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Chilling Worker Speech on Facebook

The NLRB's case against an ambulance company that fired an employee for a posting on Facebook really boils down to traditional labor law, experts say. Can a worker be fired for bad-mouthing a supervisor who denied them access to union representation? The decision will have implications for company policies on social-media use.

By Tom Starner

Employers that adopt "zero tolerance" policies relating to discussion of company matters on social media might feel protected from litigation. They may want to think again.

The outcome of an upcoming and groundbreaking case instituted by the National Labor Relations Board will determine whether social-media sites such as Facebook and Twitter should be considered the equivalent of the 21st century water cooler.

That means employees posting comments about company issues or their supervisors could be engaging in legally protected speech, according to legal experts.

"For the NLRB to step in is a major issue," says Nate White, a consultant with the Ethical Leadership Group at Global Compliance, based in Charlotte, N.C. "The fact is, though, I don't think this turns anything upside down because I don't think anyone knows what is right side up when it comes to social media."

"Companies are still fairly blind about the issue and employees too," he says. "Employers should pay close attention to this case because it signals a change."

The case relates to the actions of American Medical Response of Connecticut, an ambulance service accused of illegally firing Dawnmarie Souza, an emergency-medical technician who posted negative comments about her supervisor and the company on her personal Facebookpage, according to the NLRB.

Prior to being fired, Souza had been asked to respond to a customer complaint about herself. According to the NLRB, her supervisor denied Souza's request to seek help from her union representative in preparing that response.

Souza commented on the incident on Facebook and the NLRB agrees her comments were derogatory -- including vulgar comments about her supervisor (using the company's jargon for a mental patient).

However, the Board's position is that employees' social-media criticisms of managers or employers are generally a protected activity, and that employers could be violating the law for punishing workers because of such statements.

According to the complaint, the employer's "Blogging and Internet Posting Policy" includes the passage:

"Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers or competitors."

The NLRB called the ambulance company's policy "overly broad" and, as a result, it improperly limited employees' rights to discuss work issues among themselves.

That last part is important, says Michael McAuliffe Miller, an attorney in the Harrisburg, Pa., office of Eckert Seamans Cherin & Mellott, because, if the employee posts and discusses her situation with friends and family, it falls outside of the scope of the NLRB's complaint.

"Employees are allowed to talk about these issues, but one issue in this case is whether Facebook is a water-cooler-type situation or not," he says, adding that, in 2009, the NLRB recommended a similar case not go forward, though the circumstances were similar.

He notes the NLRB has been looking at this type of scenario for a number of years to determine how the "water-cooler" concept exists in today's electronic society.

"With this, we are seeing a change in the way the Board wants to address these issues, but it's not surprising or a shock," Miller says. "The question is: Will the position staked out by the Board survive judicial review?"

Seth Borden, a New York-based partner in the employment and labor law practice at McKenna Long & Aldridge, says new Board Chairman Wilma Liebman "has for years been telling the Board that it ... can't ignore the fact that technology is proceeding apace."

In fact, in a 2007 case related to e-mail and union-organizing activity, Liebman dissented strongly from the majority and referred to the Board as "Rip Van Winkle" when it came to the Internet and employee activity, he says.

But key to the ambulance company and its former employee's situation, Miller says, is the "nature of outbursts" and whether they were provoked by an unfair labor practice -- not whether all Facebook posts are protected speech.

"In this case, this employee requested help from her union representative and was denied it, and was fired less than a month later because of this posting," he says. "The Board is reacting more to the connection and time elapsed between request for union help and the dismissal itself, not the postings and where they took place.

"This case has more to do with context than Facebook," he says.

Borden, who is a frequent contributor to the [Labor Relations Today blog](#), says the complaint will likely prompt the NLRB to revisit the standards for determining the proper scope of an employer's social-media policy in the context of the National Labor Relations Act and what that means for employers across all industries.

The NLRB's position, he says, is that "the employer in this case violated the Act by, among other things, maintaining overly broad rules regarding blogging and Internet posting and then firing an employee for disparaging a supervisor on Facebook."

The case should not scare employers away from enacting social-media policies, however, he says.

"You can't let the idea that the government might second-guess [a policy] stop you from attempting to have such a policy," Borden says, but, he adds, employers must be careful to consider all the nuances.

"It just can't be a broad e-policy," he says.

Both Miller and Borden recommend employers review their Internet and social-media policies to determine whether they are susceptible to an allegation that such policies could reasonably tend to chill employees in the exercise of their rights to discuss work-related issues such as unionization, wages and work conditions.

The traditional labor-law question at issue in the ambulance company case is: Was this protected speech? The NLRB says yes, mainly because there is room for spontaneous outbursts -- but not defamation, Borden says.

Yet, Borden says, what set her off was the denial of union representation, so in the end, her profanity may be seen as a result of that denial -- and that might be protected by the NLR.

"There is enough gray area and questions on both sides," he says. "Oddly, none of those issues are particularly specific to Facebook. The Board decided that, if by any chance, employees' protected speech might be chilled, then it is going to prosecute."

"It remains to be seen," says Global Compliance's White, "whether or not the judge decides this is protected union [speech], as opposed to simply bad-mouthing the company in public."

And if that happens, he says, "you will see everyone run from one side of the boat to the other [in the text of their e-policies], depending on what the judge rules."

He adds that "this case was inevitable."

"Seventy-five percent of employees today are using some form of social media," he says. "I would not deign to guess how it will turn out, but with social media changing, company policy has to be fluid. In this specific case, I hesitate to take one side or the other, because I can see where each side is coming from."

"I do think," Borden says, "this case marks where the Board wants to go and the questions at issue are straightforward under existing law."

"This could decide if employees have a right to talk to each other, including being critical of management, via social media. The Board is saying there is no difference between Facebook and the break room or water cooler."

The case is scheduled to be heard by an administrative judge beginning Jan. 25.