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Facebook Firing? NLRB Complaint Alleges Employer Violated Employee's Rights

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The National Labor Relations Board's Hartford, Connecticut office recently issued an unfair labor practice complaint against an employer after the employer fired an employee who posted derogatory comments regarding her supervisor on the employee's personal Facebook page. (*American Med. Response of Conn.*, NLRB Reg. 34, No. 34-CA-12576, *complaint issued* 10/27/10). In his Complaint, Acting Region 34 Director John S. Cotter claims that the employee's Facebook comments were protected speech under federal labor laws.

The employer, American Medical Response of Connecticut, asked medical technician Dawnmarie Souza to prepare an investigative report after several patients complained about her work. Ms. Souza was upset by this request, and, from her home computer, logged on to her personal Facebook page and posted: "Looks like I'm getting some time off. Love how the company allows a 17 to be a supervisor," referring to the company's code for a psychiatric patient. Ms. Souza also called her supervisor two expletives. Ms. Souza's posts drew favorable comments on Facebook from her work colleagues. Shortly after she posted her comments, Ms. Souza's employment was terminated. The company claims that her termination was due to patient complaints, not Ms. Souza's Facebook postings.

Mr. Cotter's Complaint alleges that the company violated Section 8(a)(1) of the National Labor Relations Act by interfering with Ms. Souza's right to engage in "protected concerted activity." Federal law protects the right of all employees - regardless of union membership – to discuss the terms and conditions of their employment. This protected speech includes discussions with co-workers that are critical of management and individual supervisors. The Complaint claims that Ms. Souza's comments relating to her supervisor were protected speech relating to the conditions of her employment.

The Complaint also claims that the Company's "blogging and Internet posting policy" is overly broad. The policy prohibits employees from posting pictures of themselves that depict the Company without first obtaining permission, and prohibits employees from "making disparaging, discriminatory, or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors." According to the Complaint, American Medical Response also allegedly illegally denied Ms. Souza's request for union representation during an investigatory interview.

According to the Associated Press, the National Labor Relations Board's Acting General Counsel, Lafe Solomon, compared Ms. Souza's Facebook posts to discussions around "the water cooler," observing, "employees have protection under the law to talk to each other regarding conditions at work." Although this is the NLRB's first Complaint relating to Facebook comments, Mr. Solomon cautioned that he expects similar issues in the future.

The issuance of the Complaint is not a final determination by the NLRB, and the Complaint has been set for a hearing before an Administrative Law Judge in January 2011. **However, employers who are**

considering social media or internet policies should ensure that their policies do not have a chilling effect on employees' rights.

To determine whether a policy has a "chilling effect" on concerted activity, the NLRB examines:

1. whether the policy explicitly restricts protected activity;
2. whether, from the context of the policy, employees would reasonably construe the policy as prohibiting protected activity;
3. whether the policy has been used to discipline employees who have engaged in protected activity; and
4. whether the policy was promulgated in response to concerted or protected activity.

For example, in a December, 2009 Memorandum, the NLRB's Office of General Counsel examined Sears Holdings' social media policy, which prohibited the "disparagement of [the] company's or competitors' products, services, executive leadership, employees, strategy, and business prospects." In its non-binding Memorandum, the General Counsel concluded that this policy, when read as a whole, did not have a chilling effect on concerted activity because:

1. the policy's prohibition against disparaging the company was placed in the context of other provisions that did not violate employee rights;
2. the employer had not used the policy to discipline any employee for engaging in protected activity; and
3. the policy was not promulgated in response to concerted or union activity.

Employers should avoid enacting policies that broadly ban employee discussions relating to the company. Instead, employers should ensure that that any restrictions on employee communications are limited and narrowly tailored to legitimate, business-related areas, such as restricting communications that may violate the company's discrimination and harassment policies, confidentiality policies, patient privacy policies, or trade secret and intellectual property policies.