

# ALERT

## Employers Beware: Employee Comments on Facebook — Protected Concerted Activity?

By Bennett Pine

The National Labor Relations Board's (NLRB) Hartford, CT, office has issued a complaint alleging that ambulance service American Medical Response of Connecticut, Inc. (AMR) illegally fired one of its union-represented drivers because she posted negative remarks about her supervisor on her personal Facebook page from her home computer. The NLRB's complaint alleges that the employee's Facebook posting constituted "protected concerted activity" and that the company's blogging and Internet posting policy was impermissibly broad, contained unlawful provisions and constituted interference with employees in the exercise of their "right to engage in protected concerted activity."

### The Underlying Facts

According to the NLRB's press release, when asked by her supervisor to prepare an investigative report concerning a customer complaint about her work, the employee requested and was denied representation from her union local. Later that day from her home computer, the employee posted a negative remark about the supervisor on her personal Facebook page, which drew supportive responses from visitors to her page, some of whom were her co-workers, and led to further negative comments about the supervisor from the employee. The employee was suspended and later terminated for her Facebook postings and because such postings violated the company's Internet policies. AMR's social media policy provided that "Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers or competitors." The policy did not distinguish between use of company versus personal equipment/computers or business versus off-duty time.

“Employees have the right to engage in free speech as a form of **concerted activity** for their 'mutual aid or benefit.'”

### The Law

Under the National Labor Relations Act (NLRA), as interpreted by the NLRB over the years, employees have the right to engage in free speech as a

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form of concerted activity for their "mutual aid or benefit." This right, which applies to both unionized and non-unionized employees, has been extended to email communications and website postings. However, employees are generally not protected where the speech is false, defamatory, disloyal, malicious or reckless. Similarly, conduct that is purely personal or individual in nature, not rising to the level of "concerted activity," is not protected by the NLRA. (Evidently, the NLRB's position here is that the responsive and supportive posts by the employee's Facebook "friends" [including co-workers] and the employee's subsequent posts, satisfied the "concerted activity" threshold.)

### What It Means

It must be noted that the communications here were published on the employee's *personal* Facebook page, and were sent from her *home* computer. No employer computers or other office equipment were involved. The "concerted activity" protections afforded employees by the NLRA and the NLRB were no doubt designed to enable them to communicate with other *employees* regarding wages, hours and working conditions, and to engage in other forms of protected activities with fellow employees for the purpose of union organizing, selecting a bargaining representative, engaging in collective bargaining, presenting grievance to their employers or otherwise exercising statutory rights. Communications on Facebook, on the other hand, are not akin to more traditional forms of employee communications like meetings, bulletin board postings or water cooler talk which are directed at, and accessible by, only other *employees*. To the contrary, Facebook posts or messages go far beyond the workplace; they are available to friends, family, strangers and many millions of other Facebook subscribers around the world. As a result, the manner in which the NLRB determines how it will apply its rules, born in the 1930's industrial setting, to the new age of electronic and social media communications will be highly instructive.

It should also be noted that new guiding principles from the NLRB may affect different social media differently. LinkedIn, for example, is generally understood to be more purely a forum for business-related networking and communication rather than Facebook. Twitter can be particularly ambiguous. Some Twitter identities are plainly vehicles mainly for professional communication; some are purely personal; and a large number are hybrids.

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## Guidance for Employers

The AMR case is scheduled to be heard before an NLRB Administrative Law Judge on January 25, 2011. It is likely that no decision will issue until much later in 2011. With appeals to the full NLRB and, subsequently, to the courts, this area of law may not be settled for several years.

In the meantime, employers are well-advised to exercise caution prior to imposing discipline or discharge on an employee for engaging in criticism of other employees or the employer via Internet postings or other electronic communication. Similarly, employers should review their social media policies to ensure that, while the employer's business interests are adequately protected, the policy is not so overly broad as to interfere with employee free speech or other protected conduct. Finally, at least one commentator has suggested that employers would be prudent to include protective disclaimer language

in any Internet or social media policy to the effect that the policy is not to be applied or interpreted in any way that interferes with employee rights under the NLRA.

## Conclusion

The AMR case presents the now Obama-appointed, labor-dominated NLRB with the chance to enunciate clear and comprehensive rules regarding an employer's ability to regulate its employees' rights to utilize electronic communications and social media — such a growing part of everyday lives — in or about the workplace. Those rules, however, may be several years away. In the interim, employers are urged to exercise caution when confronted with disciplinary issues involving conduct or speech that may be deemed "concerted" — as opposed to individual or personal — in nature. We will continue to monitor development in this area. ▲