



The GSH

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When Facebook Gets Unfriendly: Social Networking Postings May Constitute Protected Activity

By Julie T. Bittner, Esq.

You just spent last year revising your handbook and company policies to ensure everything is up to date. Mindful of the increasingly ubiquitous nature of social media, you even implemented the first social media policy in your company's history. Unfortunately, just as it seems the new laptop you bought became obsolete the minute you left the store, your new social media policy may already be in need of updating thanks to a recent case brought by the National Labor Relations Board (NLRB).

In October 2010, the NLRB filed a complaint against American Medical Response of Connecticut, *American Medical Response of Connecticut, Inc. and International Brotherhood of Teamsters, Local 443*, 34-CA-12576. The NLRB complaint alleged that Dawnmarie Souza, an emergency medical technician for American Medical, had been fired on December 1, 2009, for venting about her boss on Facebook and calling him, among other things, a "scumbag." Ms. Souza had been a member of the Teamsters union, and the Teamsters represented her before the NLRB.

The events leading to her termination began when American Medical questioned Ms. Souza about a customer complaint regarding her work. Ms. Souza requested that a union representative help her prepare a response to the customer complaint, but the company refused her request. As a result, Ms. Souza posted negative comments about her supervisor on Facebook from her home computer. Specifically, she wrote in her status that she "love[d] how the company allows a 17 [company slang for a psychiatric patient] to

be a supervisor." Co-workers responded to and commented on her Facebook status with comments such as "What happened?" and "I'm sorry hun! Chin up!" Ms. Souza responded to those comments by referring to her supervisor as, among other derogatory terms, a "scumbag."

The company soon terminated Ms. Souza "based on multiple, serious complaints about her behavior." The company further contended that Ms. Souza had violated its social media and Internet policies, which forbade an employee from depicting the employer "in any way" and from posting "disparaging, discriminatory, or defamatory comments" about the company, supervisors, or coworkers.

The NLRB alleged that the termination of Ms. Souza violated the National Labor Relations Act ("Act"), which provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [the Act.]

Because Ms. Souza's Facebook comments drew supportive postings from co-workers, the NLRB asserted that she had engaged in "protected concerted activity." The NLRB argued that under that Act, employees are allowed to discuss conditions of their employment with others and claimed that Ms. Souza's comments on Facebook were no different than talk around the workplace water cooler. The NLRB further argued that the company's social media and Internet policies were too broad and infringing on employees' rights to engage in protected concerted activity by communicating with each other about the terms and conditions of employment.

The parties settled the dispute on the eve of the hearing. As part of the settlement, American Medical agreed not to discipline or discharge employees for engaging in discussions about wages and other work issues when not on the job. Further, the company promised that employee requests for union representation would not be denied in the future and that employees would not be threatened with discipline for requesting union representation.

The case leaves many issues unanswered, however. The situation may have played out differently had no one responded to her Facebook comments, if none of her Facebook friends were co-workers, or had the only responses come from non-co-workers. While the answers to those scenarios remain unclear, one thing is certain: there is a lot more litigation to come on these issues.

In the meantime, employers can draw valuable lessons from

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this case. Companies are advised to think twice before summarily dismissing an employee for comments made outside the workplace, even on a social website. The NLRB's position favors the right of employees to discuss working conditions on social media, even if the discussion portrays the company or its employees in a negative light. Depending on the context, comments made on a social media website may be just as protected as if they were made in the workplace. As a result, employers should review and revise, if necessary, Internet use and social-media policies to ensure they are compliant with the National Labor Relations Act. This area of the law, like the technology giving rise to the cases, is constantly evolving, so periodic review of your company's social media policy is essential.

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