Demystifying the Facebook Firing Case

By Shaun C. Reid, Esq.

In In the matter of American Medical Response of Connecticut, Inc., (commonly referred to as the "Facebook firing" case), it was made clear that the National Labor Relations Board ("NLRB" or "Board") will seek to invalidate any employer social media policy that it deems unlawfully restricts employee rights under Section 7 of the NLRA. Section 7 rights are rights that, among other things, permit employees to discuss together their wages, terms and conditions of employment, otherwise known as the right to engage in protected concerted activity.

The limited facts that we know about the Facebook Firing case come from the NLRB's press releases, and from the Complaint filed by Acting Regional Director of the NLRB's Region 34. The employer in the case was American Medical Response of Connecticut ("AMR").

On November 8, 2009, AMR employee Dawnmarie Souza was asked by her supervisor to write up an incident report in response to a customer complaint about her. She asked for, and was denied, union representation to help her write the report. When she went home, she posted some strong language on her Facebook page, including that her boss was a "scumbag as usual" and basically called him a mental patient. She was suspended, and then three weeks later she was terminated for violating AMR's social media policy.

On January 19, 2010, Teamster Local 443 filed a charge with the NLRB against AMR, and amended the charge on April 30, 2010. On October 27, 2010, the NLRB issued a Complaint against AMR alleging that AMR terminated Spouza for her Facebook postings, her Union support, and to discourage other employees from engaging in concerted activity.

AMR's social media policy included the following language:

> *"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 receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;"*

And:

> *"Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors."*

On February 8, 2011, the NLRB announced that it settled the case. In announcing the settlement, the Board said that, as part of the settlement, "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".

On the one hand, this result was not terribly surprising since historically it has been said that "Federal law encourages vigorous debate and permits intemperate and abusive language during organization campaigns and other labor disputes." Davis Co. v. Furniture Workers, 109 LRRM 3192 (6th Cir. 1982). So, even in instances where the activity is arguably defamatory or damaging to a company's image or reputation, the Board will still hold that employee communications concerning conditions of employment are protected so long as they are not so disloyal, reckless, or maliciously false as to lose the Act's protection. Seen in this light, the Board's stated objections to the AMR policy language seem consistent.

On the other hand, what is somewhat unnerving about the case is the fact that the NLRB has approved similar policy language before. For instance, in Tradesman International, 338 NLRB No. 49 (2002), the Board found lawful language prohibiting "**Slanderous or detrimental statements**" towards the employer or any of its employees. Also, in Advice Memorandum Webvan Group, Inc., Case 32-CA-18695, dated July 16, 2001, the NLRB General Counsel's office found lawful policy language prohibiting "**rudeness, abusive, or inappropriate behavior or ... foul, profane, or abusive language.**"

More recently, in Advice Memorandum Cintas Corporation, Case 28-CA-18488, dated September 24, 2003, and Advice Memorandum Sears Holdings, Case 18-CA-19081, dated December 4, 2009, the General Counsel has found lawful language that prohibits "**Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects**" and policy language that prohibits communication intended to "**verbally abuse or otherwise use inappropriate, defamatory, vulgar or threatening language towards customers, vendors, other partners, or any other person or entity**".

Any attempt to reconcile these seemingly inconsistent results requires a look at the test the Board uses to evaluate the lawfulness of social media policies. The standard the Board uses in determining whether a social media policy is unlawful is whether the policy "would reasonably tend to chill employees in the exercise of their Section 7 rights." The Board applies a two-step inquiry. First, the rule is clearly unlawful if it explicitly restricts Section 7 protected activities.

If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. The Board has indicated that a rule's context provides the key to the "reasonableness" of a particular construction.

The last sentence of the test is crucial in understanding the seemingly inconsistent Board findings in these types of cases. As seen in the Sears and Cintas advice memorandums, in approving language similar to that found objectionable in the AMR Facebook case, the Division of Advice has seemingly distinguished these cases on the basis that the objectionable language needs to essentially be buried within a list of other language prohibiting serious employee misconduct. Drafters need to avoid

isolating the non-disparagement/abusive language within the policy. Instead, by including this language within a list of other employee misconduct, this will presumably provide a context enabling a reasonable employee to conclude that the policy does not prohibit Section 7 activity. Thus, employer policies should be drafted accordingly. This, I believe, is the key to having your social medial policy survive NLRB scrutiny.

In addition, as a labor and employment attorney, I would also add the following disclaimer language to social media policies, just for good measure:

> *"This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities."*

With respect to the language provided above, I argue that if the NLRB mandated such language be included in all employer social media policies, we might be able to put this issue to bed in the vast majority of these types of cases. It could act as a safe harbor provision, similar to the safe harbor provision and disclaimer language found in GINA. See 29 C.F.R. Part 1635.8(b)(1)(i)(B). In the absence of that, we await guidance from the NLRB in these cases, which does not appear to be forthcoming anytime soon since the cases keep settling. The Board recently announced that it settled a Twitter case against Reuters, and another Facebook case, this time against Build.com.

Given the explosion of employee participation on social media platforms like Facebook and Twitter, and the likelihood that this trend will continue, there is no doubt that employers need to promulgate social media policies. As I have shown herein above, it is possible to do so in a way that minimizes exposure to NLRB complaints.

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