Employers should not concede defeat to Facebook just yet

On Feb. 7, 2011, the National Labor Relations Board (NLRB) announced a settlement in *American Medical Response of Connecticut, Inc.*, commonly referred to in the media as the "Facebook firing" case. In their haste to report on this case, some commentators have simply concluded that the NLRB has given carte blanche to employees to ignore their employer's Internet policies and "bad mouth" their employers and bosses online through social networking websites. However, a closer look shows that the ramifications of this case may not be as far-reaching as has been reported.

The facts leading up to this case are as follows. According to the NLRB complaint, on Nov. 8, 2009, Dawnmarie Souza, the employee at the center of this case, requested union representation for an investigatory interview. She was to prepare a written incident report that she believed would result in disciplinary action against her. She claims she was denied union representation at the interview and was required to complete the incident report. The complaint alleges that because of her request for union representation, Souza was threatened with discipline by her supervisor and the company's general manager. Later that day she logged onto her Facebook page from a home computer and wrote "Looks like I'm getting time off. Love how the company allows a 17 to be a supervisor." A 17 is code the company uses to refer to a psychiatric patient. Souza also used two expletives to describe her supervisor. Other co-workers joined in the discussion and Souza continued to reply with negative remarks.

On Dec. 1, 2009, Souza was terminated from her job. According to the employer, she was terminated based on two separate complaints about her "rude and discourteous service" within a 10-day period and not because of her Facebook postings. However, the NLRB determined that there were factual matters to be decided at a hearing and issued a complaint. In its complaint, the NLRB essentially alleged that spontaneous use of Facebook constitutes protected concerted activity under the National Labor Relations Act, which gives workers the right to form unions and prohibits employers from taking action against employees—union or non-union—for discussing workplace conditions. The NLRB also took aim at policies found in the employee handbook that prohibited employees from depicting the company in any way over the Internet without permission and from making any disparaging remarks against the company or its supervisors.[1] The NLRB alleged that these provisions were overly broad and unlawful. In its press release on the settlement of the case the NLRB stated:

> Under the terms of the settlement approved today by Hartford Regional Director Jonathan Kreisberg, the company agreed to revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions.
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> The company also promised that employee requests for union representation will not be denied in the future and that employees will not be threatened with discipline for requesting union representation. The allegations involving the employee's discharge were resolved through a separate, private agreement between the employee and the company.[2]

Given the facts of this case, it is too early for employers to throw up their arms in defeat and concede all of their rights to their employees' use of the Internet. As discussed above, this case begins with a union employee's belief that her employer denied her union representation during what she believed to be a disciplinary meeting. This is not the case where an employee has a bad day at work and decides to go home and start making personal attacks against her supervisor on her Facebook page. Such actions likely are still unprotected. In an advice memo issued by the NLRB Division of Advice just over a year ago, it stated that an employer's social media policy could not "reasonably be interpreted to prohibit Section 7 protected activity" under the NLRA, where it prohibited "[d]isparagement of company's … executive leadership [or] employees" and was listed along with "plainly egregious conduct, such as employee conversations involving the employer's proprietary information, explicit sexual references, disparagement of race or religion, obscenity or profanity, and references to illegal drugs."[3] The NLRB Division of Advice determined that, listed in context with such other egregious conduct, this policy could not be reasonably construed to prohibit Section 7 activities and, therefore, that it lawfully protected complaints about the employer or working conditions.

Moreover, unlike the policy reviewed in the advice memo, the policies at issue in the *American Medical Response* case are isolated and not in the context of other prohibited and egregious conduct.

Until a similar case is heard and decided by the NLRB, there will be some ambiguity as to how the board may rule regarding an employer's Internet policy. However, given the very specific facts of the American Medical Response case and the NLRB's advice memo issued on Dec. 4, 2009, it is reasonable to believe that the NLRB will continue to uphold carefully written Internet policies that prohibit egregious conduct while legitimately protecting the Section 7 activities of employees. ◆

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The opinions and advice set forth in this article represent the author's individual analysis and should not be considered as the opinion of the Ohio Attorney General's Office. This article does not constitute legal advice or create any attorney-client relationship, and parties should always consult their own attorneys.

Endnotes

[1] Specifically, the policies at issue read:

(a) Blogging and Internet Posting Policy

- Employees are prohibited from posting pictures of themselves in any media, including, but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee received written approval from the EMSC Vice President of Corporate Communications in advance of the posting;
- Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

(b) Standards of Conduct [prohibiting the following conduct]

- Rude or discourteous behavior to a client or coworker.
- Use of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature.

[2] The allegations regarding Souza's termination were resolved in a separate agreement. The details have not been disclosed.

[3] NLRB OGC Advice memo, Case 18-CA-19081 (Dec. 4, 2009).