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NLRB Claims That Federal Labor Law Protects an Employee's Use of Facebook to Insult a Supervisor

A recently-filed complaint by the Hartford, Connecticut Regional Office of the National Labor Relations Board (NLRB) should make employers—union and non-union alike—sit up, take notice, and evaluate their social-media policies.

Dawnmarie Souza was an employee of American Medical Response of Connecticut. After American Medical received a customer complaint about Souza's work, it scheduled an investigatory interview with her. Souza requested union representation at the interview. According to the complaint, American Medical denied her request, and her supervisors "threatened [her] with discipline because of her request." Souza responded by publicly insulting her supervisor on her Facebook page. The posts drew supporting comments from some of her co-workers.

Souza's comments violated American Medical's Blogging and Internet Posting Policy, which prohibits employees "from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors." The policy also bans "Rude or discourteous behavior to a client or co-worker." American Medical terminated Souza's employment just weeks after she had made the comments on Facebook.

According to the NLRB, Souza's posts were "concerted activity" under Section 7 of the National Labor Relations Act (NLRA), which gives both union and non-union employees the right to discuss the terms and conditions of employment with fellow employees. More significantly, in a recent press release the NLRB called American Medical's policy "overly broad," suggesting that merely having a non-disparagement policy runs afoul of the NLRA because it might discourage employees from exercising their Section 7 rights. A hearing on the allegations in the complaint is scheduled for January 25, 2011.

In response to the NLRB's complaint, employers should be cautious before disciplining an employee for posts or comments made on a blog or a social-media website such as Facebook. Such posts should be evaluated on a case-by-case basis in light of the protections afforded by the NLRA to "concerted activity." Employers should also evaluate their internet and social-media policies to ensure that they do not unreasonably "chill" an employee's exercise of Section 7 rights.

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