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Q&A with the Hon. Ronald L. Bauer

By Casey Kempner

[*Editorial Note: Governor Deukmejian appointed Judge Bauer to the Orange County Superior Court on December 31, 1990. Judge Bauer currently sits on the Complex Civil Panel. He is also an Adjunct Professor at Western State University College of Law. Prior to his appointment to the bench, he served as a Judge pro tempore, as an arbitrator for the American Arbitration Association, and as an investigative referee for the State Bar's disciplinary review committee. In private practice, he represented small businesses in landlord-tenant, real estate, and business matters. He was also General Counsel for the Western Center on Law & Poverty in Los Angeles. Judge Bauer obtained his B.A. in Mathematics from Harvard University, his J.D. from the University of Virginia, and his LL.B. from the University of Edinburgh, Scotland.*]

Q: What drew you to a career in law?

A: I did what I think is common. I intended to continue my education and thought that law was good

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In the First Ruling of Its Kind, Judge Orders Reinstatement of Employees Fired For Facebook Posts

By Maria Z. Stearns

Over the course of the last year, the National Labor Relations Board ("NLRB") has taken an active role in shaping the legal framework of social media use by employees. On September 2, 2011, an NLRB administrative law judge ruled that a non-profit organization violated federal law when it fired five employees for messages posted on Facebook. This groundbreaking decision, together with the NLRB's recently issued report on social media cases, provide important guidance to employers regarding workplace social media policies.

The Legal Framework

Section 7 of the National Labor Relations Act ("NLRA") permits employees to engage in "concerted activities for the purpose of collective bargaining ***or*** other mutual aid or protection." Regardless whether the employer is unionized, employees must be free to discuss the terms and conditions of employment without fear of reprisal. Recent actions by the NLRB make it unmistakably clear that the NLRB shows no signs of retreating from its strong stance that Section 7 rights carry at least equal weight in the context of social media as compared to more traditional forums.

Hispanics United of Buffalo, Inc.

Hispanics United of Buffalo, Inc. ("HUB") is a 30-employee non-profit corporation that renders social services to economically disadvantaged people in Buffalo, New York. HUB terminated five employees after they engaged in a group Facebook discussion about a co-

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A: I teach a class in trial practice, and we emphasize the need to cultivate a reputation for professionalism, integrity, honesty and so forth. That's not as simple as appearing in court on one occasion, but that is a career-long goal. But to be more specific about an appearance in court, it may seem trivial, but on the first day of class I tell them that we will start on time. Part of our training as trial attorneys is being on time, not just in class, but in court, papers, deadlines, and so forth. We talk about professionalism, but each relationship should be to the highest level of integrity. It will be to your own benefit to treat other lawyers professionally. Even selfishly, that is the right thing to do.

Q: What common mistakes do lawyers make to lose the appearance of professionalism?

A: Sometimes lawyers get too personal in their approaches to each other. If they recognize that each has a professional calling to represent their client in an ethical and respectful way, then they wouldn't be personal about it. I have the good fortune in this assignment [*eg: complex civil panel*] to encounter lawyers who understand that, because in complex litigation we have more experienced lawyers generally who do encounter each other regularly who know each other and may even have friendships with each others.

Q: What was your motivation to teach as an Adjunct Professor?

A: I always had an interest in teaching. Out of law school I gave serious thought to a teaching career. So I really like the fact that I have been able to practice law and be on the bench and teach. I teach at the summer judicial college for judges. I teach for law school and have been doing so for about twenty years. I also do a fair amount of teaching for continuing education classes for lawyers. Its something I really enjoy doing. When I had two careers in mind I ended up doing both.

Q: Would the ideal teaching position draw you away from your job at the bench?

A: I don't think so, certainly not at this point. I get a high level of enjoyment in what I do now and I've gotten to do both. I realize I could teach more by retiring from the bench, but I don't think I would do that. I like it the way it is.

Q: What do you do in your free time?

A: Referee soccer games for kids from the smallest up through high school. I still do some running. I promised my law school class that before I finished I would run one more marathon. Since then I've ran two half marathons, but I don't think that counts. I do a lot of reading and enjoy watching sports.

The ABTL thanks Judge Bauer for his time.

♦*Casey H. Kempner is an associate of Haynes & Boone LLP.*

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worker's criticism of their work performance. The co-worker saw the Facebook posts written about her and complained to her manager. HUB viewed the Facebook posts as a form of co-worker bullying and harassment and terminated the employees on that basis.

Thereafter, one of the terminated employees filed an unfair labor practice charge with the NLRB, claiming that his Facebook posts qualified as protected concerted activity and could not be used as the basis for termination. In response, HUB argued that the employees were not engaged in protected concerted activity because they were merely griping that another employee had criticized their work performance. According to HUB, the employees were not trying to change their working conditions and did not communicate their concerns to management. Following a three-day trial, the judge rejected HUB's argument, concluding that:

> "if employees have a protected right to discuss wages and other terms and conditions of employment, an employer violates [the NLRA] in disciplining or terminating employees for exercising this right – regardless of whether there is evidence that such discussions are engaged

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> in with the object of initiating or inducing group action."
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> Based on its conclusion that the Facebook postings qualified as protected concerted activity, the judge ordered HUB to reinstate the five terminated employees with back pay. In addition, the judge ordered HUB to post a workplace notice stating, in part:
>
> "we violated Federal labor law and [the NLRB] has ordered us to post and obey this notice. WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activity, including discussing amongst yourselves your wages, hours and other terms and conditions of your employment, including criticisms by coworkers of your work performance."

HUB has indicated it intends to appeal the decision.

NOT ALL SOCIAL MEDIA USE IS PROTECTED

Although the *HUB* decision is alarmingly broad, a recent report from the NLRB demonstrates that Section 7 of the NLRA does not extend to all social media use. On August 18, 2011, the Acting General Counsel of the NLRB issued a report summarizing fourteen social media cases decided by the NLRB during the last year. While the report does not establish bright line rules, the following general themes emerge:

Two-Pronged Analysis: Section 7 protects employees' right to engage in "protected concerted activity." The cases summarized in the NLRB's report suggest that an employee's social media use is protected if the employee's comments: (i) relate to the terms and conditions of employment; and (ii) can reasonably be interpreted as acting with, or on behalf of, other employees. The NLRA does not protect personal gripes and/or comments that have no real connection to work conditions.

Related to Terms and Conditions of Employment: Examples of social media cases where the NLRB concluded the comments were sufficiently related to the terms and conditions of employment involved topics of job performance, workload, supervisors, and staffing levels. In contrast, employee comments about the employer's customers or third parties were not entitled to protection under the NLRA.

Concerted Activity: To be concerted, social media use must be directed to or involve coworkers and invite or induce them to engage in further action. In several cases, the NLRB concluded that, although the employee's social media posts were read by fellow coworkers and elicited responses by some, the complaints did not constitute "concerted activity" because they were individual gripes and not aimed to induce group action. For example, in one case, an employer disciplined an employee for profane Facebook comments that were critical of management, and several coworkers posted supportive responses. The NLRB concluded the employee's Facebook postings were not concerted because:

> "they contained no language suggesting that the employee sought to initiate or induce coworkers to engage in group action; rather they expressed only his frustration regarding his individual dispute with the [manager] . . . . Moreover, none of the coworkers' Facebook responses indicated that they had otherwise interpreted the employee's postings. They merely . . . offered emotional support."

Overly Broad Social Media Policies Are Unlawful: In several cases, the NLRB found social media policies overbroad and unlawful because the policies "chilled" or discouraged protected concerted activity. According to the NLRB, the mere existence of an overly broad social media policy exposes the employer to an unfair labor practice charge even if no disciplinary action is taken against an employee.

Given the significant cost and distraction of defending an unfair labor practice charge, any employer seeking to regulate employee social media use should give careful consideration to the NLRB's reasons for

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SOCIAL MEDIA POLICY LANGUAGE	NLRB RULING
Policy prohibited employees from using social media in a way that: (1) violates, compromises, or disregards the rights and reasonable expectations as to, privacy or confidentiality of any person or entity; (2) constitutes embarrassment, harassment or defamation of the employer or any of its employees; and/or (3) lacks truthfulness or damages the reputation or goodwill of the employer or its employees.	Unlawful. Employees could reasonably interpret policy as prohibiting their discussion of wages and other terms and conditions of employment. Employer did not include any language excluding Section 7 activity.
Policy subjected employees to disciplinary action, including termination, for engaging in "inappropriate discussions" about the company, management, and/or coworkers.	Unlawful. Because policy did not define "inappropriate discussions," employees could reasonably interpret the rule to prohibit criticism of the employer's labor policies, treatment of employees, and terms and conditions of employment.
Policy prohibited employees from making "disparaging remarks" when discussing the company, supervisors, coworkers or competitors.	Unlawful. The policy proscribed a broad spectrum of conduct, did not define "disparaging," and contained no limiting language to clarify that the rule did not limit an employee's right to discuss matters related to the terms and conditions of employment.
Policy prohibited employees from posting pictures of themselves in any media that depicted the company in any way, including a company uniform or corporate logo.	Unlawful. Policy would prohibit an employee from engaging in protected activity; for example, an employee could not post a picture of employees carrying a picket sign depicting the company's name, or wear a t-shirt portraying the company's logo in connection with a protest involving the terms and conditions of employment.

declaring certain social media policies unlawful. The policy provisions examined by the NLRB include the following:

Social Media Policies Should Exclude Section 7 Activity: The NLRB recommends that a social media policy include language clearly informing employees that the policy does not apply to Section 7 activity and that employees are permitted to engage in concerted activity regarding matters related to their terms and conditions of employment. It remains to be seen whether such language, by itself, can overcome legal challenge to a broadly drafted social media policy.

THE NLRB'S INCREASING PRESENCE IN THE WORKPLACE

The NLRB has not signaled any intention to depart from its active involvement in social media related employment issues. If anything, the NLRB's presence may increase as a result of a new rule that goes into effect on January 31, 2012, requiring employers to post a notice informing employees of their rights under the NLRA.

Given the NLRB's stance in applying the NLRA to social media policies and the rapidly evolving law on this topic, employers should exercise caution in implementing such policies and before imposing social media related disciplinary action.

♦ *Maria Stearns is Of Counsel in the Labor and Employment department of Rutan & Tucker.*