Hot Issues Alerts (p. 6) • India (p. 31) • China (p. 35)

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NLRB "De-Friends" Employers In Its First Complaint Based On Employee's Social Network Comments

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The Acting General Counsel of the National Labor Relations Board has issued a complaint alleging that an employee was unlawfully terminated for posting negative comments about her supervisor on a personal Facebook page. The complaint asserts that comments made by an employee on the world's most popular social networking site are "protected, concerted activity" under the National Labor Relations Act (the "Act").

Background

An employee of American Medical Response of Connecticut was asked to respond to a customer complaint about her performance. The employee, upset, posted a comment on her Facebook page referring to her supervisor as a "17," which is company parlance for a mental patient. This remark in turn prompted other employees to comment about the supervisor. The employee in question then posted further negative remarks about the supervisor.

Upon learning of the employee's Facebook comments, the employer terminated the employee for violating its blogging and internet policy, which broadly prohibits making disparaging, discriminatory or defamatory comments when discussing the company or the employee's superiors, coworkers and/or competitor and which prohibited depicting the company in any way over the internet without company permission.

The complaint alleges both that the discharge violates the Act and, *separately*, that the company's policies, standing alone and irrespective of the discharge, interfere with its employees' exercise of their right to engage in protected concerted activity.

The Legal Landscape

The National Labor Relations Board (the "NLRB") has held for many years that critical statements about management can be "protected concerted activity" and policies that can be read to preclude protected activity, including making negative comments about management, have an unlawful chilling effect on employee rights. Over the years, in cases unrelated to online social networks, the Board has held that:

- It is unlawful to discipline employees for making negative comments about working conditions, including comments about supervisors. *Mountain Shadows Gold Resort*, 330 NLRB 1238 (2000).
- It is also a violation of the Act to issue and maintain general policies that broadly restrict such discussions. *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005).
- These legal protections apply whether or not employees are represented by a union. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *see Ferguson Enterprises*, 355 NLRB 189 (2010).
- For an employee's activity (including negative comments) to be protected, it must be "concerted," i.e., undertaken by or on behalf of a group, and discussions between or among employees must be "a logical outgrowth" of group action or collective goals. *Every Woman's Place*, 282 NLRB 413 (1986).
- Conduct that may look to be an individual action by a single employee, can in fact be concerted activity if the goal is to enlist the support of other employees and encourage them to engage in group action. *Benjamin Franklin Plumbing*, 352 NLRB 525 (2008).
- An individual's statements can lose protection if they go too far. *Piper Realty Co.*, 313 NLRB 1289 (1994). The NLRB has found that "insulting, obscene personal attacks" against a supervisor are not protected concerted activity. *Caterpillar Tractor Co.*, 276 NLRB 1323, 1326 (1985).
- General policies prohibiting employees from engaging in negative conversations about management violate the law because they discourage, or "chill," employees from engaging in protected concerted activity. *Claremont Resort and Spa*, 344 NLRB 832 (2005).

The NLRB is just starting to grapple with the application of these rules to social media. Last year, the NLRB General Counsel refused to issue a complaint based on Sears Holdings Social Media Policy, finding it did not violate the Act because the policy could not reasonably be read in a way to "chill" Section 7 rights. GC Advice Memorandum, *Sears Holdings*, 18-CA-19081 (December 4, 2009). The policy expressly prohibited employees from disparaging the "company's or competitor's products, services, executive leadership, employees, strategy and business prospects" in any form of social media and included a specific list of proscribed activities, such as employee conversations involving Sears' proprietary information and explicit sexual references, which were clearly not protected under Section 7. *Id.* Explaining that statements purporting to limit employee speech must be read in the context of the whole policy, the Advice Memorandum concluded that an employee would not reasonably construe Sears' policy to limit Section 7 rights. *See also Tradesmen International*, 338 NLRB 460 (2002) (the NLRB found a policy prohibiting employees from making "statements detrimental to the employer or its employees" to be legal because it provided specific examples of prohibited conduct which were not protected under the Act).

What This Means For Employers

Based on current law, the Board's Acting General Counsel has alleged the employer's policies to be overly broad. Regardless of the platform being regulated by the policy – public speeches, letters to the editor, or social media sites – the NLRB has a long history of protecting employees from being intimidated or otherwise dissuaded from engaging in concerted activity.

It is significant that the rules applied by the Acting General Counsel in this case were not developed in the context of modern social media communications. The Acting General Counsel has been quoted as saying that such statements are no different than conversations around the water cooler. But this is not the case. Comments on a social network can be broadcast to hundreds or thousands of persons with a few keystrokes and the click of a mouse. The real significance of the NLRB's move is that negative employee remarks, once limited to a few individuals gathered around a water cooler, now seem to be given the same protection when they are disseminated to a vastly larger group, the overwhelming majority of whom undoubtedly are not employees of the employer. It will be up to the Board to determine the extent to which these old rules still make legal and policy sense when applied in the social networking environment.

A hearing on the matter is scheduled for January, 2011, and may take many months to resolve. Ultimately, the real question will be whether negative comments made on such a large scale, directed to a huge group of nonemployees, deserves protection of the Act.

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