SOCIAL MEDIA CASELAW UPDATE

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There have been no additional General Counsel Social Media Reports issued by the National Labor Relations Board since 2012. However, there have been a few Board Decisions, Advice Response Memoranda, and Administrative Law Judge Decisions.

General Counsel Memorandum

The following is my understanding of the current position of the NLRB regarding social media issues:

> Social media cases are no longer mandatory submissions to Advice. Cases involving rules for use of an employer's email/computer systems (Register-Guard) are mandatory Advice submissions. Cases involving social media rules or handbook provisions (e.g., at-will clauses) must be submitted to Advice if they raise new or difficult issues not covered by previously-issued Advice memoranda.
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> There are no immediate plans to issue another General Counsel report concerning social media policies or other employer rules/policies. If a significant number of Advice Memoranda issue addressing new questions in this area, the NLRB will consider issuing another report. In the meantime, Advice memoranda are posted on the Agency website within a couple of weeks of issuance of an Advice memorandum authorizing dismissal or, if complaint is authorized, within a couple of weeks after case closure.
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> The Board does not have under active consideration at this time any substantive rules that have not already been proposed. While there have been suggestions from the public that rulemaking might be appropriate for issues involving social media, no such rulemaking is presently under consideration.

Board Decisions

<u>In Re World Color (USA) Corp.</u>, 360 NLRB No. 37 (Feb. 12, 2014).

The Board adopted the judge's finding that the Respondent violated Section 8(a)(1) by maintaining an overbroad hat policy that employees would reasonably understand to prohibit union caps. The Board reversed the judge's finding that the Respondent also violated Section 8(a)(1) through statements to an employee about the employee's Facebook posts which were not shown to be protected concerted activity. The Board amended the judge's recommended Order in accordance with Guardsmark, LLC, 334 NLRB 809 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007), to require the Respondent to rescind the unlawful hat policy and to revise its handbook to exclude that policy.

<u>Dish Network Corp. & Communications Workers of America, Local 6171 & Eric Sutton</u>, 359 NLRB No. 108 (Apr. 30, 2013).

The Board adopted the administrative law judge's findings that the respondent did not violate Section 8(a)(3), (4), and (1) of the Act by disciplining and discharging an employee technician. In the absence of exceptions, the Board also adopted the judge's findings that the respondent violated Section 8(a)(1) by maintaining certain handbook rules.

The ALJ's decision contained this discussion regarding social media policy issues:

> The *Social Media* policy is unlawful on two grounds. First, it banned employees from making "disparaging or defamatory comments about DISH Network." The Board has held that analogous electronic limitations on negative commentary violated the Act. See, e.g., *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 2 ("statements posted electronically . . . that damage the Company"); *Knauz BMW*, 358 NLRB No. 164 (2012) ("courtesy rule," which prohibited "disrespectful" conduct and "language which injures the image or reputation of the Dealership"). Second, the policy banned employees from engaging in negative electronic discussion during "Company time." The Board has found that equivalent rules, which ban union activities during "Company time" are presumptively invalid because they fail to clearly convey that solicitation can still occur during breaks and other nonworking hours at the enterprise. See *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994); *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011) (rule threatening discipline for "[p]erforming activities other than Company work during working hours"); *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

<u>DirecTV U.S. DirecTV Holdings, LLC</u>, 359 NLRB No. 54 (Jan. 25, 2013).

The Board found that the respondent's confidentiality rules unlawfully restricted employees from discussing their wages, discipline, performance ratings, and other terms and conditions of employment, as well as unlawfully prohibited protected employee communications with third parties such as union representatives and governmental agencies. The Board explained its ruling:

> On its intranet, the Respondent maintains a corporate policy entitled, "Employees." It states: "Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record." Although this policy itself references only unspecified "company information," the Respondent promulgated two overlapping sets of rules governing employee conduct--its intranet policies and its handbook--and effectively directed employees to read them as one. As explained, the handbook contains a confidentiality rule that defines "company information" as including "employee records." The Respondent's intranet policy does not further explain, limit, or otherwise address the term. Employees who read the two policies in tandem would understand the intranet policy to prohibit disclosure of "employee records," which would include information concerning their own or fellow employees' wages, discipline, and performance ratings. See Hyundai America Shipping Agency, 357 NLRB No. 80, slip op. at 12 (prohibition on unauthorized disclosure of information from an "employee's personnel file" could reasonably be read to bar

> discussion of wages, disciplinary actions, and performance evaluations). At the very least, the scope of "company information" in the intranet policy is ambiguous in light of the handbook provision, and the Board has recognized that "employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition." Id. For these reasons, we find the Respondent's maintenance of this policy to be unlawful.

<u>New York Party Shuttle, LLC & Fred Pflantzer</u>, 359 NLRB No. 112 (May 2, 2013).

The Respondent discharged Pflantzer because he engaged in union and concerted protected activity by (a) using electronic mail to discuss with employees of other employers in New York about terms and conditions of employment and (b) communicating by way of social media with employees of the Respondent and employees of other employers about terms and conditions of employment.

The administrative law judge held Pflantzer's February 10 email (and his follow up Facebook entry) were communications that were protected by Section 7 of the Act. In those communications, Pflantzer stated that he had made some efforts to get a union; that the employees of the Company needed a union; and that the law protected employees in their right to organize a union. This was, in effect, union related activity. C.S. Telecom, Inc., 336 NLRB 1193 fn. 3 (2001), and Acme Bus Corp., 320 NLRB 458, 479 (1995).

The ALJ found that Pflantzer's statements regarding the company were "harsh" but that they were not libelous. The judge stated:

> In fact, virtually all of the accusations made by Pflantzer were true and therefore cannot be deemed to be libel. It was admitted that there were occasions when the checks issued to employees were not covered by sufficient funds. It was also admitted that the Company had received a number of safety violations. The statements regarding the employee benefits were substantially correct and even if slightly off, would not constitute the type of statements that would lose the protection of the act either under *Atlantic Steel Co.*, 245 NLRB 814 (1979), or *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953). (The latter case holding that disparaging statements about working conditions are protected but that statements that disparage the employer or its products may not be protected.) See also *Montauk Bus Co.*, 324 NLRB 1128, 1138 (1997), and *Darphin USA, Inc.*, 326 NLRB 1153, 1156 (1998).

<u>Hills & Dales Gen. Hosp.</u>, 360 NLRB No. 70 (Apr. 1, 2014).

This case presented a challenge to the facial validity of three workplace rules in the Respondent's Values and Standards of Behavior Policy. The Hospital's policy contained the following rules: paragraph 11 - employees will not make negative comments about fellow team members including coworkers and managers, paragraph 16 - employees will represent the employer in the community in a positive and professional manner in every opportunity, and paragraph 21 - employees will not engage in or listen to negativity or gossip. The rules were developed by the Hospital with direct input from employees who were unhappy with the back stabbing and back-biting in the workplace.

The rules were used as the basis for disciplinary action against employees, including disciplinary action based upon a Facebook post. The Board found that all three rules were overboard and ambiguous and that they violated Section 8(a)(1).

> The requirement that employees "represent [the Respondent] in the community in a positive and professional manner" is just as overbroad and ambiguous as the proscription of "negative comments" and "negativity" in paragraphs 11 and 21. Particularly when considered in context with these other unlawful paragraphs, employees would reasonably view the language in paragraph 16 as proscribing them from engaging in any public activity or making any public statements (i.e., "in the community") that are not perceived as "positive" towards the Respondent on workrelated matters. This would, for example, discourage employees from engaging in protected public protests of unfair labor practices, or from making statements to third parties protesting their terms and conditions of employment—activity that may not be "positive" towards the Respondent but is clearly protected by Section 7. See generally *Claremont Resort & Spa*, supra; *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 2 (2012) (rule stating that any communication posted electronically that damaged the Company, defamed any individual, or damaged any person's reputation could result in discipline, including termination, found unlawful).
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> We also reject the judge's reliance on *Tradesmen International*, supra, in which a "conflicts of interest" work rule that required employees "to represent the company in a positive and ethical manner" was found lawful. We find the rule in *Tradesmen* distinguishable from paragraph 16.5 The context of the provision in *Tradesmen*—in contrast to paragraph 16 here—did not include closely related unlawful provisions. Rather, it was part of a rule addressing a subject, "conflicts of interest," unlikely to suggest to employees that Section 7 activity might be implicated. Reasonably understood in context, the phrase "positive and *ethical* manner" in *Tradesman* would likely be construed quite differently that the phrase "positive and *professional* manner" at issue here. Coupled with the word "ethical" in a rule addressing conflicts of interests, the term "positive" has a significantly narrower scope of meaning than the same term coupled with the word "professional," a broad and flexible concept as applied to employee behavior.
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> Accordingly, we find that paragraph 16's requirement that employees represent the Respondent "in the community in a positive and professional manner in every opportunity" violates Section 8(a)(1) of the Act as alleged.

Advice Response Memoranda

Corning Hospital - Case Number: 03-CA-068201.

"The Region submitted this case for advice on whether a provision in the Employer's social media policy admonishing employees to "[b]e respectful and professional" to their co-workers is unlawfully overbroad. We conclude that employees would not reasonably interpret this provision to restrict Section 7 activity, given the particular context in which it appears. Accordingly, the maintenance of this provision does not violate Section 8(a)(1)."

Available at: http://www.nlrb.gov/case/03-CA-068201.

Giant Food, LLC - Case Number: 05-CA-064793.

"The Region submitted this case for advice as to (1) whether the Employer unilaterally implemented a new social media policy in three separate bargaining units; and (2) whether that policy would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.

The General Counsel concluded that the Employer unlawfully unilaterally implemented the policy in the units represented by Locals 730 and 922, but the third unit represented by Local 639 waived its right to bargain over the policy by inaction. He also concluded that portions of the Employer's social media policy would reasonably be construed to chill the exercise of Section 7 activity and, therefore, violate Section 8(a)(1), including a prohibition against disclosing confidential or non-public information and a prohibition against using the Employer's logo, trademark, or graphics, or photographing or video recording the Employer's facility. He further concluded that employees would not reasonably construe the Employer's rule prohibiting employees from defaming or discrediting the Employer's products or services to restrict protected conduct. Moreover, the Employer's rule encouraging employees to report violations of the policy to management will not chill Section 7 activity once the unlawful provisions of the policy are removed. Lastly, he concluded that the policy's savings clause does not cure the otherwise unlawful policy provisions."

Available at: http://www.nlrb.gov/case/05-CA-064793.

McKesson Corporation - Case Number: 06-CA-066504.

"This case was submitted for advice on whether the Employer violated Section 8(a)(1) of the Act by giving the Charging Party a low performance rating and putting her on a personal improvement plan because of a negative comment she posted on Facebook, and whether the Employer maintains overly broad social media rules. The General Counsel concluded that the Charging Party was not engaged in protected concerted activity when she posted a comment on Facebook; therefore, the Employer did not violate the Act by giving the Charging Party a low performance rating and putting her on a personal improvement plan. He further concluded that some of the Employer's social media guidelines are overly broad in violation of Section 8(a)(1) of the Act."

Available at: http://www.nlrb.gov/case/06-CA-066504.

Rehabilitation Institute of Chicago - Case Number: 13-CA-066487.

"The Region submitted this case for advice as to whether provisions of the Employer's social media policy would reasonably be construed to chill Section 7 protected activity in violation of Section 8(a)(1). The General Counsel concluded that the portions of the policy that prohibit employees from 1) photographing, recording or providing information about staff for uploading onto public forums or websites; 2) using the Employer's name and/or logo on any websites; and 3) posting confidential information about the Employer or its employees or discussing Employer-related matters on social media, are unlawfully overbroad."

Available at: http://www.nlrb.gov/case/13-CA-066487.

Phenom Hospitality, LLC - Case Number: 04-CA-061044.

"This case was submitted for advice as to whether the Employer violated the Act by discharging the Charging Party in response to messages (Facebook "status" and "comments") she posted on an employees-only Face book page. The General Counsel concluded that the Charging Party's Face book postings were protected concerted activity for mutual aid and protection, and, consequently, that the Employer's discharge of the Charging Party violated Section 8(a)(1) of the Act."

Available at: http://www.nlrb.gov/case/04-CA-061044.

Price Edwards & Company - Case Number: 17-CA-092794.

"This case concerns whether the Employer violated Section 8(a)(1) of the Act by: (1) interrogating an employee about work-related complaints posted on her Facebook page; (2) instructing that employee not to access Facebook at work or post similar comments on Facebook at any time; and (3) maintaining an electronic communications policy which prohibits emails containing salary information, "inflammatory" communications, and instant messaging with friends or surfing the Internet during working hours.

The General Counsel concluded that the employee was not engaged in concerted activity when she posted her comments on Facebook and therefore that the Employer lawfully questioned her about the postings. However, he concluded that the Employer violated Section 8(a)(1) by forbidding the employee from accessing Facebook at work or posting similar online commentary at any time. He further concluded that the electronic communications policy's limitations on emailing about salary and making inflammatory communications unlawfully restrict employees' Section 7 activity, notwithstanding the Board's decision in Register Guard, because the Employer permits incidental personal use of its electronic communication systems and these restrictions do not constitute the type of Section 7-neutral line-drawing expressly permitted in Register Guard. The Region should also use this case as a vehicle to argue that Register Guard should be overturned, and that employees have a Section 7 right to use their employer's electronic communications systems. If Register Guard is overturned, the prohibition on instant messaging with friends and surfing the Internet during working hours is additionally unlawful because it is overly broad."

Available at: http://www.nlrb.gov/case/17-CA-092794.