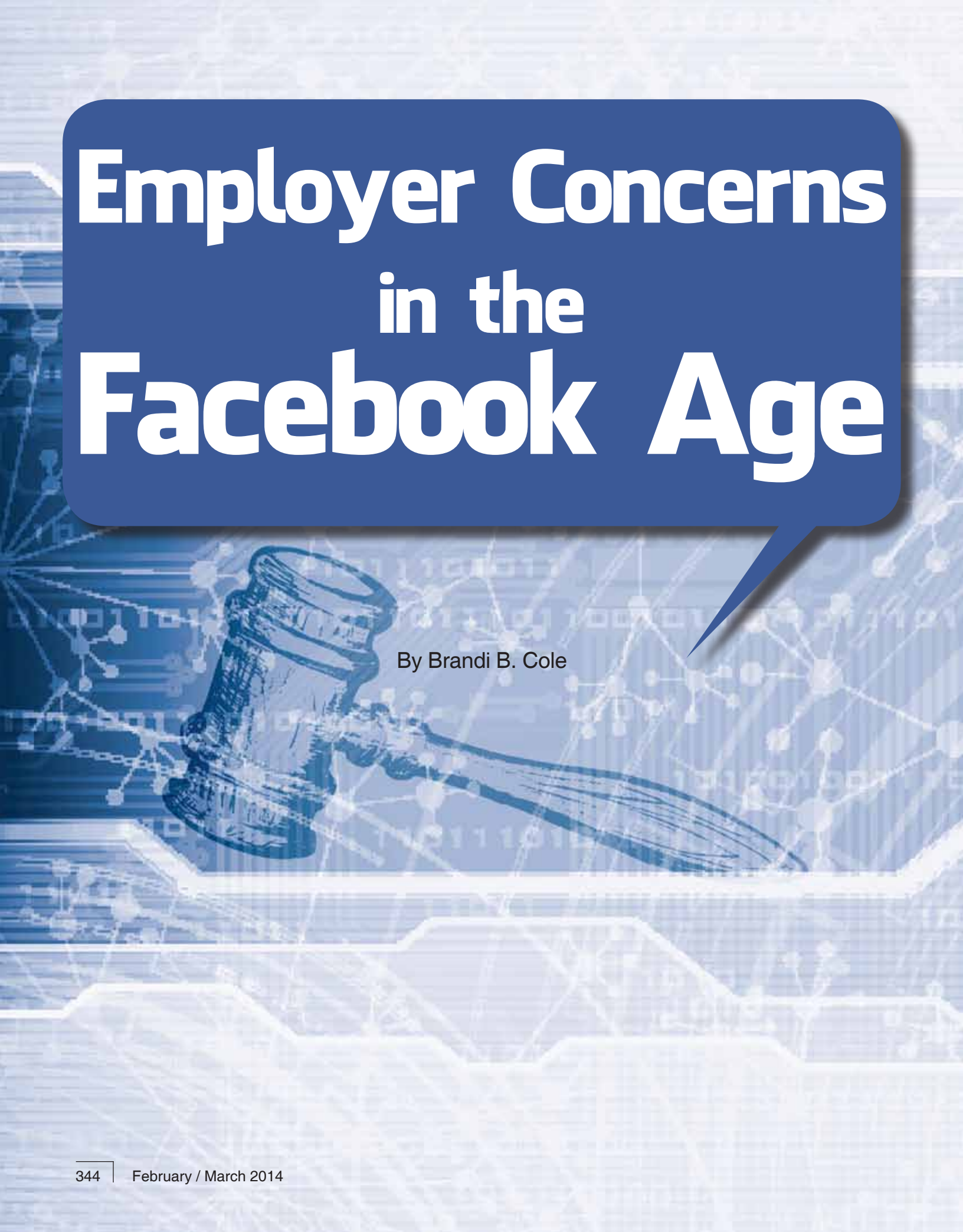
Employer Concerns in the Facebook Age

By Brandi B. Cole



Facebook continues to be the leader in social networking.[1] Facebook allows a user to post his every thought at the push of a button, whether it is a fiery status message about the ex, a to-the-minute update on life ("just took a shower, turned on the crockpot and walked the dog"), or the all-too-popular "I hate work" messages. Facebook certainly has some incredibly positive aspects. How else would every distant family member and friend keep up with my growing children? Nonetheless, many users do not consider the fact that the information they are posting may be viewed by the public, and even subject to privacy settings, by hundreds or thousands of "friends."

Most people have heard stories about employees facing termination for outrageous posts that make some ponder whether good sense has been replaced by 24/7 access to the Internet. In an occasion that can easily be found in a "fired for Facebook" Internet search, an employee conveniently forgot that she had befriended her manager on Facebook and posted the following on a status message for her network's viewing pleasure: "OMG I HATE MY JOB!! My boss is a total pervvy wanker always making me do sh** stuff . . . WANKER." Although this alone may draw a gasp, the subject manager's comment on the status is what really takes the cake: "Hi . . . i guess you forgot about adding me on here? Firstly, don't flatter yourself. Secondly, you've worked here 5 months and didn't work out that i'm gay? . . . Thirdly, that 'sh** stuff' is called your 'job,' you know what i pay you to do . . . . Don't bother coming in tomorrow . . . And yes, i'm serious."

Although this may be an extreme example, most Facebook users are all too familiar with those who openly complain about their jobs, their bosses or otherwise give too much information to their 4,500 friends. So where does the law intersect with social networking? If a client calls to tell you that an employee went on a tirade against the company, his boss and even bashed a customer or two for his entire social network to see, are there any legal issues you need to discuss before he tells this guy to hit the road? The answer is an absolute yes.

In the realm of labor and employment law, most people remember the basics — discrimination, harassment and retaliation. Unless a Facebook post is related to some allegation of discrimination or harassment, these categories of actionable claims will typically not come into play when an employee is complaining about work. However, an often forgotten protection, even for non-union employees, is set forth in Section 7 of the National Labor Relations Act (NLRA), which protects employees' right to engage in "concerted activities" for "mutual aid or protection." Section 8 of the NLRA prohibits employers from interfering with or restraining employees' rights under Section 7. Protected concerted activities include discussions between (or on behalf of) two or more employees about work-related issues, including pay, safety concerns or working conditions. An employee's activity may only be considered "concerted" if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries, Inc.*, 268 NLRB No. 73 (1984).

The National Labor Relations Board (NLRB) has held that activity must be both concerted and for mutual aid or protection (as opposed to an individual goal or benefit) to be protected. *See, e.g., Holling Press, Inc. and Boncraft-Holling Printing Group fka Boncraft, Inc.,* 343 NLRB No. 45, Case No. 3-CA-20229 (2004).

An employer commits an unfair labor practice if it interferes with, constrains or coerces an employee in the exercise of protected concerted activity. Although Section 7 was always important, if not often overlooked by non-unionized employers, it has taken on a whole new meaning in the electronic age. When an employee engages in a Facebook rant, whether during or after work time, an employer must ask whether the rant could be protected concerted activity, and whether it may face trouble for inhibiting that activity.

What is a Protected Posting?

As background, when an employee decides to complain about an unfair labor practice, such as being fired for a Facebook post, he first files a charge with a local division of the NLRB. If a regional director decides that the claim has merit, the director issues a complaint, and a NLRB administrative law judge (ALJ) issues a decision. This decision can be appealed to the NLRB in Washington, D.C., but if no exceptions are filed, the opinion becomes the order of the board. However, the ALJ's decisions are not binding legal precedent unless adopted by the board on a review of an exception.[2] In accordance with Section 10(e) of the NLRA, the decision of the board may then be appealed to the federal court of appeals of the petitioner's choosing.

ALJs have recently been flooded with social media cases and the NLRB's general counsel has issued reports regarding what social networking activity is considered protected activity under the NLRA. Generally, the NLRB views employees who use social media to communicate with family and friends about work issues as not protected under Section 7, nor is an employee who acts solely by himself and for himself, rather than calling for group action, protected by the NLRA. In other words, the above-referenced "pervvy wanker" status should not be protected by the NLRA. However, postings between co-workers or a post calling for commentary from co-workers regarding working conditions or some work-related issue will likely be protected. A few of the relevant cases are discussed below.

Triple Play Sports Bar, Case No. 34-CA-12915 (ALJ Jan. 3, 2012) is an example of one of the many cases decided by an ALJ pending before the board. In this case, the ALJ found that an employer unlawfully terminated employees for discussing the employer's alleged improper withholding of taxes on a Facebook status and related comments. Although some judges have disagreed, the ALJ found that one employee participated in the conversation by simply hitting the "Like" button. This Facebook conversation had been continued from some face-to-face discussions about the tax withholding

issue, and the ALJ found that the use of some expletives to describe the employer did not render the conduct unprotected.

The NLRB issued its first decision involving an employee fired over Facebook posts in September 2012. In *Karl Knauz Motors, Inc. and Robert Becker*, 13-CA-046452, 194 LRRM 1041 (9/28/12), the board affirmed an ALJ's opinion that an employee was lawfully fired over a Facebook post. A BMW salesman posted photos of, and sarcastic comments about, an accident at an adjacent employer-owned Land Rover dealership when another salesman allowed a 13-year-old boy to sit behind the wheel after a test drive. The boy hit the gas, drove over his dad's foot, over a wall and landed in a pond. The salesman also posted about a "luxury" event hosted by his employer, in which he mocked the menu of hot dogs, chips and water for the BMW dealership's most valued customers, and posted a photo of the hot dog cart. Eventually, other employees made sarcastic comments on these posts. Upon his employer's discovery of these posts and finding that the salesman showed no remorse for his actions, he was terminated. The NLRB agreed with the ALJ that the salesman was not improperly terminated. His posts about the accident at another car dealership were not protected activity, and the board adopted the factual finding of the ALJ that the salesman was terminated solely for that posting. Thus, the NLRB did not rule on whether the postings about the "hot dog" event would constitute protected activity.

The board issued its second decision regarding employees fired for Facebook in December 2012. In *Hispanics United of Buffalo*, 03-CA-27872, 359 NLRB No. 37 (Dec. 14, 2012), five claimants worked for a non-profit corporation that provided social services to the economically disadvantaged. A grant worker had criticized the work performance of these employees and threatened to address their deficiencies with the director of the company. One of the employees finally had enough and posted a status message after work hours (from home) complaining about the criticisms: "[Employee], a coworker feels that we don't help our clients enough at [Respondent]. I about

had it! My fellow coworkers how do u feel?" This led to a number of comments from the other four co-workers defending themselves and generally expressing disdain. When the employee claimed to their supervisor that she had been bullied, harassed and defamed, these employees were terminated. The NLRB had no problem finding that these communications were concerted for mutual aid and protection, and agreed with the ALJ's finding that the comments, although riddled with profanity and sarcasm, were not prohibited harassment or bullying. Because claimants were discharged solely for these postings, the discharges violated Section 8 of the NLRA.

On May 2, 2013, in *New York Party Shuttle, L.L.C.,* Case No. 02-CA-073340, the board found that New York Party Shuttle violated the NLRA when it discharged a tour guide after sending emails and posting complaints about the company in a tour guide group's site on Facebook. The board found that although claimant's communications were directed at employees of other tour guide companies and not his fellow employees, they were a continuation of union organization activities which his employer was aware he had been engaging in. Prior to sending the communications that resulted in his termination, the claimant had sent previous emails to the company's guides and other guides in New York City with concerns about the terms and conditions of his employment and discussing the benefits of unionization. In February 2012, in emails and postings to a NYC Tour Guides Facebook site which could be seen by invitation only, he referred to a former employer as "a worker's paradise" compared to New York Party Shuttle. He also noted that there was no union protection, no benefits and no vacation time, and worst of all, the company's paychecks sometimes bounced. The claimant also said in these communications that when he started agitating for a union, he stopped getting work, and he was planning to file an NLRB charge. The tour guide company admitted that the claimant was fired for the emails and postings, asserting that they were libelous communications. The NLRB judge rejected this argument, noting that while the communications were harsh, they were mostly true, down to the allegations of bounced checks. Reinstatement and back pay were ordered for the claimant.

When considering whether to take an adverse employment action against an employee, an employer should analyze the circumstances and whether the activity could be protected. Was the employee soliciting commentary or action from his co-workers or just friends and family? Is the posting part an ongoing work-related issue? Is or has the employee expressed interest in creating a union? An employer also must remember that the use of profanity and/or sarcasm will not necessarily take communications outside the realm of protection.

Social Media Policies and the NLRB

Employer social media policies have been another hot topic for the NLRB. With more than one billion users of social networking sites, many employers have standard social networking policies and/or other broad Internet policies. However, employers should be aware that standard language used in a number of policies has been struck down as chilling Section 7 rights.

In the NLRB's first social media decision, *Costco Wholesale Corp.,* Case No. 34-CA-012421, 93 LRRM 1241 (Sept. 7, 2012), the board found that a policy in an employee handbook violated Section 8(a)(1) where it prohibited electronic postings "that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement . . ." *Id.* at 1243. Reversing the ALJ's ruling,

the board found that an employee would find this broad prohibition to "clearly encompass concerted communications protesting the Respondent's treatment of its employees," and added that there was nothing in the policy suggesting that protected communications were excluded from the broad parameters of the rule. The board noted that unlike some other cases they had addressed, the policy was not accompanied by any language which would restrict its application to certain circumstances like sex or race-based harassment. *Id.* at 1244.

Also, in the Knauz case referenced above, the board again struck down a social media policy as violating Section 8(a)(1) of the NLRA. The courtesy rule in the handbook read as follows:

> (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.

Knauz BMW, 194 LRRM at 1042.

The NLRB had a problem with the second sentence. The board found the "courtesy" rule unlawful because employees could reasonably construe the prohibition against "disrespectful" conduct and "language which injures the image or reputation of the Dealership" to include Section 7 activity, *i.e.,* employees' protected statements to coworkers, supervisors, managers or third parties which object to working conditions and seek help in improving those conditions. The board took issue with the fact that the handbook contained no specific language informing employees that statements protected under Section 7 were not prohibited. Additionally, employees would reasonably assume that "statements of protest or criticism" were prohibited by the rule.

Along with various ALJ decisions striking down policies as chilling protected rights, general counsel for the NLRB issued Memorandum OM 12-59 on May 30, 2012, the board's third set of guidance for employers on this topic. In this memorandum, the board's general counsel found a number of the company's current policies to be unlawful, and advised that an employer cannot prohibit "inappropriate postings" or "inappropriate comments" if the terms are not defined by the policy. However, Wal-Mart, which adopted a revised policy after a claimant filed suit, apparently got it right. Although Wal-Mart's policy contained some broad language, the report noted that "it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity." For instance, part of the two-page policy forbids "inappropriate postings," including "discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct." Although the policy has a fair and courteous provision, it goes on to state that employees "are more likely" to resolve workplace disputes by using the company's open-door policy or speaking directly to co-workers rather "than by posting complaints to a social media outlet."

Conclusion

Although policies may appear vulnerable and subject to challenge by the NLRB, employers should adopt social media policies and enforce them consistently. Employers should avoid the use of ambiguous and overbroad language, and should instead adopt rules that restrict the scope of the policy and provide specific examples of prohibited conduct. An employer should not adopt a blanket rule in an attempt to control the tone or content of a communication, but an employer may prohibit statements that are harassing, discriminatory, false or defamatory, and can further prohibit the disclosure of confidential or proprietary information, within limits.[3] After the recent NLRB decisions, it is also a good practice to specifically set forth that Section 7 activity is not prohibited by the policy. Keep in mind, however, that ALJs have issued inconsistent decisions, and the federal appellate courts have not yet opined on the issue.

Two hot topics for the NLRB this year have been protected activity on Facebook and related sites and social media policies. Attorneys should stay informed of any decisions from the NLRB and, moreover, any decisions that go beyond the NLRB to federal court, which undoubtedly, a number of employers are awaiting.[4]

FOOTNOTES

1. Facebook has more than 650 million active users. *www.facebook.com.*

2. *www.nlrb.gov/cases-decisions/case-decisions/administrative-law-judge-decisions.*

3. In a recent NLRB decision involving Quicken Loans, Inc.'s policy for its mortgage bankers, the board struck down provisions on "confidential information" and a non-disparagement clause as being in violation of Section 7. Case No. 28-CA-075857 (June 21, 2013). The definition of "confidential information" included "all personnel lists, personal information of co-workers" . . . "personnel information such as home phone numbers, cell phone numbers, addresses and email addresses," which the board found would violate the employees' rights to communicate with each other about wages and other issues. The standard non-disparagement clause was struck down because "[w]ithin certain limits, employees are allowed to criticize their employer," and such a clause could be seen as prohibiting lawful conduct.

4. On Jan. 25, 2013, the D.C. Circuit issued a panel decision ruling that the NLRB was without authority to issue decisions because President Obama's "recess appointment" of three board members in January 2012 was unconstitutional. The board has issued about 200 decisions since that time, including the ones at issue in this article, but it is unclear at this time whether this decision will be reviewed by the full D.C. Circuit or the Supreme Court.

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