Archer&Greiner P.C.
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Client Advisory

Employees Fired for Facbook Posts Entitled to Reinstatement and Backpay

In a fast-developing area of labor law, employers based upon a recent decision of the federal labor law agency need to be cautious before taking any employment action against employees who make derogatory Facebook postings against their employers. On September 2, 2011, a National Labor Relations Board Administrative Law Judge determined that a Buffalo nonprofit organization unlawfully discharged five employees after they made Facebook posts in response to a co-worker's criticism of their job performance. The ruling comes after a rash of recent charges involving employee use of social media that have been submitted to the NLRB for resolution, in both union and non-union settings.

The case involved Hispanics United of Buffalo (HUB), a provider of social-services to low-income individuals. One of HUB's employees frequently criticized her co-workers' performance, stating that they did not do enough to help their clients. On one occasion, she mentioned to a co-worker that she was going to raise these concerns with the organization's Executive Director. That same evening, the co-worker posted a message on her Facebook page mentioning the criticism and, critically for this case, she also solicited her co-workers' response to her posting. Several co-workers responded by criticizing their co-worker. This employee who was the subject of the posts complained about them to the Executive Director. The Executive Director immediately fired five participants, stating that the retaliatory posts constituted bullying and harassment in violation of the organization's anti-harassment policy.

The case came before an administrative law judge, who considered whether the five employees were engaged in "protected concerted activity" within the meaning of the National Labor Relations Act. Generally speaking, protected concerted activity will be found where two or more employees act together to improve the terms and conditions of their employment. There is no requirement that the employees are part of a labor union, as any concerted effort among any set of employees subject to the Act is protected. In this case, the judge concluded that the employees' Facebook communications in reaction to their co-worker's criticism of their job performance was protected activity.

Specifically, it was determined that the employees were taking the first step towards initiating group action to defend themselves against accusations which they could reasonably believe were going to be presented to management. Significantly, the judge stated that whether the activity was protected was not dependent on whether the employees had brought their concerns to management, whether they intended to take further action, or whether they were actually attempting to change their working conditions.

As a result of this finding, the judge ordered HUB to reinstate the five employees and awarded the employees backpay. Also, the organization was ordered to post a notice at its facility concerning employee rights under the National Labor Relations Act.

This marks yet another reminder to employers to tread carefully when it comes to addressing their employees' use of social media sites. Employers should avoid drafting overbroad policies restricting the use of social media sites, and should be very conscious of employee rights when taking any action against employees as a result of their use of such sites. While employees cannot bully or harass their co-workers via Facebook, if the postings are based on performance issues and employees act in a concerted fashion, the activity will be protected. This decision also highlights that even non-union employers must be conscious of this doctrine.

If you have questions or concerns related to the new NLRB regulations or other labor and employment matter, please contact a member of Archer & Greiner's Labor and Employment Department in Haddonfield, N.J., at (856) 795-2121, in Philadelphia, Pa., at (215) 963-3300 or in Hackensack, N.J., at (201) 342-6000.

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