Insights, News & Events

A PICTURE IS WORTH 1,000 WORDS – AND FACEBOOK UPS THAT ANTE

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In the last edition of Dealership Update, we talked about the potential problems that a dealership faces when it reacts to an employee's Facebook postings.

In this issue, we want to alert you to an actual case involving a dealership that was recently decided by one of the National Labor Relations Board's Administrative Law Judges (ALJ). The case illustrates just how important it is for managers to be aware of the law as it continues to develop in this area.

THE CASE

A BMW dealership planned an "Ultimate Driving Event" to introduce the redesigned BMW Series 5 and invited its customers to come and test drive the car. The dealership also decided to serve hot dogs, chips and cookies. When the plans for the event were announced to the sales staff, a few sales people responded that they did not think hot dogs were appropriate for a BMW dealership. The General Sales Manager explained that it was not "a food event." After the meeting, a number of sales people continued to discuss among themselves what they felt was a bad decision because, as one salesperson later explained, it "was absolutely not up to par with the image of the [BMW] brand, the ultimate driving machine, a luxury brand."

On the day of the Event, one salesperson, an amateur photographer, took a series of pictures of the hot dogs, the person serving the hot dogs, and his coworkers holding hot dogs and told his coworkers that he was going to post them on his Facebook page.

About five days later, there was an incident at the Land Rover dealership next door, which was part of the same automotive group. A salesperson, sitting in the passenger seat, had allowed a customer's 13-year-old son to sit in the driver's seat. For some unknown reason, the car lurched forward, drove over the customer's foot, rolled down a small hill and into a pond. The BMW employee walked next door and took a series of pictures of the car, the customer and the Land Rover salesperson. Later that day, he posted pictures of the hot dogs on his Facebook page. He wrote:

> I was happy to see that [the Dealership] went "All Out" for the most important launch of a new BMW in years...the new 5 series. .. The small 8 oz bags of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch...but to top it all off...the Hot Dog Cart. Where our clients could attain a over cooked wiener and a stale bun....
>
> No, that's not champagne or wine, it's 8 oz. water. Pop or soda would be out of the question. In this photo, [a coworker] is seen coveting the rare vintages of water that were available for our guests.

Along with the hot dog posting were pictures of the Land Rover accident and further snarky comments. One picture showed the Land Rover with its front end in the pond and the salesperson with a blanket wrapped around her. The comment read:

> This is what happened when a salesperson sitting in the front passenger seat (Former Salesperson actually) allows a 13 year old boy to get behind the wheel of a 6000 lb. truck built and designed to pretty much drive over anything. The kid drives

over his father's foot and into the pond in all about 4 seconds and destroys a $50,000 truck.

There was also a picture of the 13-year-old himself with additional comments. A number of the salesperson's coworkers responded to the pictures and comments with their own comments.

The dealership's management learned of the postings and the General Sales Manager asked him to take them down, which he did. The next day, the dealership's General Manager met with the salesperson, showed him the pictures and comments that they had printed off his Facebook page and asked "What were you thinking?" The salesperson responded: "It's none of your business." The GM responded that he had been receiving calls from other dealers and that the salesperson had thoroughly embarrassed all management and all of his coworkers and everyone who works at BMW. They sent the salesperson home and later terminated him.

Even though the salesperson was not in a union, he went to the National Labor Relations Board and filed an unfair labor practice charge, alleging that he had been terminated in violation of the National Labor Relations Act (NLRA) for engaging in "protected, concerted activity." The NLRB made an initial investigation and issued a Complaint. The Hearing was held in July 2011.

THE HEARING

The issue to be decided at the Hearing was whether or not the salesperson was terminated for engaging in "protected, concerted activity." Under the NLRA, an employee – even a non-union employee – who engages in "protected concerted activity" cannot be punished or terminated. Traditionally, "concerted activity" is any activity where employees object to their "wages, hours or working conditions." It can include individual activity where "the employee seeks to initiate or induce or to prepare for group action, as well as where the employee individually seeks to bring truly group complaints to the attention of management." According to the NLRB, such activity is "protected" so long as the activity is conducted in a reasonable manner and does not overtly disparage the company.

The ALJ first found that the posting of the hot dog pictures and related comments was "concerted activity" because two or more sales people shared the belief that serving hot dogs was inappropriate and because, at the hearing, the salesperson testified that they were truly concerned that serving hot dogs at the event might damage the image of their brand and that might result in lower sales commissions. The ALJ went along with this, reasoning that "there may have been some customers who were turned off by the food offerings at the event and either did not purchase a car because of it, or gave the salesperson a lower rating in the Customer Satisfaction

Rating because of it; *not likely, but possible*." Thus, the ALJ determined that the posting was "protected" even though there was absolutely no evidence to show that it would impact their commissions or that it was even likely to affect their commissions. The mere possibility that it *might* was sufficient to make it concerted activity.

The ALJ went on to determine that the posting did not rise to the level of disparagement necessary to deprive otherwise protected activities of the protection of the Act. The Judge found that although the comments accompanying the posting were "mocking and sarcastic, that did not take them outside the protection of the Act. In support of his position, the ALJ cited past NLRB cases holding that comments referring to supervisors as "a-holes" and calling a company's CEO a "cheap son of a bitch" did not exceed the "permissible bounds" and were entitled to protection.

The ALJ went on to make the same "protected concerted activity" analysis for the Land Rover pictures and comments. He concluded that these postings were neither concerted nor protected. He found that the salesperson had posted them as a lark, without discussing them with coworkers, and that they had nothing to do with his "wages, hours or working conditions."

Having determined that some of the postings were protected concerted activity and some were not, the ALJ, next had to determine exactly why the salesperson was terminated. If he was terminated for the hot dog posting, that would be a violation of the law and the employer would be required to immediately reinstate the salesperson, pay him more than a year's back pay and post a notice admitting its violation of the law. On the other hand, if he was fired solely because of the Land Rover posting, then his termination was proper.

The ALJ considered the testimony of the salesperson and the dealership's managers and concluded that he was terminated solely for the unprotected Land Rover posting. The salesman testified that at his meeting with management, they were angry and did not distinguish between the two postings. The managers testified that even though the two postings were made at the same time, the Land Rover posting upset them the most because it was a dangerous situation which occurred on their premises and he had made light of it.

As for the hot dog posting, they testified they considered his posting comical and that they laughed about it. They all testified that the Land Rover posting was the sole reason for the termination. The ALJ found their testimony to be credible and concluded that the salesperson had not been terminated improperly.

WHAT LESSONS CAN WE LEARN FROM THIS CASE?

First, taking any form of disciplinary action because of an employee's Facebook postings can have very serious consequences.

Second, the NLRB can get involved in your business even if your employees are not represented by a union, have never had a union, and do not want a union. If two disgruntled employees act together by talking in the break room or posting on each other's Facebook page, their activity may be protected.

Third, dealership managers may have to develop thicker skins. This case says that it is perfectly lawful for an employee to publicly criticize or embarrass managers or their employer if it is somehow related to their work.

Fourth, in the NLRB's eyes, any commission-paid employee is free to publicly criticize management's business decisions with "mocking and sarcastic" postings if there is even a remote possibility that the decision will impact their compensation.

Fifth, this dealership's managers were well-versed in the law or received good advice before they made the decision to take any disciplinary action. The case turned on which of the two postings prompted the termination. While no doubt both were irritating to the dealership's managers, they were wise enough to put their emotions aside and make a proper analysis of what happened before they acted.

Every dealer and every General Manager should read the entire ALJ Decision in this case because it provides an excellent insight into how the NLRB analyzes these kinds of cases. If you would like a copy, please contact the author of this article and he will e-mail you a copy.

For more information, or if you would like to read a copy of the entire decision, contact the author at jdonovan@laborlawyers.com or (404) 231-1400.