WARD AND SMITH, P.A.
ATTORNEYS AT LAW

'#YOUSHOULDSUE' The Danger of Firing an Employee who has Called-Out the Company in Social Media

Written By **Grant B. Osborne** (gbo@wardandsmith.com)
October 11, 2013

Employers may like to believe that they are free to discharge an employee who, via Facebook, has encouraged a former co-worker to hire a lawyer and sue the employer. Why in the world, you might ask, would an employer have to tolerate an effort by one of its trusted employees (who, under North Carolina law, has a "duty of loyalty" to the employer) to incite expensive and potentially embarrassing legal action against the employer? The truth, however, is that federal labor law, in effect, prohibits employers that are subject to the National Labor Relations Act (the "NLRA" or the "Act"), **regardless of whether a labor union is in the picture**, from retaliating against an employee because the employee engaged in "protected concerted activity." Such activity, as illustrated by a recent decision of an administrative law judge ("ALJ"), can include merely encouraging a former fellow employee to file suit.

The decision was issued by an ALJ of the National Labor Relations Board (the "NLRB" or the "Board") on September 4, 2013, in Butler Medical Transport, LLC. Butler Medical Transport, LLC ("Butler Medical" or the "Company") was ordered, in part, to reinstate an employee whom it had fired because the employee had encouraged another former employee to obtain legal counsel and consider contacting the "Labor Board."

The facts of the decision are involved but worth the trouble. The claimant in question, William Norvell, worked as an emergency medical technician for the Company, which is in the business of providing ambulance transport to hospital patients. He was acquainted with another Company employee, Chelsea Zalewski, who had recently been fired by Butler Medical. A dialogue between Norvell and Zalewski ensued on (naturally) Zalewski's Facebook page. Norvell, upon hearing that Zalewski had been fired (apparently because she had allegedly told a patient that the Company failed to maintain its vehicles), posted on Ms. Zalewski's Facebook page: **"Sorry to hear that[,] but if you want you may think about getting a lawyer and taking them to court."** Norvell also suggested to Zalewski that, **"you could contact the labor board too."**

Butler Medical's Human Resources Director and Chief Operating Officer got wind of Norvell's suggestions, on the basis of which they (just as naturally) decided to terminate his employment. The HR Director told Norvell that he had violated a written rule that required employees to "refrain from using social networking sites [that] … could discredit Butler Medical Transport or [damage] its image." The Company also had an employee handbook that prohibited "unauthorized posting or distribution of papers." The HR Director and the Chief Operating Officer did not give Norvell "any reason for his termination other than his … Facebook posts."

Norvell filed an "unfair labor practice" ("ULP") charge with the NLRB, which, after a hearing, resulted in the ALJ's decision. The ALJ determined that "Norvell's Facebook posts must be considered in the context in which they were made. He was advising Zalewski, a fellow employee, to obtain an attorney and/or contact the Labor Board." Norvell had done so when "responding to a post in which Zalewski stated [that] she had been terminated for commenting to a patient about the condition" of Butler Medical's vehicles. "By advising Zalewski to obtain legal counsel or contact the Labor Board," the ALJ determined that "Norvell was making common cause with Zalewski regarding a matter of concern to more than one employee," and that Norvell's Facebook post was therefore "protected" by law.

What law is that? That would be the NLRA, which, according to the NLRB's website, "covers the great majority of non-government employers with a workplace in the United States, including non-profits, employee-owned businesses, labor organizations, non-union businesses, and businesses in states with 'right to work' laws" (such as North Carolina). (The NLRB's jurisdiction is beyond the scope of this article, but, generally, the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level, and, according to the NLRB, "[e]mployees at union and non-union workplaces have the right to help each other by sharing information, signing petitions, and seeking to improve wages and working conditions in a variety of ways.")

Section 7 of the Act provides in part that "[e]mployees shall have the right to self organization … and to engage in other concerted activities for the purpose of … mutual aid or protection." According to the ALJ, the "protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship … . Thus, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute." As a result, that Norvell's "posts were accessible to customers or others outside of Butler Medical" was no defense to his ULP charge. The ALJ determined, based on "long-standing Board precedent," that the employee's Facebook posts were protected by Section 7 and that the Company therefore "violated the Act in terminating him for making these posts." The ALJ also noted that the handbook provision that prohibited "unauthorized posting or distribution of papers" and the employee's promise that, "I will refrain from using social networking sites [that] … could discredit" the Company or damage "its image" violated the Act because they could be construed "to prohibit posting and distribution of papers regarding wages, hours and other working conditions."

The Company, as a result of its unlawful termination of Norvell's employment, was ordered to "offer him reinstatement and make him whole for any loss of earnings and other benefits," which included many months of back pay with interest. The Company was also ordered to post a humbling notice "in conspicuous places" and provide the notice "electronically, such as by e-mail … if the [employer] customarily communicates with its employees by such means," indicating that the "National Labor Relations Board has found that we violated Federal Labor Law."

Butler Medical demonstrates that a personnel policy that prohibits employees "from using social networking sites" in a way that "could discredit" the employer or "damage its image" can easily be found to have violated the NLRA. It also shows that an employer may be held to have violated the Act if it fires an employee merely because he or she, in an effort to make "common cause" with other employees regarding matters of common concern, encourages another employee on a social networking (which is to say public) website to bring legal action against the employer. Personnel policies addressing employees' use of social media sites, and personnel decisions based on violations of such policies, can be lawful. The Butler Medical decision, however, illustrates that employers must be careful when issuing such policies and deciding whether to fire an employee who has violated them. Butler Medical Transport now knows all too well that a poorly considered decision can prove expensive and result in the "posting" of the employer's name in the permanent, and very public, records of the National Labor Relations Board.

--