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LEGAL ALERT

Legal Alert: NLRB Settles Charge Claiming Employee was Fired for Facebook Post

2/10/2011

The National Labor Relations Board (NLRB) has settled an unfair labor practice charge it filed in October 2010 against an ambulance service claiming the company discharged an employee for making disparaging comments about her supervisor on her Facebook page. The Board claimed this violated the employee's right to engage in protected concerted activity under the National Labor Relations Act (NLRA). The Board also claimed the company's social media policy was overly broad and interfered with its employees' right to engage in protected concerted activity. *See In re American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (filed October 27, 2010).

Background

The employee was asked to prepare a response to a customer's complaint about her work. The Board claimed the employee was unhappy because the company refused her request to have a union representative help her prepare the response. Later, the employee posted negative comments about her supervisor on her Facebook page from her home computer. Co-workers who viewed her page posted comments supporting the employee and criticizing the supervisor.

The Board claimed the company fired the employee because of her Facebook postings and because these postings violated the company's social media policy. The company claimed the employee was discharged for multiple, serious complaints about her behavior, including negative personal attacks about a co-worker posted on her Facebook page.

Board Claimed Facebook Posting Was Protected Concerted Activity

The Board claimed the employee engaged in concerted activity with other employees when she criticized her supervisor on her Facebook page; thus, the company violated her Section 7 right to engage in such activity when it fired her for these postings. Additionally, the Board claimed the company's Blogging and Internet Posting Policy, which prohibits employees from "making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors" and 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" is overly broad and interferes with employees' exercise of their Section 7 rights.

Settlement of Charge

The parties settled the charge shortly before the scheduled Board hearing. Although the full terms of the settlement were not disclosed, in a press release issued February 7, 2011 the NLRB stated that the employer has 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." According to the press release, 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.

Other Claims Likely to Follow

Although this case has settled, it is not likely to be the last time an employer's social networking policy is challenged as an unfair labor practice. In December 2010, the Service Employees International Union (SEIU) filed an unfair labor practice charge against Student Transportation Services of America (STSA), a bus services contractor, claiming it suspended an employee because of union-related conversations with his co-workers. The SEIU's blog alleges that the supervisor who suspended the employee flashed a printout of the employee's personal Facebook page as evidence the employee "harassed" other employees. Additionally, on February 4, 2011, SEIU filed a ULP charge claiming STSA interfered with its employees' Section 7 rights by maintaining certain handbook policies, including a policy prohibiting the use of electronic communications and/or social media in a manner that may "target, offend, disparage, or harm customers, passengers, or employees. . ." Both of these charges are still in the investigation stage, which means the Board has not determined whether to file a formal complaint against the employer.

Regardless of whether the Board files a complaint in this particular case, it is clear that the unions and individual employees will continue to challenge what they perceive as efforts by an employer to interfere with employees' Section 7 right to discuss their terms and conditions of employment among themselves.

Employers' Bottom Line

Employers should use caution when considering discharging or disciplining employees based on comments made on social media sites such as Facebook or blogs. While not every comment is protected under Section 7, the Board interprets this provision broadly and it applies to all employees covered by the NLRA, not just those in unionized workplaces. Additionally, employers may want to review their social media policies to ensure that the language, especially any non-disparagement language, is not overly broad. Employers should also consider including a statement that the provisions of the social media policy will not be construed or applied in a way that

interferes with employees' rights under federal labor law.

If you have any questions regarding the issues addressed in this article or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.