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SOCIAL MEDIA UPDATE: What's Love Got To Do With It? The NLRB's War On Courtesy And Respect In The Workplace

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In our July 2011 issue, we alerted you of a National Labor Relations Board ("the Board") complaint filed against a Chicago-area BMW car dealership, Karl Knauz Motors, Inc., which was one of the first such complaints that involved the social media arena. The complaint alleged that the dealership violated the National Labor Relations Act ("Act") when it terminated a salesman for comments on Facebook he made about an accident at the dealership and promulgated and enforced a policy requiring that employees adhere to the following etiquette:

> (b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

After hearing, the administrative law judge found that the termination was lawful but that the "courtesy policy" violated the Act. On September 28, 2012, the Board affirmed the ALJ's decision. *Karl Knauz Motors, Inc.*, 358 N.L.R.B. 164 (Sept. 28, 2012). It affirmed the ALJ's finding that the employee was lawfully fired for posting the derogatory comments about the dealership and its product because it was posted solely by the employee as a lark, without any discussion with any other employee of the Respondent, and had no connection to any of the employees' terms and conditions of employment.

Although most commentators have focused on the termination decision, we think the bigger problem in the case is that part of *Karl Knauz* which found a courtesy policy unenforceable on the basis that "employees could reasonably construe its broad prohibition against 'disrespectful' conduct and 'language which injures the image or reputation of the Dealership' as encompassing Section 7 activity." This decision reflects a growing trend by the N.L.R.B. to render unenforceable any employer policy which demands courtesy and respect in the workplace. *See, e.g., Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (2012). It used to be that the Board determined whether a policy might "chill protected activity," based upon how a *reasonable employee* might construe it. *Lutheran Heritage Village-Livonia,* 343 N.L.R.B. 646, 646 (2004). Now, it appears that such determinations are being made by Board lawyers who, one can only imagine, sit around and torture an employer's policy until they can figure out a way to find it illegal. See, for example, Member Hayes' dissent:

> Purporting to apply an objective test of how employees would reasonably view rules in the context of their particular workplace and employment relationship, the analysis instead represents the views of the Acting General Counsel and Board members whose post hoc deconstruction of such rules turns on their own labor relations "expertise." In other words, the test now is how the Board, not affected employees, interprets words and phrases in a challenged rule. Such an abstracted bureaucratic approach is in many instances, including here, not "reasonably defensible".

That's exactly right. In general, I think most employees understand the importance of respect and courtesy in the workplace. More problematic than the Board's questionable interpretations of language, however, is their rather low opinion of human nature, employers, employees, and unions. Apparently, the Board is convinced that employees and unions are only capable of organizing or complaining about work conditions if they are rude, discourteous and disrespectful and that

an employer's only aim in promulgating a rule regarding courtesy and respect is to discourage protected activity and fire their employees.

Having just finished reading a series of cases in which the Board ruled various policies unlawful, I wondered whether the Board's own policies would pass muster if reviewed by its own lawyers. Its own social media policy, for example, prohibits the public from posting "comments that the NLRB Office of Public Affairs deems *inappropriate*," or constitute "defamation to a person or people." Wouldn't this language be unlawful? For example, the Acting General Counsel has outlawed a particular social media policy for, among other things, banning "inappropriate" communications, observing:

> The instruction to be aware that '[c]ommunications with coworkers ...that would be *inappropriate* in the workplace are also *inappropriate* online' does not specify which communications the Employer would deem inappropriate at work and, thus, is ambiguous as to its application to Section 7.

MEMORANDUM OM 12-59 (May 30, 2012), p. 8. He also found unlawful a rule requiring employees who receive "unsolicited or *inappropriate* electronic communications" to report them because, in part, it was overly broad. *Id.* Similarly, that portion of the Board's social media policy that prohibits comments which constitute "defamation to a person or people" also violate its own rules. *See, e.g., Costco Wholesale Corp.* (finding unlawful the maintenance of a rule prohibiting statements posted electronically that "damage the Company . . . or damage any person's reputation"); B*everly Health & Rehabilitation Services*, 332 N.L.R.B. 347, 348 (2000) (rule that prohibited "[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates" found unlawful); MEMORANDUM OM 12-59 (May 30, 2012), p. 17 "('First, the prohibition on making' "disparaging or defamatory" comments is unlawful.").

Now, admittedly, the Board's social media policy is directed towards the public, and not necessarily its own employees. Still, an agency that professes a certain "expertise" in teasing out policy language that chills free expression ought to either know better or give employers the same benefit of the doubt it gives itself. ■

For more information about any of the topics covered in this issue of the Labor and Employment Law Alert, please contact:

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