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Employee Handbooks and Social Media - Again?!

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There have been two recent decisions by the National Labor Relations Board regarding an employer's attempt to limit an employee's comments on social media, without violating the employee's First Amendment rights or the National Labor Relations Act ("NLRA"). One case favored the employees. The other favored the employer. No clear guidelines came out of these decisions. Quite frankly, it is still the Wild West. The decisions are *Costco Wholesale Corporation and United Food and Commercial Workers Union Local 371*, Case No. 34-CA-012421, decision dated September, 2012 and *Carl Knauz Motors, Inc. dba Knauz BMW*, Case No. 13-CA-46452 dated September, 2012.

The facts in the *Costco Wholesale Corporation* case are entirely too long to go into in this newsletter. Briefly, in *Costco*, the NLRB upheld the Administrative Judge's decision that Costco could maintain a rule requiring employees to "use appropriate business decorum" in communicating with others. However, the NLRB also found that Costco violated Section 8(a)(1) of the NLRA by "maintaining a rule prohibiting employees from electronically posting statements that 'damaged the company . . . or damaged any person's reputation . . .'" The NLRB also held Costco did *not* violate the NLRA by maintaining a rule that prohibited employees from "leaving company premises during working shift without permission of management."

The *Carl Knauz* case involved the discharge of an employee who made derogatory Facebook posts. In *Knauz*, a salesperson witnessed an accident at an adjacent dealership owned by the same person. The accident occurred when a salesperson let a 13-year-old get behind the wheel of a vehicle which caused an accident. The salesperson posted derogatory remarks about the accident on his Facebook page. In the same posting that describes how the accident happened, the employee made several derogatory comments about the dealership serving hot dogs and chips at the introduction of a new BMW vehicle. After reviewing the Facebook post, the dealership fired the salesperson due to his comments surrounding the accident with the 13-year-old driver.

It must be noted that some business attorneys hailed the *Knauz* decision and some employer attorneys thought the *Costco* decision did not go far enough. The bottom line is that not all employee social media statements will be considered protected activity under Federal labor law.

The *Knauz* decision seems to indicate that even if an employee is making a comment that is related to the business of the dealership, this does not mean it is a protected activity and the

employee can be terminated. Therefore, not every employee posting on social media will be considered protected or concerted activity. However, the *Knauz* and *Costco* decisions did not provide any clear guidance on what limits there are when an employee is within his protected rights and when he is unprotected.

In the *Knauz* case, the employee made numerous Facebook comments, not only about the accident, but comments regarding the food served at the introductory event. The reason the employee was terminated was due to the comments regarding the accident and not the comments regarding the food. It could have been construed that the postings regarding the hot dogs and chips were protected activities because the employee had discussed the matter with his co-workers and could have been concerned that the poor quality of food would affect the dealership's image and the salespeople's ability to earn commissions. The decision clearly indicates the NLRB will not hold employers at fault for terminating employees based on postings that are unrelated to working conditions, but the Board did not provide any other framework relative to what is acceptable or not acceptable work related online statements.

It must be noted that even though the dealership won the *Knauz* case in terminating the employee, the Board did criticize the dealership's policy requiring all employees to be polite, forbidding them from being disrespectful or from using profanity. The NLRB stated that the policy was too broad in the way it was written. The NLRB reasoned that this could interfere with the employee's First Amendment rights.

The *Costco* decision affirmatively ordered Costco to amend its handbook so that it did not prohibit unauthorized postings, distribution or alteration of material on company property. (Obviously, this policy is designed to limit union organizing activities in the workplace.) Further, Costco cannot prohibit employees from discussing wages or conditions of employment with third parties, which includes union representatives. In addition, employees may not be prohibited from sharing or storing wage information or information relating to other terms and conditions of employment, with each other or union representatives. Finally, Costco was prohibited from maintaining a policy that prevents employees from electronically posting statements that damage any person's reputation or prevent the removal of confidential information defined as information regarding employee's wages or other terms or conditions of employment.

In a nutshell, if employees are discussing and posting items relating to conditions of employment, wages or generally discussing their employment, this could be construed as a protected activity by the NLRB.

The saving grace in all the decisions has been the catch-all disclaimer that the decision in *Costco* rendered (which may or may not protect the employer's enforcement of the policies in its Employee Handbook). To paraphrase that catch-all disclaimer, "any and all conditions of employment contained in the Employee Handbook are enforceable, with the exception of any rules or regulations that interfere with any NLRA protected activity."

The bottom line is: (1) have your Employee Handbook reviewed by legal counsel, and (2) if you are approached with a situation that deals with social media posting, before terminating the employee, it is strongly suggested that you confer with your legal counsel to make sure you are not violating the employee's rights under the NLRA or his or her First Amendment Rights.

However, the social media postings can be used effectively against the individual and his/her friends that post defamatory statements against a business. Recently, a Massachusetts judge ruled

that the postings by a terminated employee's brothers were a defamatory social media smear campaign that cost the small town dealership millions in business. The judge ordered the brothers to produce evidence to support their allegations and when they failed to do so, the court awarded damages in the amount of $1.5 million to the business. *Clay Corporation vs. Adam Brook Colter and Jonathan Colter*, Mass. Superior Court Case No. 12-001138, September 12, 2012.

This is a quickly changing landscape and there are no firm answers or limitations yet. Therefore, every case will be new on its face.

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