted to get his co-worker to go to work for another employer. Highlighting the lack of protections for other than "employees", the NLRB in *Waters of Orchard Park*, 341 NLRB No. 93 (2004), held that the termination of a supervisor who had circulated a petition protesting working conditions was lawful. A supervisor is not an employee and therefore, is not entitled to the protections of the Act.

3. Right to Witness or Assistance at an Investigatory Interview

In *NLRB v J. Weingarten*, 420 U.S. 251 (1975), the Supreme Court held that an employee's insistence on union representation at an investigatory interview that the employee reasonably believed might lead to discipline was protected concerted activity. Thus, the discipline or discharge of an employee for refusing to engage in an

investigatory interview without the presence of a union representative when such has been requested is unlawful.

Whether those employed in non-union facilities are entitled to the presence of a co-worker in a similar interview has swung back and forth several times, depending upon the political make-up of the Board. Thus, in *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board ruled that unrepresented employees were entitled to the presence of a co-employee during an investigatory interview.

Three years later, in *Sears Roebuck & Co.*, 274 NLRB 230 (1985), the Board ruled that unrepresented employees were not so entitled. But in 2000, the Board reversed itself and in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000) returned to its view in *Materials Research*, that unrepresented employees were indeed entitled to the presence of a co-worker in investigatory interviews.

Finally (for now), in *IBM Corp.*, 341 NLRB No. 148 (2004), the Board returned to its holding in *Sears Roebuck*, once again holding that unrepresented employees are not entitled to the presence of a co-worker at an investigatory interview.

II. THE NEW SOCIAL MEDIA CASES AND MEMORANDA

The NLRB has approached concerted/protected activities issues to new social media—Facebook, Twitter, LinkedIn, etc.—by applying its previous established rules. The one thing that has changed is the speed with which employees can find themselves the subject of scrutiny because of their ability to instantly post for the world to see their immediate, un-filtered thoughts.

A. CONCERTED ACTIVITY

1. *Hispanics United of Buffalo, Inc.*, NLRB ALJ, No. 3-CA-27872 (September 2, 2011)

Facts:

> An employee was critical and dissatisfied with her coworkers' performance. *Id*. at 4. She informed another coworker of her intent to bring her concerns to the employer's attention. *Id*. That night, one of her fellow employees posted a statement on Facebook indicating the same and soliciting responses about such criticisms. *Id*. Six employees and a member of the Board of Director of the employer responded. *Id*. at 5-6. Five of those employees were discharged (the sixth was the Executive Director's secretary who was not discharged) after the subject of

the posting complained that she felt she was being bullied and harassed. *Id.* at 6-7.

Law – Concerted Activity:

Concerted activities protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Id*. at 7, *quoting Myers Industries*, 281 NLRB 882 (1986).

"[T]he Activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity." *Id*.

"Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action." *Id*.

Holding:

The discriminatees' "Facebook communications with each other, in reaction to a co-worker's criticisms of the manner in which HUB employees performed their jobs, are protected." *Id*. at 8.

"[D]iscriminatees' discussions about criticisms of their job performance are also protected." *Id*.

"The discriminatees . . . were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe [the employee] was going to make to management." *Id*.

"Moreover, the fact that Respondent lumped the discriminatees together in terminating them, establishes that Respondent viewed the five as a group and that their activity was concerted." *Id*. at 9.

2. *Karl Knauz Motors Inc.*, NLRB ALJ, No. 13-CA-46452 (Sept. 28, 2011)

Facts:

A luxury car salesman was discharged from employment after posting photos of two work-related happenings on Facebook and making derogatory comments about the photos, which were also commented by the salesman's family and friends. In the first occurrence, the salespeople were generally annoyed that the car

dealership served existing and potential clients hotdogs, water, cookies and assorted fruit, rather than more sophisticated food, for a new product launch party. They discussed it amongst themselves and expressed their concern about lowered commissions as a result of the catering of the event. One of the salespeople took pictures of the event, including of his coworkers with hotdogs, and posted those pictures on Facebook with comical statements.

In the second incident, that same salesperson posted photos with disparaging comments about a car accident at an adjoining dealership, which was also owned by his employer, when a potential customer was hurt after a car was accidentally driven into a pond. During the hearing, the record established that the salesperson had been discharged for this particular posting, as it was highly embarrassing to the dealership.

Law – Concerted Activity:

Concerted activity does not require two or more individuals to act in unison.

"Concerted activities include[] individual activity where, 'individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.'"

"The lone act of a single employee is concerted if it 'stems from' or 'logically grew' out of prior concerted activity."

Holdings:

ALJ found that the salesperson's posting of Facebook concerning the low quality food was protected concerted activity. The ALJ reasoned that the catering of the party was a group complaint as the potential customers could possibly decide not to buy a car based on the low quality of food.

However, the ALJ found that the car accident posting was not concerted activity. The ALJ reasoned that the salesperson acted alone without any discussion with other employees as a lark; it had no connection to any terms or conditions of employment.

3. *American Medical Response of Connecticut, Inc.*, NLRB Advice Memo., 34-CA-12576 (October 5, 2010)

Facts:

> An employee was discharged from employment after she posted, and responded to, various statements on Facebook calling her supervisor names, such as "psycho," "scumbag" and "dick," after he refused her request to have a union representative present during the employer's initial stages of an investigation that could result in discipline. That is, she was denied her *Weingarten* rights.

Holding:

> The employee's comments on Facebook were protected activity because the comments were made (1) in connection to her exercise of *Weingarten* rights and (2) when discussing supervisory action, both of which are independently protected activity.

4. Office of the General Counsel: Division of Operation-Management Memorandum OM 11-74 (August 18, 2011) p. 9.

"Employer's Facebook Postings About Tax Withholding Practices Were Protected Concerted Activity"

Facts:

> Both of the charging parties were discharged after, respectively, contributing a "Like" and a comment (that one of the owners was "such an asshole") to a former employee's Facebook posting. The posting concerned her dissatisfaction with the employer's paper work, which resulted in the employees owing state income taxes. A couple of customers and other employees contributed to the FB post as well. Prior to the posting, an employee had brought the issue to management and asked to discuss it at the next management-employee meeting, which was later noted on the FB post.

Holding:

> The Facebook conversation "related to employees' shared concerns about a term and condition of employment – the Employer's administration of income tax withholdings."

The Facebook conversation also noted at least one employee's discussion with management concerning the issue and her intended discussion of the issue at a future management-employee meeting.

"Thus, the conversation that transpired on Facebook not only embodied 'truly group complaints' but also contemplated future group activity."

Notably, the employer's threat to sue the charging parties for defamation, after engaging in protected activity, also violated Section 8(a)(1) of the Act.

B. NOT CONCERTED ACTIVITY

1. *Sagepoint Financial, Inc.*, NLRB Advice Memo., 28-CA-23441 (August 9, 2011)

Facts:

Service technician was discharged from employment after posting numerous complaints about his supervisor on Facebook and sending critical emails to his two coworkers.

Holding:

The employee was not engaged in protected activity.

His complaints about his supervisor and his perceived preferential treatment by her of his coworkers were made solely on his behalf.

> He did not "advance any cause other than his own. Moreover, he did not evidence any intention of instigating group action or bringing up group concern to management."

Any comments made on his Facebook posts were not made because of mutual concern for terms and conditions of employment.

2. *Rural Metro*, NLRB Advice Memo., 25-CA-31802 (June 29, 2011)

Facts:

Employee, an EMT, posted message to U.S. Senator's Facebook page, in response to an announcement of federal funding for fire

stations. She complained of low wages and ineffective services provided by her employer.

Holding:

The employee's comments were not concerted activity.

She did not discuss the posting with anyone before or after making it.

There were no employee meetings or attempts to initiate group action.

She was not trying to make a complaint to management and did not expect the Senator to be able to help.

Instead, she was trying to make a public official aware of her opinions about emergency care.

3. *Martin House*, NLRB Advice Memo., 34-CA-12950 (July 19, 2011)

Facts:

Employee who worked at non-profit residential facility for individuals with mental illness and substance abuse problems posted on Facebook derogatory comments about facility's clients. Some of her Facebook friends contributed to the jokes, but none of the employee's coworkers had access to her Facebook posts. A former client did have such access and reported the employee, who was then terminated from employment for the posts.

Holding:

The employee was not engaged in protected activity.

The employee did not discuss the posts with any coworkers and none responded to the posts.

She was not seeking to induce or prepare for group action and her statements were not a result of such collective concerns.

Her posts did not mention any terms or conditions of employment, but rather told her friends what occurred while she was at work.

4. *JT's Porch Saloon & Eatery, Ltd.*, NLRB Advice Memo., 13-CA-46689 (July 7, 2011)

Facts:

Responding to a question on Facebook, a bartender replied with a post that was critical of his employer, a bar, because he hadn't had a raise in years and didn't get a portion of the waitresses' tips, even though he assisted them. He further demeaned the employer's clientele as "rednecks." He was then discharged from employment by Facebook message, which was followed up by a voice message saying the same the next day.

Holding:

The employee was not engaged in protected activity.

He did not discuss his Facebook postings with any of his employees before or after he wrote it.

None of his coworkers responded to the post.

There were no employee meetings or any attempt to initiate group action regarding the tipping policy or raises

There was no effort to take these concerns to management.

5. *Wal-mart*, NLRB Advice Memo., 17-CA-25030 (July 19, 2011)

Facts:

Employee posted statement on Facebook that began with "Wuck Falmart!" He then proceeded to complain about his supervisor, while his coworkers made joking, supportive, and observational, rather than substantive, comments.

Holding:

This was not protected activity; it was "an expression of an individual gripe."

No initiation or inducement of group action.

No evidence of individual outgrowth of prior group activity.

6. *Lee Enterprises, Inc., d/b/a Arizona Daily Star*, NLRB Advice Memo., 28-CA-23267 (April 21, 2011)

Facts:

A Tucson, Arizona newspaper reporter was discharged for writing messages on Twitter, which were also sent to his Facebook and MySpace accounts that were inappropriate and offensive.

Holding:

The employee was discharged for misconduct for posting tweets, such as: "What?!?!?! No overnight homicide? WTF? You're slacking Tucson."

His tweets did not relate to terms and conditions of employment.

His claim that the employer implemented an inappropriate, overly broad rule was without merit as the employer had no written rule and the oral instructions from management concerned his inappropriate and offensive tweets.

7. *Buel, Inc.*, NLRB Advice Memo., 11-CA-22936 (July 28, 2011)

Facts:

Truck driver who was stuck in snow because roads were closed made critical comments on Facebook about his employer after his calls to the dispatcher were not answered or automatically forwarded to another dispatcher. He also mentioned that the on call dispatcher was unreachable by other drivers.

Holding:

Employee was not engaged in protected activity.

He did not discuss his posts with any of his coworkers and none of them responded to his posts.

There was insufficient evidence that his activity was a continuation of collective concerns

He was not seeking to induce or prepare for group action.

He was merely griping about being stranded by the weather.

Employee's claim of impermissible surveillance is unsupported as he invited supervisors to be Facebook "friends."

III. POLICIES CONCERNING SOCIAL MEDIA

A. *SEARS HOLDINGS (ROEBUCKS)*, NLRB ADVICE MEMO, 18-CA-19081 (DECEMBER 4, 2009)

Facts:

The union, which was regrouping after an aborted organizing attempt, filed an unfair labor practice charge concerning the employer's new social media policy, as it appeared to affect the union's email list server, which was used for the organizing campaign.

The social media policy prohibited employees discussing on social media, among other things, the following: "disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects."

Holding:

The rule did not violate the NLRA

There is a two part test:

1. Does the rule explicitly restrict Section 7 protected activities?

2. If not, the policy would be an unfair labor practice only if: (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.

The analysis concluded that only subsection 2(a) of the above test was implicated by the charge, and no employee could reasonably construe the language to prohibit Section 7 activity.

B. OFFICE OF THE GENERAL COUNSEL: DIVISION OF OPERATION-MANAGEMENT MEMORANDUM OM 11-74 (AUGUST 18, 2011) p. 19-24.

1. Provisions of Employer's Social Media Policy Were Overly Broad

Facts:

Several nurses were unhappy about a coworker's frequent absences, which caused increase work for them. One of the nurses posted a Facebook comment critical of the oft-absent employee. The nurse who posted the comment was then disciplined under the social media policy.

The social media policy contained the rules as follow:

- Employees prohibited from using "any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity."

-Employees prohibited from making any "communication or post that constitutes embarrassment, harassment or defamation of the hospital or of any hospital employee, officer, board member, representative, or staff member."

-Employees prohibited from making "statements that lack truthfulness or that might damage the reputation or goodwill of the hospital, its staff or employees."

Holding:

The policy is overly broad because there is no definition in the first above-listed rule explaining the employer considered "private or confidential."

The remaining two rules were overly broad because they included terms that would commonly apply to labor policies or treatment of employees. Without additional explanation as to what exactly these rules covered, they were found to be overly broad.

2. Employee Handbook Rules on Social Media Policies Were Overly Broad

Facts:

Employer's policy prohibited its employees from doing the following:

-Micro-blogging from their private accounts on their own time about company business;

-Posting anything that they would not want their manager or supervisor to see or that would put their job in jeopardy;

-Disclosing inappropriate or sensitive information about the employer;

-Posting any pictures or comments involving the company or its employees that could be construed as inappropriate.

Holding:

These rules were overly broad because they could reasonably discourage employees' exercise of Section 7 rights, as they "would commonly apply to protected discussion about, or criticism of, the employer's labor policies or treatment of employees."

Furthermore, the company's rule against using the company name, address or other information on employees' profiles was unlawful, as the employer had no good reason to make such a rule.

3. Policy's Bar on Pressuring Coworkers to Use Social Media Was Lawful, But Other Prohibitions Were Too Broad

Facts:

Employer promulgated a social media policy that banned the conduct as follows:

-Pressuring coworkers to connect via social media

-Having employees reveal personal information regarding coworkers, company clients, partners or customers without their consent

-Using employer's logos and photographs of its store, brand or product without written authorization.

Holding:

The first rule was lawful, as it was narrowly tailored so that an employee would not reasonably interpret it to restrain his or her Section 7 rights.

The other two rules were overly broad because they could reasonably be interpreted to restrain Section 7 rights. Employer rules cannot prohibit employees from discussing terms and conditions of employment or sharing information about themselves or their fellow employees.

4. Employer's Rule Restricting Employee Contacts with Media Was Lawful

Facts:

Company had a media policy that set forth the following:

-Public affairs office was responsible for all official external communications

-Employees were expected to maintain confidentiality about sensitive information

-It was imperative that one voice speak for the company

-Employees were not allowed to use cameras in store or parking lot without prior approval

-Employees were told to respond to questions by answering that they were not authorized to speak to media or did not have that information, and refer the question to the public affairs office.

Holding:

While employees are entitled to speak to reporters about terms and conditions of employment, this media policy was narrowly drawn to ensure the official company response was consistent. Thus it "cannot be reasonably interpreted to restrict Section 7 communications."

The decision also found that the prohibition against cameras in the store or parking lot was reasonable because, when taken in context, it appeared in the section concerning how to deal with the media and could only refer to news cameras.