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Policies and Discipline for Facebook Postings May Constitute Unfair Labor Practices

In an unprecedented action, the National Labor Relations Board (NLRB) has charged a company with committing an unfair labor practice for terminating an employee over her postings on Facebook. This is the first attempt by the NLRB to address whether an employee's online discussions regarding a supervisor is a protected activity under the National Labor Relations Act (the "Act").

After the employee was allegedly denied union representation during the investigation of a customer complaint, she took to Facebook on her home computer to complain about her supervisor. In turn, co-workers chimed in online in support of her comments. But some of those comments may have gone a bit too far—in part of her rant the employee inferred the supervisor had psychiatric problems. The company fired the employee, stating that her posted comments violated its Internet policy prohibiting employees from making disparaging comments when discussing the company or managers. The NLRB has charged that once the initial posting led to conversations—albeit online—between co-workers, the protections of the Act were triggered. The Act not only gives employees the right to attempt to unionize, it also protects employees from adverse employment action for discussing their working conditions with other employees. Once the Facebook comments about the supervisor led to the online discussion with other employees, the NLRB alleges the online commentary constituted "concerted activity" protected under the Act. To the extent the employee's termination was based on this online discussion, the NLRB alleges the discipline violated her rights under the Act.

The NLRB also challenges the company's Internet policy itself as an unfair labor practice. The Act prohibits not only actual interference with concerted activity, but policies that would reasonably tend to "chill" employees from exercising their rights to discuss their working conditions. The NLRB alleges the company's policy allowing termination for negative Internet postings could dissuade employees from exercising rights under the Act.

This case raises particular concerns that will require the administrative law judge hearing the matter to parse through the online postings to determine those that may be protected communications under the Act and those that are simply offensive and disparaging and then to decide which formed the basis of the termination. Regardless of the outcome of the case it is unlikely that the decision will provide employers with a bright line to guide them when dealing with an employee's online postings.

Until a clear decision is rendered, employers should be cautious if terminating employees based on their online activity and should review their Internet usage policies to ensure such policies are not overly broad in prohibitions.



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