



Can You Insult Your Employer On Facebook?

September 8, 2011

Hispanics United of Buffalo, Inc., Case 3-CA-27872 (September 2, 2011)

When thinking about sources of e-discovery, companies generally look at their internal systems, software and hardware. But what happens when the case arises from electronic media controlled entirely by a third party – in this case, Facebook? This post begins a multi-part exploration of that issue.

First a brief outline of the case: Generally, in New York, a non-union employee of a private company who complains about his/her job on Facebook can be fired (assuming, of course, that the employee doesn't have an employment contract). After all, New York is an employment at will state where a non-union employee (who is also not subject to an employment agreement) can be fired for any reason or no reason. But, what if a group of employees decide to hold a virtual flogging of the employer on Facebook? Can they all be fired? The NLRB just said no. In *Hispanics United of Buffalo, Inc.*, Case 3-CA-27872, an employee complained on Facebook about a fellow employee and then four (4) other employees piled on but also threw the employer into the vitriolic blender as well by complaining about working conditions. The employer fired all of them. In a proceeding before the NLRB, the administrative law judge found that the employer violated the National Labor Relations Act because it disciplined employees – albeit non-union – for engaging in protected, concerted activity because they were discussing employment matters among themselves (notwithstanding that the forum they chose had numerous potential uninvolved third parties, including customers, who could have viewed the entire exchange).

The use of social media in and outside of the work place is evolving and as of now, there are no hard and fast rules. However, individual employees or a group of them can be disciplined for discriminatory or harassing activities online. Also, employees of private companies also have no free speech rights. But, when it comes to razzing the employer, what an individual cannot do alone online may be permissible for a group of employees – at least for the moment.

Here, should this case proceed on appeal in federal court, how do the litigants gain access to, let alone preserve, materials stored on Facebook? How do they gain access to the metadata? Can they? Since that data is controlled by a third party, do they even have an obligation to try? Circle back here in the coming weeks as we answer those questions for you.