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Status Updates, Tweets, and Gripes, Oh My! The NLRA in the Era of Social Media

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Complaining about one's boss at the water cooler is a time honored tradition and, for some, a daily occurrence. With the increased prevalence of social networking websites, however, what was once a private conversation is now on display for all to see. What was once the water cooler is now the Hoover dam.

The National Labor Relations Board (the "NLRB") recently filed a complaint against American Medical Response of Connecticut, an ambulance service company, accusing the company of violating the National Labor Relations Act (the "NLRA"). The NLRB asserts that the company improperly terminated one of its employees, Dawnmarie Souza, after Ms. Souza posted comments on Facebook criticizing her supervisor.

With the recent boom in the popularity of social networking websites, the NLRB's action is poised to affect the current legal landscape as it relates to employees' use of social networking websites. Even further, due to the publicity of this issue, the outcome of Ms. Souza's case will likely affect the ultimate comfort that employees have to criticize their employers on social networking websites.

In a potentially precedential decision, an Administrative Law Judge will hear the NLRB's Complaint on January 25, 2011. Ultimately, the question before the Administrative Law Judge is the extent to which communications on Facebook and other social networking websites are protected activity under the NLRA.

The Facebook Post Heard 'Round The World

The story of Ms. Souza's termination gained national attention after the NLRB filed a complaint on her behalf against her employer. As alleged in the NLRB's complaint, Ms Souza's employment was terminated by American Medical Response of Connecticut as a result of several Facebook posts she made related to her supervisor.

Ms. Souza was allegedly unhappy that she was forced to prepare a response to a customer's complaint without support from her union. As a result, Ms. Souza chose to voice her displeasure with her supervisor on her Facebook page. Ms. Souza's Facebook posts ridiculed her supervisor and, in one, Ms. Souza compared her supervisor to a psychiatric patient – calling him a "17," the company's term for a psychiatric patient.

Ms. Souza's unflattering Facebook posts sparked supportive responses from her co-workers and led to additional negative comments about her supervisor from her co-workers. Ms. Souza's posts were made from her personal computer, on her personal Facebook page, and on her own time.

After posting the unflattering remarks about her supervisor, Ms. Souza's employment was terminated. American Medical Response of Connecticut claims that Ms. Souza's employment was terminated as a result of serious concerns about her behavior. The company has also taken the position that Ms. Souza's Facebook activity does not constitute protected activity under the NLRA.

The Anatomy of Social Networking Websites

It is necessary to understand the anatomy of two of the most popular social networking websites in order to understand how the communicative nature of social networking may implicate the NLRA.

Facebook

Facebook is a social networking website with over 500 million users worldwide. Facebook describes itself as "a social utility that helps people communicate more efficiently with their friends, family and *coworkers*." (emphasis added). Although Facebook has numerous features and has just announced many more, including a new e-mail integration system, for our purposes, it is important to focus on the ways which Facebook facilitates communication among its users.

Facebook allows its users to create individual "pages" on which the user can post various information about himself or herself. Facebook also permits its users to provide status updates, upload pictures, become "friends" with other users, comment on other users pictures, post comments on a friends walls, and send private messages to other Facebook users.

A status update is essentially a user's opportunity to post comments to his or her own page/wall. One's status basically becomes the most current "headline" to the user's Facebook page. Facebook users have the option of restricting access to their status updates by modifying their privacy settings.

A user's wall is essentially a list of the user's status updates and friends' comments (and comments to comments, *ad infinitum*) viewable on the user's Facebook page. In fact, Facebook has its own Facebook page (a debate about the significance of which is better left to the existentialists) that can be viewed at www.facebook.com/facebook on which it posts status updates that appear on its wall.

Twitter

Twitter is a social networking website with 175 million users worldwide. Titter describes itself as a "real-time information network" permitting its users to identify streams that he or she may find compelling and follow the "conversations." Twitter permits each user to create a personalized "handle" (user name) and post tweets from the handle.

Tweets are short statements by users limited to 140 characters. Each Twitter user can "follow" other Twitter users and can gain "followers" who follow him or her. Similar to Facebook, Twitter allows its users to restrict access to their tweets to individuals approved by the users. Twitter also allows users to embed links to articles, videos, pictures, etc. within each tweet enabling quick and easy dissemination of information and content.

Although many other social networking websites exist, Facebook and Twitter are the focus herein because their communicative natures and wide distribution most directly relate to the issues at hand in Ms. Souza's case.

The NLRA

The NLRA is a federal law protecting the rights of most private sector employees to bargain collectively, join unions, and strike. Supervisors are specifically exempted from the definition of "employee" under the NLRA and, therefore, similar action by supervisors is not protected by the NLRA. One critical aspect of the law that should not be overlooked is that the NLRA, as it relates to the

matter at hand, applies to both union and non-union workforces alike.

The NLRA protects an employee's right to engage in concerted activity. Concerted activity is activity in which two or more employees work together in an attempt to improve working conditions. In order to be concerted activity, the communication must encourage the recipients to engage in group activity. Because private sector employees are not guaranteed first amendment rights by their employers, the NLRA protects speech in this limited context.

The NLRB lists examples of concerted activity to include: 1) two or more employees addressing their employer about their working conditions or pay; 2) one employee speaking to his or her employer on behalf of himself and one or more co-worker about improving workplace conditions; and 3) two or more employees discussing pay or other work-related issues.

The NLRB is an administrative body tasked with enforcing the NLRA. The NLRB will generally exercise jurisdiction over all employers unless the company is a "small employer" – one who purchases or sells goods not in excess of $50,000 or, in the case of retail, has sales not in excess of $500,000. The NLRB also does not exercise jurisdiction over railroads, the airline industry, agricultural employees, and the horse and dog racing industries.

The NLRB contends that Ms. Souza's Facebook posts regarding her supervisor and allegedly resulting in her termination constitute concerted activity. As such, the NLRB claims that Ms. Souza's termination was in violation of the NLRA because it was based on her protected activity.

Thus, because a large majority of employers fall within the NLRA's purview, the outcome of the case at hand may have significant legal ramifications for many employers.

The Ramifications

So much attention has been focused on Ms. Souza's case because it is one of first impression and, as such, its resolution is likely to affect the behavior of both employees and employers alike. In fact, the NLRB indicated in a recent press release that, although this was the first instance in which they had taken action against an employer related to social networking, it likely would not be the last.

Ultimately, the outcome of Ms. Souza's case could affect the way companies treat their employees who chose to express criticism on social networking websites. In that respect, there are two main components to the NLRB action at issue: 1) whether Ms. Souza's Facebook posts are concerted activity under the NLRA and are, therefore, protected; and 2) whether the company's policies were over broad to the extent that they had the effect of "chilling" an employee's exercise of his or her rights.

Facebook Posts and Tweets as Concerted Activity

As noted previously, the NLRA protects concerted activity including communications between employees related to the terms or conditions of their employment. The NLRA has been found to protect communications such as water cooler talk (general conversations between employees at work, even when based on rumors or speculation), employee use of bulletin boards, and employee e-mail communication. For instance, an employer cannot prohibit posting material that would be considered concerted activity on a bulletin board if it has permitted other, miscellaneous items to be posted. Further, it is clear that critical comments about an employee's supervisor are protected concerted activity under the NLRA.

The NLRA does not, however, protect communications that are disloyal, reckless, or malicious or statements that unduly interfere with the company's business interests. Furthermore, insulting or obscene comments directed towards

supervisors are not protected by the NLRA. Therefore, in the event that Ms. Souza's communication is determined to be within one of these categories, her Facebook posts will not be protected by the NLRA.

Obviously, the comparison between social networking websites and other forms of concerted activity such as e-mail, bulletin board use, and "water cooler talk" only goes so far. For instance, Facebook is used by over 500 million people (and Twitter by 175 million people), and, without privacy settings, Facebook posts are available to each of the 500 million Facebook users. Even if privacy restrictions are used, a Facebook post is generally seen by and available to many more individuals than just co-workers who happens to be the user's friends. Conversely, the concerted activity discussed previously is generally only read or heard by a limited number of individuals, most, if not all, of whom are employees. Because of the inherent publicity of Facebook and Twitter there is a strong argument that social networking websites should not be treated the same as other forms of communication that occur between employees.

Furthermore, because Facebook posts and tweets are not generally directed at specific individuals, there may be an inability in some cases to determine whom the intended recipient of a particular communication was. Even further, it may be clear from a Facebook post or tweet that the intended recipient was not a co-worker and, therefore, the communication arguably should not be protected. It is interesting to note, however, that Ms. Souza used a company term, "17," when referring to her supervisor – a term that would presumably only be understood by her co-workers.

As stated above, Facebook describes itself, in part, as a tool to facilitate communication between co-workers, and Twitter describes itself as a tool for communication. The nature of social networking websites as communicative tools should be balanced with the public aspect of social networking websites to determine the extent, if any, the NLRA protects Facebook and other social networking communications. For instance, although employees may be permitted to criticize supervisors under the NLRA, it does not follow that they should necessarily be able to do so in such a public fashion.

In the event that Ms. Souza's Facebook posts are considered protected concerted activity, the issue will become what parameters are imposed on concerted activity occurring on social networking websites. Remember, however, the means of communicating on Facebook is variable including different privacy settings, friends, publicity, communicative methods (status update, comment, e-mail, etc.). For instance, there is little doubt that a private Facebook message would be treated similar to an e-mail whereas a status update may not be. Therefore, every communicative method may not be treated the same and, for this reason, it could take years to sort out the parameters of the NLRA's application to social networking websites, if any.

Overbreadth of Policies

One key component of the NLRB's action related to Ms. Souza's case that should not be overlooked is the NLRB's claim that the policies maintained by the company are over broad because they have the potential to "chill" protected speech. Courts have held that it is a violation of the NLRA to maintain a policy that broadly restricts protected discussions. Furthermore, general policies restricting an employee's ability to comment about a manager can violate the NLRA. Therefore, if American Medical Response of Connecticut's policy is found to unlawfully interfere with the employee's rights to engage in protected concerted activity, the policies will be violative of the NLRA.

The NLRB, in a November 2, 2010 press release, cites two of the American Medical Response of Connecticut's social networking policies that it claims are overly broad. The first policy prohibits employees from making disparaging remarks when

discussing the company or its supervisors. The second policy prohibits employees from depicting the company in any way over the internet without permission.

Regardless of whether Ms. Souza's particular statements are determined to be protected, the policy that specifically prohibits employees from making disparaging remarks about supervisors is potentially over broad because the NLRA protects concerted activity related to comments regarding one's supervisor.

American Medical Response of Connecticut's policy against depicting the company in any way over the internet is also potentially overly broad considering the numerous ways by which employees can communicate via Facebook and other social networking websites. If it is determined that Facebook posts can be protected activity, irrespective of Ms. Souza's particular case, it may very well be determined that maintaining a policy against any depiction of the company on the internet chills protected speech.

As noted previously, the potential size of the venue, whether Facebook or Twitter, should be taken into consideration because the dissemination of information through social networking websites is far different than the dissemination of such information at the water cooler.

As a result, the almost unlimited public nature of the forum may be an important factor in determining whether such speech is protected and whether the company's policies chill that protected speech.

Ultimately, a finding that the company's policies are unlawful would have an immediate impact on employers throughout the country that maintain social networking policies or similar policies related to social media and internet communications.

Action Employers Should Take

As a general principle, extreme caution should always be used when an employer wishes to take action against an employee on the basis of something learned through a social networking website.

Employers must bear in mind, at least until definitive action is taken by the NLRA, that taking any action based upon social networking activity poses a risk because the employee's activity could be considered protected concerted activity. Any such action a company desires to take related to potential concerted activity should be strictly scrutinized and legal counsel should be involved.

As noted previously, however, not all communication is protected by the NLRA. A classic example in the arena of social networking is when an employee calls in sick and then posts a Facebook status of "called in sick to go to the Phillies game!" Although technically this communication is related to employment, it is not protected and could form the basis for the employee's termination (other considerations aside).

More instantly pressing is the potential for companies to have their social media policies violate the NLRA due to overbreadth. One step that all employers should take immediately is to reassess their social networking policies to ensure that the policies do not potentially chill protected or arguably protected concerted activity. The NLRB has specifically indicated its belief that Ms. Souza's case is only the first of many and employers should take caution therefrom.

As noted previously, however, not all policies related to social networking websites are unlawful. Irrespective of the outcome of Ms. Souza's case, an employer's ability to protect its confidential or client information from dissemination via social networking sites will not be affected nor will the

decision affect a company's right to monitor its own computer systems.

The decision in Ms. Souza's case should also not affect an employer's ability to restrict the use of its computer system for social networking as long as it does so consistently and without regard to the content of the employees' activity. For instance, employers need not provide employees with access to social networking sites during work time or on company computers. As long as the company's restriction is uniformly written (i.e. it does not permit access for some purposes and not others) and as long as the policy is uniformly applied (i.e. all violations are addressed in similar fashion), employers will continue to be permitted to restrict access to social networking sites during work hours and on work computers.

Ultimately, the determination of Ms. Souza's action by the Administrative Law Judge will begin to define the parameters by which employee communication on social networking sites is protected. In the interim, however, employers can take steps to ensure that they do not run afoul of the NLRA, especially considering the NLRB's indication of its intention to pursue additional cases related to social networking policies and action based on social networking.

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