



NLRB Approves Settlement of Facebook Case

Late last year, the NLRB charged an employer with unlawfully firing an employee for posting negative comments about her supervisor on her Facebook page. Although this closely watched case has recently settled, it provides some insight into the NLRB's current thinking on employers' social media and Internet use policies.

Background

Section 7 of the [National Labor Relations Act](#) (NLRA) guarantees most private sector employees the right to organize, to bargain collectively, and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Under Section 8(a)(1) of the NLRA, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of those rights. The National Labor Relations Board (NLRB) is charged with enforcing the NLRA and remedying unfair labor practices committed by private sector employers and unions.

In November 2009, American Medical Response (AMR) of Connecticut, an ambulance service, asked one of its employees (Dawnmarie Souza) to prepare an incident report addressing patient complaints about her work. When Souza asked for help from her union to complete the report, her supervisor denied the request and allegedly threatened her with disciplinary action for requesting union representation. After leaving work, Souza logged onto her Facebook page from her home computer and posted derogatory remarks about the supervisor. Several of her co-workers then posted their own negative comments about the supervisor on Souza's Facebook page, which led to additional postings by Souza. Three weeks later, AMR fired Souza.

NLRB Proceedings

Souza's union (International Brotherhood of Teamsters, Local 443) filed unfair labor practice charges with the NLRB relating to her discharge. The NLRB's investigation concluded that Souza was engaged in protected activity (discussing the terms and conditions of her employment) when she posted the comments about her supervisor and responded to co-workers' postings, and that AMR discharged Souza for her Facebook postings.

The NLRB also found that AMR had an overly restrictive blogging and Internet posting policy. Among other things, AMR's policy prohibited employees from making “disparaging, discriminatory or defamatory comments” about the company, its supervisors, co-workers or competitors and also from depicting the company in any way online without AMR's prior written approval. The NLRB viewed the online policy as overly broad, interfering with employees' exercise of their Section 7 rights on their own time.

BUCK COMMENT. *The NLRB has addressed this topic before, but reached a different conclusion. In a December 4, 2009 Advice Memorandum ([Case 18-CA-19081](#)), the NLRB's Office of the General Counsel said that Sears Holdings' policy which prohibited employees from using any social media to disparage the "company's ... executive leadership, employees, [or] strategy" did not interfere with their Section 7 rights.*

On October 27, 2010, the NLRB's regional office in Hartford, Connecticut issued an unfair labor practice [complaint](#) (No. 34-CA-12576) against AMR alleging that the company unlawfully terminated Souza for engaging in activity protected under the federal labor laws. The NLRB further alleged that AMR unlawfully denied union representation to Souza shortly before the Facebook postings, and that AMR's overly broad social media policy violated the NLRA. AMR claimed it fired her because of patient complaints it had received.

BUCK COMMENT. *As reported by [The New York Times](#), this was the first complaint issued by the NLRB arguing that employees' criticisms of their supervisors or employers on a social networking site are generally protected under the NLRA.*

The NLRB case was initially set for hearing on January 25, 2011, but was later postponed pending settlement discussions.

The Settlement

On February 7, 2011, the parties settled. In a [press release](#) issued on February 7, 2011, the NLRB announced that the company had agreed to revise "overly-broad" rules in its employee handbook on blogging, Internet posting, and communications between employees. According to the NLRB, the revisions are to ensure that AMR does not improperly restrict discussions concerning wages, hours, and working conditions between co-workers and others outside the workplace. AMR further agreed that it would not discipline or discharge employees for engaging in these discussions, deny employee requests for representation, or threaten disciplinary action for making such requests in the future. AMR reportedly reached a separate, private agreement with Souza.

BUCK COMMENT. *The same NLRB regional office that issued the complaint against AMR is investigating an [unfair labor practice charge](#) filed by the Connecticut State Employees Association, Local 2001, SEIU against Student Transportation of America (No. 34-CA-12906) for allegedly maintaining a social media policy that infringes on employees' Section 7 rights. If this case goes forward, it may provide much needed guidance on the permissible scope of social media policies.*

Conclusion

The NLRB's Facebook [page](#) notes that not all social media comments are protected under the NLRA. Although the AMR case provides some insight into the NLRB's current thinking on employers' social media and Internet use policies, it leaves unanswered questions about when employees' social media activity is protected or loses protection under the NLRA.

As the law in this area evolves, employers in both union and nonunion settings should periodically review and, if appropriate, revise their social media or other policies affecting employee speech. In view of the NLRB's recent enforcement activity, employers should exercise particular caution when crafting or enforcing policies that seek to restrict their employees' off-duty use of electronic communications and online social networks such as Facebook, MySpace, and Twitter.

Buck's consultants are available to discuss the impact of this case on your Internet and social media policies.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.