NLRB Poised To Rule On Facebook Case

Insights
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On October 27, the National Labor Relations Board's General Counsel (GC) made national headlines with the issuance of an unfair labor practice complaint against American Medical Response Of Connecticut (AMR) accusing the company of unlawfully discharging an employee for posting critical remarks about her supervisor on her personal Facebook page. The GC's complaint also alleged that AMR maintained unlawful employment policies regulating employee blogging and Internet postings, prohibiting employee conduct of a "generally offensive nature" and on-premises employee solicitation and distribution.

According to the GC's Complaint, AMR representatives denied Dawnmarie Souza's request for union representation at an investigatory interview, required her to complete an incident report without the presence of a union representative and then threatened her with discipline because she had requested union representation. Later that same day, after she had left work, Souza logged onto her Facebook page and posted highly critical comments about her supervisor.

Co-workers who visited Souza's Facebook page responded with comments in which they expressed their support and agreement with her. Although the GC's Complaint is conveniently silent on the actual text of Souza's posting, reports say that it contained a number of insulting and personally offensive comments about her boss. AMR maintains that Souza's Facebook posting played no role in her termination and that it discharged her because of patient complaints.

Background
Section 7 of the National Labor Relations Act (NLRA) protects the "*concerted activities*" of both union and non-union employees provided they are for the purpose of their *mutual aid and protection*. In order to be deemed "concerted," employee activities must be collective in nature. In a non-union setting, this ordinarily means that the activities in question must be carried out by two or more employees who are acting together or in concert with one another in furtherance of employment-related concerns.

Alternatively, the actions of a single employee may be in concert with others if the employee acts on behalf of others and the individual's actions are on the authority of fellow workers. But, because an essential component of "concerted activity" is its collective nature, the actions of a *single* employee

for their individual benefit or in furtherance of their individual grievances – even if their complaint is employment-related and might ultimately improve the working conditions of others – has never been considered "concerted" and never qualified for NLRA protection.

The facts in the AMR complaint do not seem to qualify Souza's Facebook posting as a concerted act. She acted alone, apparently out of pique about an individual dispute that she had with her boss and her employer. There is nothing remotely suggesting that she engaged in this activity in concert with her co-workers or for their collective aid and protection. Souza's offensive Facebook posting was her individual doing, precipitated by her individual treatment and directed at her individual complaint.

So, even assuming that the GC proves that Souza was discharged for posting her offensive Facebook message, it is still hard to understand how her conduct can fairly be characterized as protected, concerted activity or why her discharge is unlawful. Indeed, if these facts present "protected" conduct, it's hard to imagine any criticism that individual employees might make about their employer, boss or working conditions that would not qualify as legally protected concerted speech. Because the GC's complaint appears to be pushing the limits of the definition of protected, concerted activities, and because the left-leaning Obama Board is quite likely to find a way to agree with this activist view of the law, then the AMR case bears very close watching. Whether such a decision would pass judicial review is another question entirely and largely dependent upon the credible record evidence developed at trial.

The Law's Catchall Provision

It's also important to remember that the AMR/Facebook case arises under NLRA Section 8(a)(1). This omnibus section of the federal labor law protects employee rights by broadly prohibiting all employer conduct that interferes with, restrains or coerces employees in the exercise of their Section 7 rights. Section 8(a)(1) is a strict-liability statute; any adverse employment action taken in response to an employee's protected concerted conduct is automatically considered an unfair labor practice (ULP).

Thus, an employer need not actually know that an employee's conduct qualifies as protected concerted activities to violate the law. If you discipline workers because of their participation in what later turns out to be legally protected, concerted conduct, that discipline is unlawful. Likewise, you need not intend the discipline to interfere with, restrain, or coerce employees in the exercise of their rights. Liability is established if the adverse treatment has or tends to have a chilling effect on protected employee conduct.

Finally, Section 8(a)(1) protects both unionized and non-union employees. Accordingly, an employer need not employ a union workforce to be covered by the law. Nor does an employee need to be engaged in union activities or be a union member to be protected. Indeed, employees do not even need a lawyer to pursue an 8(a)(1) claim since once the NLRB's GC believes an employee's case has arguable merit, the GC will prosecute the case on behalf of the employee absolutely free. Given its strict liability and because many employers will simply not know or recognize a worker's conduct to be legally protected until after the fact of discipline, Section 8(a)(1) presents a minefield of potential

exposure – especially if the GC's position in AMR is sustained.

Is Online Discrimination Different?

The AMR case is worthy of note as one of the Board's first forays into policing employment policies regulating cyber-speech. The NLRB has a long history of attacking employment policies that may operate to prohibit legally-protected conduct. Therefore, its legal methodology for testing the facial validity and lawful enforcement of employment policies is relatively well settled. According to the Board, a plainly-worded policy that clearly states its scope, requirements and limitations and does not appear to proscribe protected conduct is presumptively lawful. But the discriminatory or selective enforcement of even a valid rule because of an employee's protected conduct will still be found to violate Section 8(a)(1).

Conversely, the mere maintenance or promulgation of a policy that is so overbroad or ambiguously worded as to arguably prohibit protected conduct is presumptively unlawful because it is likely to chill protected conduct. Where an ambiguous rule is found to be overbroad, the Board will assign the legal risk of that ambiguity to the employer and find the rule's mere promulgation or maintenance to be unlawful -- even in the absence of its enforcement. Likewise, the enforcement of an overbroad policy to protected activity runs afoul of Section 8(a)(1).

An employer seeking to defend a presumptively illegal overbroad rule must present evidence of special circumstances showing that the overbroad rule as written is necessary and that it cannot be more narrowly drawn to avoid an impact on Section 7 rights. In some instances, you may also successfully overcome the presumptive invalidity of an overbroad rule by proving that you have effectively communicated a lawful clarification, narrowing or curing the ambiguous provision to your workforce so as to eliminate the rule's unlawful impact.

The Board will no doubt apply these analytical precepts to AMR's policies and, in so doing, set the legal standards by which other employers' Internet and blogging policies will be measured. For example, the first of the AMR blogging/Internet policies now under NLRB attack prohibits employees from "posting pictures of themselves in any media . . . which depicts the Company in any way including but not limited to a Company uniform, corporate logo or an ambulance" without prior written approval. On its face, this rule appears to prohibit an employee from posting a graphic depiction of themselves as the persona of the Company.

Although not an absolute model of clarity, this rule is couched in terms that define its scope, requirements and limitations and no reasonable reading of the language is likely to suggest that its prohibition reaches protected, concerted activity. Moreover, even assuming that it contains some level of ambiguity, the rule, as written, serves the important dual business purposes of protecting the company's trademark and avoiding the misimpression or false appearance that an employee blogger speaks for their employer or that their posting is a message coming from or sanctioned by their company. Accordingly, this first rule appears to have a decent shot at ultimately passing legal muster.

The second AMR policy in controversy prohibits employees from "making disparaging,

discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors" is less rosy. Case law is mixed in terms of whether and when workers' "disparagement" of their employer will qualify as protected conduct under the law. Accordingly, a generic rule that prohibits all employee disparagement of an employer, without limiting the scope of the prohibition and carving out protected activity from its proscription, risks being found overbroad and presumptively invalid.

Likewise, the rule's use of the phrase "defamatory comments" may prove problematic since defamation is a term that has multiple meanings and may, depending upon the meaning given to the word, reach Section 7 conduct. For example while acting on a collective employee concern, a worker may express an opinion or viewpoint about their employer which the employer considers to be damaging to its reputation and totally untrue (key components of defamation claims). But such expressions of employee belief play a central rule in protected concerted activities and are themselves typically protected speech.

Further, the mere fact that a worker's statements may later be disproven or shown to be false or inaccurate generally will not strip the worker of their Section 7 protections. Accordingly, a rule like AMR's that can be read to prohibit such potentially protected, albeit "defamatory comment[ary]" runs a good chance of being declared overbroad and presumptively invalid.

What's Coming Down The Road

The AMR/Facebook case is a loud wakeup call to all employers, but to non-union employers in particular. Contrary to what many union-free managers may believe, the NLRA applies to them, their workplaces, and their employees and thus, presents a significant source of liability. So supervisors and the other management representatives who are involved in the disciplinary decision-making process need to be acquainted with the NLRA's Sections 7 and 8(a)(1) and educated on the identification of protected, concerted employee activities.

The AMR/Facebook complaint also gives reason to closely scrutinize and evaluate your employee handbook and policies with an eye towards identifying and narrowing provisions that may be overbroad and not pass NLRB muster. As a stopgap measure, many employers have published new policy statements in which they advise their employees that the company's policies do not prohibit conduct protected by the NLRA.

But such disclaimers may offer employers cold comfort since a number of Board decisions place the legal protections afforded by such generic disclaimers in question. According to these NLRB decisions, these disclaimers are often too vaguely drafted to be effective because workers reading them may wonder what terms like "protected, concerted activities" or "Section 7 conduct" mean, and what actual conduct falls outside their employer's policy proscriptions. Assuming that it runs true to form, the Obama Board is likely to give such generic savings clauses short shrift and to find an employer's otherwise overbroad policies unlawful. Therefore, a more effective approach for employers may be a careful review and revision of their employment policies.

Even if your policy house is in order, you should never take an adverse employment action against a worker because of their protected concerted activities. This means that those meting out discipline at your company know what "protected activity" is, and that it is not a legally permissible basis for adverse action. You should take steps to ensure the equal and consistent application of all valid policies so as to avoid later claims of selective or discriminatory enforcement against a worker who also happens to have engaged in protected concerted activities.

And finally, at least while the AMR case is pending and until the substantive law in this area is sorting itself out, proceed carefully before disciplining an employee for posting critical comments about your company, their supervisors, or their working conditions.

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