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NLRB Says Negative Facebook Posting Is Protected Activity

On October 27, 2010, the Hartford Regional Office of the National Labor Relations Board ("NLRB") issued a complaint against American Response of Connecticut, Inc. ("AMR"), alleging that the company unlawfully terminated an employee who posted negative remarks about her supervisor on a popular social networking site, Facebook. The NLRB has also alleged that AMR maintained and enforced an overly broad social networking policy that violated the employee's rights under the National Labor Relations Act ("NLRA").

Background

Dawnmarie Souza, an employee of AMR, was asked to provide a written response to a customer complaint about her performance. Souza allegedly requested union representation in connection with the preparation of her response. The company denied her request. Souza later posted negative comments about her supervisor on her Facebook page from her home computer. An article in *The New York Times* states that Souza wrote, "love how the company allows a 17 to become a supervisor." The article explained that a "17" is AMR's code for a psychiatric patient. Several of Souza's co-workers wrote supportive comments about Souza's posting, which led her to post more disparaging remarks about the supervisor. Less than one month later, AMR discharged Souza for "multiple serious issues."

Social Networking as Protected, Concerted Activity

The NLRB has taken the position that an employee's criticism of a supervisor on a social networking website may constitute "protected concerted activity" under the NLRA. The Acting General Counsel of the NLRB, Lafe Solomon, was quoted in *The New York Times* as stating, "This is a fairly straightforward case under the National Labor Relations Act - whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions, in this case about their supervisor, and they have a right to do that."

The NLRB's Change of Position on Social Networking Policies

In this case, the NLRB has also alleged that AMR's social networking policy contained unlawful provisions, including prohibitions against employees making disparaging remarks about the company or its supervisors and depicting the company in any way over the Internet without company permission. The NLRB has stated that these provisions "constitute interference with employees in the exercise of their right to engage in protected concerted activity." It should be noted that Section 7 of the NLRA, which protects employees' right to engage in "concerted activity," applies to all workplaces, whether or not they are currently unionized.

The NLRB's position in this case appears to contradict prior advice that the agency gave regarding social networking policies. In 2009, the NLRB's Division of Advice issued an advisory memorandum stating that a social networking policy similar to AMR's was permissible under the NLRA. That policy also prohibited employees from disparaging the company or its officers and leaders.

A Good Time to Review Social Networking Policies

Although this case is just commencing, it clearly demonstrates the NLRB's current pro-labor approach and its new interest in issues related to social networking. Employers should exercise caution before taking an adverse employment action based on an employee's work-related comments on a social networking site. In addition, employers should review their current social networking policies to ensure compliance with the NLRA and other labor laws. For more information about drafting or revising a social networking policy, contact one of the Day Pitney LLP labor and employment attorneys.