News & Publications

Settlement in NLRB Facebook Case Sends a Message

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In our article "Damned if You Do, Damned if You Don't," which appeared in the winter edition of the *New Jersey Labor and Employment Law Quarterly*, we reported on a pending unfair labor practice complaint that was filed by the National Labor Relations Board's (NLRB) Hartford, Connecticut, office against American Medical Response of Connecticut Inc. (AMR). There, the NLRB alleged that AMR unlawfully: 1) promulgated and implemented a social media policy, and 2) terminated employee Dawnmarie Souza for insulting her supervisor on Facebook and inciting responses from other employees. The NLRB brought this complaint to enforce Souza's rights under the National Labor Relations Act (NLRA) to discuss her terms and conditions of employment with co-workers and others.

However, before the NLRB could fully adjudicate this matter, the parties reached a settlement on Feb. 7, 2011, (while publication of the winter issue of the *Quarterly* was pending).

In reaching this settlement, AMR agreed to revise its "overly-broad" Internet policy to ensure that it does not restrict employees from engaging in concerted

activity in violation of Section 7 [1] of the NLRA outside the workplace. Specifically, AMR agreed to remove from its employee handbook a blogging and Internet posting policy that improperly restricted its employee's rights to engage in union activities or to discuss their wages, hours, and working conditions with fellow employees.[2] It also agreed to refrain from disciplining employees for participating in concerted discussions, and pledged it would no longer deny employees' requests for union representation or threaten to discipline for such requests.[3] Finally, the allegations regarding Souza's discharge and request for back pay were resolved through a separate, undisclosed, private agreement between Souza and AMR.

Based on the foregoing, the NLRB sent a clear message to all employers that it will prosecute companies that attempt to stifle employees from communicating about their conditions of employment with their co-workers, regardless of the location or forum. As such, employers are clearly on notice that whether their employees are discussing their conditions of employment in the lunch room, by a water cooler or on a social media site, employees may be engaging in protected activities for which there can be no interference.

The NLRB stated that: "[t]he fact that they [AMR] agreed to revise their rules so that they're not so overly restrictive of the rights of employees to discuss their terms and conditions with others and with their fellow employees is the most significant thing" that came out of the settlement.[4] Accordingly, going forward businesses should carefully review their employee handbooks and social media policies to ensure they:

1. Define what "social media usage" is and what activities are subject to the social media policy.

2. Include a disclaimer that the policy is not intended to interfere with or restrict employees' Section 7 or any other rights under the NLRA.

3. Ensure social media policies do not prohibit or deter non-supervisory employees from engaging in concerted activities under the NLRA (e.g.,

discussing wages, workplace safety or other terms and conditions of employment with fellow employees).

4. Inform employees that all other company rules of conduct apply to their use of social media including: antidiscrimination and harassment policies, computer-technology use policies; public relations policies; wage and hour policies; and conflicts of interest and code of conduct policies.

Additionally, prior to taking any disciplinary action against an employee for violating a company's policy, the business should carefully investigate the facts to ensure the conduct does not involve "concerted activity" or was not engaged in "for the mutual aid and protection" of employees pursuant to the NLRA unless it is so egregious that it qualifies for the "disloyalty exception," in which case the employer may still discipline the employee.[5] By taking the foregoing steps, employers should be able to avoid that damned if you do, damned if you don't feeling when implementing and enforcing social media policies.

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1. 29 U.S.C. § 157

2. Press Release, National Labor Relations Board Office of the general Counsel, Settlement Reached In Case Involving Discharge For Facebook Comments (Feb. 7, 2011).

3. *Id.*

4. Sam Hananel, Associated Press, NLRB Settles Case Involving Employee's Facebook Posting, *Connecticut Law Tribune,* Feb. 14, 2011