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Testing The Limits Of Protected Activity

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Last October, the National Labor Relations Board issued a complaint against American Medical Response of Connecticut Inc., alleging that an ambulance service illegally terminated an employee who posted negative remarks about her supervisor on her personal Facebook page.

This complaint is unique: It represents the first time the board has argued that workers' criticisms of their companies or bosses on a social media site is considered a protected activity. And given the explosion in the number of Americans using social media on a daily basis, it will certainly not be the last.

The facts before the board are straightforward: Dawnmarie Souza, an employee of American Medical Response of Connecticut (AMR), was asked by her supervisor to write a response to a customer's complaint. In turn, Souza asked her supervisor to allow a representative from her union, Teamster's Local 443, to help prepare a written incident report. Much to Souza's displeasure, her supervisor denied her request.

Later that afternoon, Souza, using her home computer and home network, signed onto her Facebook account and proceeded to vent. Specifically, she noted that she "love[s] how the company allows a 17 [the company's term for a psychiatric patient] to be a supervisor," before pronouncing the same supervisor to be a "dick," and a "scumbag."

Souza's actions violated AMR's blogging and Internet posting policy, and, as a result, was fired.

The Investigation

According to an NLRB investigation, not only do Souza's Facebook postings constitute "protected concerted activity," but AMR's blogging and Internet posting policy contain unlawful provisions, including the one that "prohibited employees from making disparaging remarks when discussing the company or supervisors and… depicting the company in anyway over the Internet without company permission."

In addition to the social media-related component of the complaint, the board also charged that, by refusing Souza's request for union representation, AMR violated the National Labor Relations Act.

Despite the hype surrounding this complaint, the two primary issues—at least as it relates to social media—are rather straightforward: 1) Do Souza's Facebook postings constitute the type of "concerted activities" protected by Section 7 of the National Labor Relations Act; and 2) Does AMR's blogging and Internet posting policy contain "overly broad," and therefore unlawful, provisions in violation of the act.

Griping

Section 7 of the National Labor Relations Act provides that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."


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As noted in the 1978 Supreme Court case *Eastex v.NLRB*, "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity." Such activity, the Court held, "cannot fairly be deemed to come within the 'mutual aid or protection' clause."

The question, therefore, is what sort of activity should be excluded from Section 7 protection? Although the NLRB has offered several answers to this question, the most relevant exclusion noted in prior cases seems to be when an employee is merely "griping." For example, in *Diva Ltd.*, 325 NLRB 822, 830 (1998), the board held that an individual employee's activities are concerted when "they grew out of prior group activity; when the employee acts, formally or informally, on behalf of the group; or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected." Indeed, the board has long held that "for conversations between employees to be found protected concerted activity, they must look toward group action and mere 'griping' is not permitted."

It would be a rather imaginative seman-

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tic stretch to argue that by denouncing her supervisor as a psychopath, a "dick," and a "scumbag," Souza was somehow acting on behalf of a group—particularly given the fact that there was no further discussion on her Facebook page about taking any sort of group action. Indeed, Souza's comments, posted initially in the personal "status" section of her Facebook page, seem to be the very definition of "griping."

The board's charge against AMR's Internet and blogging policy is also curious, particularly in light of a December 2009 Advice Memorandum, in which NLRB associate general counsel considered whether Sears Holdings Corp.'s social media policy could reasonably be construed to chill Section 7 protected activity.

The policy promulgated by Sears, and approved by the board, barred discussion of, among other subjects, "disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects"—language that bears remarkable similarity to AMR's policy prohibiting employees from making "disparaging, discriminatory, or defamatory comments when discussing the company or the employee's superiors, co-workers, and/or competitors."

The logic applied in the memorandum is equally applicable to the instant scenario. When considering Sear's Internet policy, the associate general counsel noted that "the Board's exhortation against reading phrases in isolation prevents us from surgically excising one piece of the policy for close examination. While the ban on 'disparagement of company's…executive leadership, employees, [or] strategy…' could chill the exercise of Section 7 rights if read in isolation, the policy as a whole provides sufficient context to preclude a reasonable employee from construing the rule as a limit on Section 7 conduct." The memorandum also notes that, in Sear's policy (just as in AMR's policy) these prohibitions against disparagement come as part of a list of "plainly egregious conduct," and that, taken as a whole, "the policy contains sufficient examples and explanation of purpose for a reasonable employee to understand that it prohibits the online sharing of confidential intellectual property or egregiously inappropriate language and not Section 7 protected complaints about the employer or working conditions."

Steady Guidance Needed

Social media, and Facebook in particular, is currently one of the hottest topics in labor and employment law. And there is a temptation to try and match new technology and terminology with new laws and legal interpretation. Such a tactic, however, would be a mistake: existing National Labor Relations Board law can answer many of the questions that arise from employees' use of social media. Rather than rushing to provide new technology with new legal interpretations, the board should strive for consistency, offering steady guidance to employers working to integrate social media technology with their existing workplace policies. ■