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Facebook Case Shows NLRB's Hard Line On Social Media

By **Leigh Kamping-Carder**

Law360, New York (March 1, 2011) -- A National Labor Relations Board complaint that accused a company of wrongly firing an employee for her Facebook comments ended in settlement, but the case remains a warning to employers that the agency is taking a tough stance against Internet policies that appear to interfere with employees' protected concerted activities, attorneys said.

Without a ruling in the case against American Medical Response of Connecticut Inc., employment attorneys were left without explicit guidance as to exactly what kind of social media communication between employees is protected by the National Labor Relations Act.

But there is still wisdom to be gained from the case, namely that the NLRB intends to fiercely pursue those employers it believes maintain an overly broad Internet policy, attorneys said.

“In terms of reading the tea leaves, we see the possibility of changes in how the board approaches these issues, and we're advising clients accordingly,” said Scott T. Patterson, a Butzel Long PC shareholder.

The settlement in the case, approved on Feb. 7 by Jonathan Kreisberg, regional director at the NLRB's office in Hartford, Conn., calls for AMR to make changes to its Internet policy and union representation procedures. Dawnmarie Souza, the worker at the heart of the dispute, reached a separate, private agreement with AMR to resolve allegations surrounding her firing, the agency said.

Under the settlement, AMR agreed to scrap from its employee handbook a blogging and Internet posting policy that “improperly restricts your right to engage in union activities or to discuss your wages, hours and working conditions with your fellow employees and others.”

The deal resolved an Oct. 27 complaint brought by the NLRB that alleged AMR illegally terminated Souza for insulting her supervisor on her personal Facebook page, which the agency said constituted protected concerted activity. The complaint also alleged that AMR “maintained and enforced an overly broad blogging and Internet posting policy.”

Despite the attention the case received, and the fanfare with which the NLRB launched the labor charge, attorneys said they were not wholly surprised the case ended in settlement before the first hearing.

The agreement was fairly straightforward and inexpensive for AMR, with the company simply agreeing to modifications to its employee handbook, attorneys said.

“If you're a company, that's a pretty bland settlement and one that isn't too surprising,” said Mayer Brown LLP partner Marcia E. Goodman.

“All I think the company is doing in the settlement is reaffirming its obligation under the law to apply the law as it currently is,” said William Bevan, a labor lawyer at Reed Smith LLP. “Tactically, the employer made the right settlement here.”

Beyond the specific terms, the case may have a more far-reaching effect, signaling that the NLRB is taking an assertive stance on social media, attorneys said.

“The fact that [the NLRB] participated in making sure this was in the media throughout the country says something about how they're approaching social media, and it may signal an increased aggressiveness in going after these policies,” Patterson said.

The NLRB office viewed Souza's Facebook postings as akin to private communications, such as a conversation between employees, rather than public communications, such as a newspaper or a billboard, Goodman said.

“It's mind-opening for many employers and lawyers to say, 'Wait a minute, we have to think about where this actually fits, where social media fits in the world, what does it actually mean?'” Goodman said. “We thought it was something outside the workplace and, for the most part, outside of employment law unless somebody brings it into the workplace.”

The labor agency's stance represents a departure from previous guidelines from the agency, such as a December 2009 general counsel memo finding that Sears Holdings Corp.'s social media policy would not "chill" activity protected under Section 7 of the NLRA, which guarantees the right to concerted activities.

Like AMR, Sears barred workers from disparaging employees online, but the former NLRB general counsel recommended the Minneapolis office dismiss its complaint.
The current general counsel, Lafe Solomon, will likely take a more active role in issuing complaints against employers that attempt to regulate what their employees say about wages, hours and working conditions on the Internet, Bevan said.

Current NLRB Chairwoman Wilma B. Liebman, who has been a member of the board since 1997, has dissented from the board majority on some of the leading decisions that employers have relied on to defend their online communications policies, attorneys said. There's every reason to believe her thinking on workers' online rights will remain the same, and now she is backed up by pro-labor allies on the board, they said.

“Even though it's a settlement agreement, the fact that a complaint was issued in this [AMR] case signifies that there has been a substantial shift in how the board views social media and social media policies,” said Mike Hanna, a partner at Squire Sanders & Dempsey LLP.

As a result, attorneys advising clients on Internet policies must stay alert to the agency's every decision on the issue, Patterson said.

“I think every management-side labor lawyer's fear is to approve a policy today that, three years from now, is going to get a client in trouble with the NLRB,” he said.

Hanna has advised employer clients to do two things: modify policies to explicitly state they're not meant to interfere with Section 7 rights, and develop a thicker skin, at least until the case law attains some coherence.

One thing is certain, and that is that the issue of Internet usage policies will continue to be the target of future unfair labor practice charges, attorneys said.

On Feb. 4, a Connecticut chapter of the Service Employees International Union filed a charge with the NLRB against Student Transportation of America Inc., alleging the bus transportation company violated Section 7 with its social media policy.

At issue in that case is not the employer's specific actions, but the policy itself, which bans “the use of electronic communication and/or social media in a manner that may target, offend, disparage or harm customers, passengers or employees,” the filing said.

Although that case has yet to result in an office complaint, the NLRB is likely on the lookout for other charges that involve an Internet or social media component, Goodman said.

“I think they will bring a series of cases until it's clear everyone understands what their position is,” Goodman said. “If they go too far, if the NLRB becomes too restrictive, some employers will fight them, and then the courts will begin to decide the situation.”

--Editing by Christine Caulfield and John Williams.