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## Free Speech?

***If you blast your boss on Facebook, are you protected?***

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If you complain about your boss on Facebook, can you be fired? How much free speech do we actually have?

Free speech is something guaranteed by the Constitution. But this doesn't always give you a free pass at work.

Check out this case. Dawnmarie Souza, an emergency medical technician employed by American Medical Response of Connecticut, a private ambulance service, had a problem. She had been ordered to respond to a customer complaint. But she wanted a union rep with her. Her supervisor said no. Unhappy with the supervisor's decision, Ms. Souza posted on Facebook disparaging comments about her supervisor's actions and these postings were commented on by several other employees.

Ms. Souza was then terminated for violating the company's rule that prohibited employees from depicting the company "in any way" on social media sites.

What does the NLRB have to say about this? Read on. But first, as usual, some background…

The National Labor Relations Act (Section 7) states that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all such activities."

But what if you make a disparaging comment about your boss? Is that protected as a "concerted activity"?

In my July 2005 Allegro article "Concerted Activity and Labor Law," I explored the limits of what the courts then considered was appropriate concerted activity.

In that respect, a 1954 decision by the Supreme Court seemed to define Section 7's outer boundaries.

There the Supreme Court held that employees who engaged in activity that disparages either their employer's product or business policies were not engaged in protected activity. NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464 (1953) (Jefferson Standard Broadcasting).

In that decision, the Supreme Court held that an employer's termination of several technicians was not an unfair labor practice in violation of Section 7 because the technicians had distributed handbills highly critical of the company's policies and product.

Even though a labor dispute had existed at the time the handbills were distributed, the handbilling was not deemed to be concerted activity because there was no reference to the labor dispute or collective bargaining in the leaflet. The sole objective of the handbill was to denigrate the employer.

I also noted that courts have affirmed on a countless number of occasions employer policies geared to prohibiting employees from participating in activities that are demonstratively disloyal to their employer. These activities are not deemed entitled to protection under Section 7.

For instance, an Administrative Law Judge upheld the termination of several employees who had made disloyal and disparaging remarks about their employer and their employer's product during a news broadcast of a protest the employees were engaged in. Mastec Advanced Technologies and Joseph Guest, 2008 WL 89636 (2008).

The NLRB has also previously upheld employer restrictions on employee use of e-mail and social media. For example, in Prudential Insurance Company of America and OPEIU, Local 153, 2002 WL 31493320, a National Labor Relations Board

Administrative Law Judge held that a company may lawfully restrict use of its internal e-mail to bar union supporters from soliciting votes for a union representation election through the company's internal e-mail.

In fact, on Dec. 4, 2009, the National Labor Relations Board's General Counsel issued an advice memorandum that found that employers could promulgate policies that limited employees' use of social media without infringing their Section 7 rights. Sears Holdings, 2009 WL 5593880.

I had also noted that it may be difficult to discern the difference between some forms of concerted activity and activity which evidences disloyalty and it would seem that on some level, the two may intersect.

The case we started with – of EMT Dawnmarie Souza – concerns just such an area of intersection between concerted activity and disparaging activity and may redefine and expand the parameters of protected activity: posting comments on social networks such as Facebook.

**WORKERS WIN?**

Now let's see what the labor board decided in this case.

The regional director of the NLRB took the side of the worker and decided to issue a complaint, saying that the employee was engaged in protected concerted activity because a social networking site is "interactive."

The worker's Facebook comments prompted responses by her co-workers and thus is analogous to employees discussions at the water cooler or lunch room regarding working conditions, which are traditionally protected activity.

The NLRB's acting general counsel said, "This is a fairly straightforward case under the National Labor Relations Act. Whether it takes place on Facebook or 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 complaint has further to go: the regional labor board has set Jan. 25 as the hearing date. The board's ultimate determination of this case will be eagerly anticipated by anyone involved in labor relations.

However, for those contemplating concerted activity utilizing social media, until a definitive ruling is issued, the best course of action is to abide by any restrictions established by your employer. That is, of course, until those restrictions are deemed unlawful.