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Another Foul on Social Media Policies as Judge Rules Policy Too Ambiguous

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On April 19, 2013, an administrative law judge (ALJ) struck down an employer's policies concerning employees' use of non-work email and media as violating Sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA). While the ruling remains non-binding unless, and until, the NLRB formally adopts it, this ruling reflects a growing trend by such judges to find otherwise mundane employee use of social media to constitute protected concerted activity.

The employer, UPMC, operates a number of hospitals in Pennsylvania. Following charges of unfair labor practices brought by a local union, the government brought suit alleging that three of UPMC's email and social media policies violated the NLRA because they were impermissibly broad and ambiguous.

Specifically, UPMC's email policy allowed employees to use email for non-work purposes, but included certain prohibited uses, including e-mails that "may be disruptive, offensive to others, or harmful to morale" or emails "soliciting employees to support any union or organization, unless sanctioned by UPMC executive management."

The judge struck down this policy for two reasons. First, he ruled that the employer did not precisely define the types of communications barred. For that reason, he expressed concern that employees might reasonably interpret the policy as prohibiting "expression of certain protected viewpoints." Second, the judge held that the employer's efforts to bar solicitation for certain groups or organizations while allowing solicitation for other groups or organizations approved by management as "antithetical to Section 7 activity."

Similarly, UPMC's Acceptable Use policy provided that company computers, email, servers and network could only be used to support work-related and authorized activities. It prohibited employees from engaging in a range of inconsistent uses, including "independently" establishing or participating in Facebook or other social media accounts without prior consent, and it prohibited employees from describing any affiliation with UPMC and using UPMC's logos or other copyrighted or trademarked materials. The policy contained a "significant carve-out" for "de minimis personal use" by employees that did not affect job performance.

Once again, the judge concluded that the employer's Acceptable Use policy established "overly broad and vague restrictions" on the use of IT resources. For example, UPMC broadly prohibited employees from "describing any affiliation with UPMC," which would bar employees from describing where they work and might otherwise interfere with their Section 7 rights to complain about their working conditions.

Interestingly, the judge rejected UPMC's effort to prohibit its employees from using the company's logos on social media sites. While acknowledging that employers have a right to prohibit trademark and copyright infringement, he insisted that "[e]mployees have a Section 7 right to display a [company] logo as part of their Section 7 communications." Thus, the UPMC ruling continues a string of successive ALJ decisions that allow employees to include company logos on their private, non-work posts.

This opinion reinforces the advice that Baker Donelson attorneys have been providing their clients for years that employers should carefully construct social media policies to avoid these pitfalls. The best examples of these policies often provide examples or guidance to assist employees in interpreting its policies and ward off

overly broad government interpretations. If you have questions about social media policies, please contact any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.