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NLRB Upholds Facebook Firing in Hot Dog Case

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Karl Knauz Motors, Inc., Case No. 13-CA-46452 (9/28/11)

Several weeks ago, we wrote about an employee of a BMW dealership who was allegedly terminated due to posting on his Facebook page regarding the quality of food served at a dealership event. Specifically, on the day of the event, there was a hot dog cart (with hot dogs), bags of Doritos, cookies, and bowls of apples and oranges. The employee took pictures of the sales people holding hot dogs, water, and Doritos and told them that he was going to post the pictures on his Facebook page. In addition, the employee posted pictures and posted comments regarding an incident that occurred on the same day at the adjoining Land Rover dealership involving a car being driven into a pond. Approximately 15 employees of the Respondent were able to access the employee's Facebook page.

The employee was subsequently terminated and alleged that the Respondent discharged him because he engaged in protected concerted activities, in violation of Section 8(a)(1) of the Act.[1]

In the decision, the Administrative Law Judge found that the employee's complaints regarding the quality of food at the dealership was concerted activities,. In doing so, the ALJ reasoned that the posting was a protected concerted activity because it could have had an effect upon compensation (not by reducing wages or other benefits, but by potentially lowering commissions or resulting in lower customer satisfaction ratings).

The ALJ next turned to the issue of whether the tone of the Facebook account rose "to the level of disparagement necessary to deprive otherwise protected activities of the protection of the Act." The ALJ found that it did not, reasoning that, although the Facebook account had a mocking and sarcastic tone, that, in itself, does not deprive the activity of the protection of the Act.

Despite these findings, the ALJ still found that the employee was not wrongfully terminated. The ALJ reasoned that the employee's posting of the Land Rover accident on his Facebook account was neither protected nor concerted activity as it had no connection to any of the employees' terms and conditions of employment. Consequently, the ALJ found that the employee was fired because of his Facebook posting of the Land Rover accident, based primarily on the fact that the ALJ found the Respondent's witnesses to be more credible than the employee.

Although the ALJ ultimately found against the employee, this case is yet another example of the NLRB's focus on social media and the protection it is afforded under the NLRA.

1. [1] The Amended Complaint also alleges that since at least August 28, 2003, the Respondent has maintained four rules in its Employee Handbook that contain language that makes them unlawful, however, that issue is not addressed here.