SOCIAL NETWORKING

NLRB issues another hit to employers

by Taylor Chapman

We have continued to update you on the National Labor Relations Board's (NLRB) decisions in social media cases. In our November 2012 issue, we addressed the Board's decision rejecting an employer's broadly worded policy prohibiting disrespectful language (see "NLRB issues first Facebook decision" on pg. 4). Recently, the Board considered an employer's termination of five employees who posted comments on Facebook about a coworker and again ruled against the employer.

Facts

The decision, issued December 14, 2012, involved Hispanics United of Buffalo (HUB), a nonprofit organization that provides social services primarily to members of the Hispanic community in Buffalo, New York. HUB, which isn't unionized, employed Lydia Cruz-Moore and Marianna Cole-Rivera. Cruz-Moore was critical of her coworkers' job performance and sent a text message to Cole-Rivera stating that she intended to address her concerns with the organization's executive director. Cole-Rivera responded via text message, asking whether Cruz-Moore thought the executive director really wanted to know how she felt about her coworkers. In addition, she posted the following message on Facebook from her home computer:

> Lydia Cruz-Moore, a coworker[,] feels that we don't help our clients enough at [HUB]. I about had it! My fellow coworkers[,] how do u feel?

Four coworkers responded from their personal computers, defending their job performance and commenting on their working conditions. Some of the comments were sarcastic and far from professional. Cruz-Moore complained to HUB's executive director about the comments. The executive director later terminated the five employees who made the posts because their conduct violated the company's zero-tolerance policy against "bullying and harassment."

Board's decision

The general counsel of the NLRB challenged the employees' firings as unlawful, and the Board agreed, determining that the Facebook posts and comments were "without question" concerted activity for the purpose of mutual aid and protection, which is protected conduct under Section 7 of the National Labor Relations Act (NLRA). In reaching its conclusion, the Board reasoned that the terminated employees were working together toward a common goal and "taking a first step towards taking group action to defend themselves against accusations they could reasonably believe Cruz-Moore was going to make to management."

It's important to note that the NLRB rejected HUB's argument that the posts violated its zero-tolerance policy, finding that the comments couldn't reasonably be construed as harassment or bullying under the policy, regardless of Cruz-Moore's subjective feelings of offense. Further, the Board found that the organization couldn't apply the policy without exempting concerted activity protected by the NLRA. Accordingly, the NLRB (1) concluded that the termination of the five employees over their Facebook posts violated the law and (2) ordered that they be reinstated. *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012).

Bottom line

Employment issues involving social media continue to be a hotbed of NLRB action and discussion. Accordingly, you must proceed with caution when taking any employment action against an employee based on her use of social media. In our October 2012 issue, we reported that the Board will reject broad policies that could result in dissuading protected concerted activity (see "NLRB issues a hit to corporate social media policies" on pg. 1). The *Hispanics United* opinion delves deeper into the issue of what constitutes protected concerted activity. To ensure compliance with the most recent NLRB pronouncements on protected activity, you should contact your employment counsel before making any employment decisions related to social media. ✤