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CLIENT BULLETIN

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"Facebook Firing" Is Chock-Full of Concerns for Employers, Whether You Have a Union or Not

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The well-publicized controversy over the **complaint** filed recently against an ambulance service for firing an employee who bad-mouthed her supervisor on her Facebook page should cause concern and be carefully watched by all employers -- including those companies without unions.

As most readers know by now, the National Labor Relations Board recently **filed** a complaint against American Medical Response of Connecticut, alleging the company engaged in unfair labor practices by firing Dawnmarie Souza, an emergency medical technician, after Souza posted negative comments about her supervisor and the company on her private Facebook page. The NLRB's complaint also alleges that the company refused Souza Union representation in preparing an incident report in response to a patient complaint, and threatened to terminate her for making the request. Finally, the NLRB contends that the employer's blogging and internet posting policy was overly broad, based on the employer's prohibitions on disparaging the company or individual supervisors, and on depicting the company on the internet in any way without permission. The case is scheduled for hearing before an administrative law judge on January 25.

The Facebook exchange, which the employer has released to the media, went as follows:

> DS: looks [sic] like I'm getting some time off. Love how the company allows a 17 to be a supervisor!
>
> Commenter: What happened?
>
> Commenter: What now?
>
> DS: Frank being a [expletive deleted].
>
> Commenter: I'm so glad I left there!
>
> Commenter: Ohhh, he's back, huh?

DS: yep has a [expletive deleted] as usual [sic]

Commenter: I am sorry, hon! Chin up!

A "17" is the employer's code for a psychiatric patient.

Souza was terminated in December 2009, although company representatives state that it was because of "multiple, serious complaints about her behavior," and not because of her Facebook posting. To this end, the company claims that it received two complaints in 2009 that Souza was rude to patients. As for the additional allegations, the company denies that it refused to allow Souza the assistance of the Union in preparing a response to the patient complaint received in November 2009, and denies threatening her for making such a request. Seeking the assistance of a Union representative in responding to discipline is a protected activity, and a company violates the law by threatening an employee for exercising such a right, so these allegations – if they occurred – would certainly constitute unfair labor practices by the company. As for the Facebook postings, however, the situation is significantly more complex.

The cause of this complexity is the concept of "protected concerted activity." The National Labor Relations Act specifically protects employee actions which are undertaken for the benefit of others, and which relate to working conditions. As such, it is a violation of the NLRA for an employer to discipline employees (including non-union employees) for discussing wages or working conditions. And, although normally more than one employee must be involved (thereby making the activity "concerted"), even a single employee can be engaged in protected concerted activity if that employee purports to be acting on behalf of a group, or preparing for group action. Finally, even when the activity is somehow defamatory or damaging to a company, the Board still applies a high standard, and holds that all communications concerning working conditions are protected so long as they are not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.

Within this legal framework, the NLRB has taken the position that Souza's Facebook post was protected concerted activity. Lafe Solomon, Acting General Counsel for the NLRB, was **quoted by *The New York Times*** as saying that Facebook is no different from a water cooler – and that discussions on Facebook or other social media are just as protected.

(Interestingly, the NLRB has its own **Facebook page** devoted to this case.)

But there are several problems with the NLRB's position. First, as the majority of commenters on the news websites reporting on this issue have noted, it defies common sense to bash one's supervisor and employer in a semi-public arena where the evidence may exist forever. Second, is calling one's supervisor a "psychiatric patient" and "expletive deleted" necessarily a discussion of working conditions at all? Third, based on the exchange quoted above (which may not be complete), it does not appear that the commenters responding to Souza's post were co-workers, but rather former co-workers. Indeed, there are an estimated 500 million active users of Facebook, the vast majority of which would not be co-workers of the posters. Finally, although most courts would probably find that Souza's calling her boss a "17" (psychiatric patient) was mere opinion and hyperbole (and therefore not defamatory), it seems there is at least an argument that this was a defamatory statement.

The NLRB also contends that the ambulance service's internet and blogging policy unlawfully deterred protected concerted activity because it prohibited (1) online disparagement of the company and supervisors, and (2) *any* depiction of the company on the internet without prior permission. Although the NLRB may be right about the

latter, assuming that is really what the policy says, it seems that the former is lawful and reasonable because of the potential for widespread exposure that is inherent to internet communications. The following are some other tips on social media policies in light of the NLRB's action:

Don't give up on having a social media policy.
Having a realistic and enforceable social media policy in place before issues arise is still highly recommended. In addition to providing helpful and proactive guidance to employees who may or may not be very sophisticated about who actually reads their Facebook postings, such policies are also helpful in defending cases of online harassment or discrimination. Make it clear that the policy is for the mutual protection of the employer and employees, and that the company respects the individual's right to self-expression and concerted activity. Ensure that every employee receives and signs a copy of your policy. Make it clear that any violation will subject an employee to disciplinary action, up to and including termination. But, by all means, revise the policy regularly in light of changes in technology and in the law.

Make sure your employees don't forget their day jobs.
As stated in **IBM's publicly posted social computing guidelines**, make it clear that social networking should not interfere with job performance, and that employees should avoid harming the image and integrity of the company -- for example, by making an unflattering (or potentially libelous) portrayal of the company to the general public or customers. Also make it clear that the publication of any confidential or proprietary information will be grounds for discipline or termination, as will publication of statements that falsely purport to be made on behalf of the company.

Posting at home can still violate the policy if it affects the workplace.
A good social media policy should convey that harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home, and on home computers. In sum, respectful communication is still a requirement for the well being of all parties.

"Drink responsibly," as they say.
Encourage responsible use of the internet and social media forums when discussing the company or its employees. Many employees actually believe that their social media communications are "private," and it is worthwhile to caution them that such is not the case. Warn them that if they wouldn't say it directly to a supervisor's face, then they may not want to publish it to Twitter, which is estimated to hit 200 million users by the end of the year, or on Facebook, with 500 million users. Moreover, electronic communications live forever: an employee can deny calling his boss an "SOB" at the water cooler (not that we condone lying), but the MySpace post saying the same thing can never be denied.

Add a disclaimer.
In light of the NLRB's position, it is prudent for employers to consider adding to their social media policies a disclaimer similar to the following: "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."

Constangy will continue to monitor the "Facebook firing" case and will update our readers and our social media recommendations as needed.

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