NLRB Issues Complaint Against Employer For Facebook Termination

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The National Labor Relations Board has announced that its Hartford Regional Office issued a complaint against American Medical Response of Connecticut, Inc., alleging that this employer unlawfully terminated an employee for posting negative comments about her supervisor on her Facebook page. After Dawnmarie Souza made the posting, several of her co-workers posted responses supportive of her posting and then Ms. Souza posted additional negative comments about her supervisor. The employer first suspended and then terminated Ms. Souza for violating its internet posting policies.

The NLRB Complaint alleges that Ms. Souza's Facebook posts were "protected concerted activity" within the meaning of the NLRA and that the employer's internet posting policies contained unlawful provisions, including one that prohibited employees from making disparaging remarks about their supervisors. The NLRB concluded that such provisions constitute interference with an employee's exercise of his or her right to engage in protected concerted activity.

This development is problematic. First, the decision appears to contravene the long-standing principle that an employee such as Ms. Souza, whose termination was based on her activity solely on behalf of herself, does not engage in "concerted" activity where the activity was not "engaged in with or on the authority of other employees…." *Prill v. NLRB*, 835 F.2d 1481, 1483 (D.C. Cir. 1987). Second, Ms. Souza's conduct, even if "concerted," does not appear to qualify as "protected." "[Such] …expression of criticism about management . . . is not a condition of employment that employees have a protected right to seek to improve." *New River Industries, Inc. v. NLRB*, 945 F.2d 1290, 1294-95 (4th Cir. 1991). *See also Carleton College v. NLRB*, 2390 F.3d 1075, 1081 (8th Cir. 2000). While work-related criticism of or complaints about a supervisor arguably are protected, defamatory or highly personal comments about a supervisor outside of the workplace which appear on the internet for the whole world to see surely are not protected. *See, e.g., St. Luke's Episcopal-Presbyterian Hosps. v. NLRB*, 268 F.3d 575, 580 (8th Cir. 2001) (quoting *Montefiore Hosp. & Med. Ctr. v. N.L.R.B.*, 621 F.2d 510, 517 (2d Cir. 1980)).

The NLRB is testing the limits of Board law as to new forms of media. This affects all employers, whether unionized or not. It also creates uncertainty in the emerging area of workplace social media policies.

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Labor & Employment
November 2010

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