

NLRB: Auto Dealership did not Violate Labor Law when it Fired Employee for Posting Facebook Photos of Accident at Sales Event

4 min read

Oct 2, 2012

In a decision made public yesterday, the National Labor Relations Board determined that a car dealership employee who was terminated for posting mocking photos on Facebook of a serious accident at its “Ultimate Driving Event” was not engaged in concerted activity, and that his termination, therefore, did not violate the National Labor Relations Act. The decision in *Knauz Motors, Inc. d/b/a Knauz BMW*, Case 13-CA-046452 (Sep. 28, 2012), is not all good news for employers, however, as the Board suggested that other photos posted by the employee, which mocked the food at the sales event — but which no other employee commented on or joined in — constituted protected activity because they related to earlier complaints from the sales team regarding the food.

The claimant was a member of the sales team at the employer’s auto dealership. In anticipation of a major sales event for its BMW models — the dealership’s biggest of the year — management met with the team to discuss plans. When the sales team learned that the employer planned on serving hot dogs, chips, and cookies, they complained that this low-quality food would hurt their opportunities to make sales and earn commissions: “BMW is a luxury brand,” the claimant testified, “and if you walk in and sit down and your waiter serves you a happy meal from McDonald’s ... it could potentially affect our bottom line.” The employer responded that the sale was “not a food event” and moved forward with plans.

On the day of the event, the claimant took photos of other sales team members posing with the food, including a hot dog cart and bottled water. He later posted these photos on Facebook, including sarcastic comments about customers being served “a over cooked wiener and a stale bunn (sic)” and “the rare vintages of water that were available for our guests.” No other employees commented on his photos of the food. Also during the event, a serious accident took place at the employer’s Land Rover dealership next door, when a child permitted to sit behind the steering wheel in a truck lost control and drove it into a pond on the property. Several people were injured and the truck was ruined. The claimant posted photos of the scene to his Facebook page, with the caption

“This is your car: This is your car on drugs.” Several employees commented on the claimant’s photos of the truck incident.

The following day, the employer became aware of the claimant’s Facebook postings through phone calls from other dealerships. The employer met with the claimant to discuss the photos and was subsequently terminated. The basis of the decision to terminate the claimant was the posting of the Land Rover accident, which the employer found to be “making light of” a serious incident involving injuries; regarding the food-related photos, the employer mentioned them only in passing and actually “laughed about it.” The claimant filed a charge against the employer with the NLRB, claiming that his termination was in retaliation for protected activity under the National Labor Relations Act.

The Board rejected the claimant’s argument, finding that the photos for which the claimant was terminated – of the Land Rover accident – were “posted solely by [the claimant], apparently as a lark, without any discussion with any other employee of the [employer], and had no connection to any of the employees’ terms and conditions of employment.” As a result, the Board found, his photos were “so obviously unprotected that it is unnecessary to discuss whether the mocking tone of the posting” removed it from protected status, and the employer did not violate the Act. At the same time, however, the Board found that the pictures mocking the food served at the sales event were protected, and therefore that if they had been the basis for the claimant’s termination, the employer would have violated the employee’s rights under the Act. The Board determined that the quality of food at the event had the potential to impact the sales team’s compensation, and that the claimant’s “mocking and sarcastic tone” did not “in itself, ... deprive the activity of the protection of the Act.” Further, the Board found, because the issue of the food being served had been discussed by the sales team at their meeting with management, it was protected activity under the Act “even though only [the claimant] complained further about it on his Facebook pages without any other input from any other salesperson.”

This case is the latest in what appears to be a steady stream of NLRB decisions involving social media. Employers should note two important points from this case. First, online activity that does not relate to the terms and conditions of work and that was posted by a sole employee “as a lark” does not qualify for protection under the Act, even if the activity relates to the workplace. That’s the good news. Second, however, unilateral online activity by a single employee (i.e., posting a picture or making a comment) may gain protected status if it “stems from or logically grew out of prior concerted activity” such as a discussion among employees. This is a potentially significant problem for employers — an employee’s irresponsible online behavior with apparently no connection to other employees may gain protected status if employees had previously discussed the issue amongst themselves. In this case, the employer happened to be aware of that discussion because it occurred during a sales meeting, but the Board did not necessarily rely upon that fact in its finding. We can expect that this is an issue that the NLRB will sort out in subsequent decisions.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm’s national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution,

and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

Facebook, National Labor Relations Board (NLRB)