NLRB Argues Employers Cannot Terminate Employees for Insulting Bosses on Facebook

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A recent complaint filed by the National Labor Relations Board (NLRB) may make it tougher for employers to terminate or discipline employees who make negative comments about their employers through the Internet and social media.

The NLRB complaint, filed in November 2010, alleges American Medical Response of Connecticut, Inc. (AMR) unlawfully terminated an employee after the employee made negative remarks about her supervisor on Facebook. The complaint also argues AMR's internet and blogging policies are overly broad so as to infringe on employee activities protected by the National Labor Relations Act (NLRA).

The AMR employee was asked by a supervisor to prepare an incident report detailing a customer's complaint against that employee. The employee then requested union representation but was denied by the supervisor. Later that same day, the employee made a negative comment about the supervisor on Facebook. The employee's co-workers responded in support of the comment, which caused the employee to make additional negative remarks about the supervisor.

When AMR caught wind of the employee's Facebook activity, it terminated her because the comments violated AMR's company policies, including a policy prohibiting an employee from making disparaging comments when discussing the company or the employee's superiors.

The NLRB subsequently launched an investigation into the employee's termination, and it found the employee's Facebook discussion with her co-workers about the supervisor constituted protected, concerted activity under the NLRA. The NLRB also found the provision in AMR's policy prohibiting an employee from making disparaging remarks about the company or his or her supervisors was unlawful.

Section 7 of the NLRA provides employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8 of the NLRA declares an employer has committed an unfair labor practice if it interferes with an employee's rights under Section 7. Therefore, the NLRB alleges the AMR employee and her co-workers engaged in protected Section 7 activities when they had the Facebook discussion about the employee's supervisor. It follows, according to the NLRB, that the employer committed an unfair labor practice by terminating the employee due to her participation in those protected, concerted activities under Section 7.

Although the AMR case has not yet been adjudicated, the NLRB issued a decision in a different case in August 2010 in which it found an employee's expletive-laced outburst directed at his superior fell within the realm of Section 7's protected, concerted activities.

The employee in that case called the owner of the company a "F'ing crook, and an a__hole" and "f___ stupid." The employee was terminated as a result of his outburst. The NLRB found that insults or profanity are not always so egregious as to cause the employee to lose the protections of the NLRA. Even though the employee made profane, insulting statements, the NLRB found those statements were provoked by the company owner's dismissal of the employee's complaints about his working conditions, which complaints were protected, concerted activities. The employer illegally terminated the employee based on his outburst because the outburst flowed from NLRA protected activities.

The issue of what constitutes behavior so egregious that the employee will lose NLRA protections is murky. It is imperative that employers not over react and terminate an employee based on his or her disparaging remarks about the employer because those remarks could likely be protected, concerted activities under the NLRA.

Having in place an overbroad policy that prohibits all negative or disparaging remarks by an employee about an employer may be unlawful, even if the policy is never enforced, because it may have a chilling effect on NLRA protected activities. However, the NLRB has suggested that if a company policy prohibiting disparagement has sufficient illustrations or examples of prohibited employee activity, it may be lawful.

It is important to note that Section 7 of the NLRA protects both union and non-union workers, so *all* employers must be wary of committing unfair labor practices proscribed by Section 8.

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