Concerted Activity and Social Media:

Failing to Hang Together May No Longer Mean Hanging Separately

"We must all hang together,
or assuredly we shall all hang separately."
— Ben Franklin

By Christopher Hogan

At the signing of the Declaration of Independence, the ever-quotable Ben Franklin reportedly admonished his colleagues, "We must all hang together, or assuredly we shall all hang separately." This quip nicely encapsulates a key rationale underpinning the protection afforded by federal and state labor laws for what is often referred to as "protected concerted activity." A species of associational rights, the concept of protected concerted activity is derived from labor laws, such as Section 7 of the National Labor Relations Act, which provides in part that employees "shall have the right to self-organization, to form, join, or assist labor organizations,...and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" Importantly, these protections extend to both unionized and non-unionized workplaces.

Recent events on the world political stage leave little doubt that social media is a powerful tool of collective action, which is perhaps why the National Labor Relations Board, now controlled by three appointed union lawyers, has recently turned its attention to employers' efforts to regulate employee social media use. The settlement of a recent case out of the Hartford Region represents a missed opportunity for the NLRB to address the role of social media in the context of protected concerted activity and to clarify whether employee action must any longer be concerted or for mutual aid or protection to be legally protected. The settlement provides several policy lessons for employers.

According to the complaint filed by the NLRB's Hartford Office, American Medical Response, an ambulance company, dismissed Dawnmarie Souza after she engaged in protected concerted activity on her Facebook page. The complaint alleges generally that, after a customer complaint, AMR asked Souza to complete an incident report, at which time she requested the presence of a union representative. The complaint alleges further that AMR then threatened Souza with discipline because she had requested union representation. After work Souza logged onto her Facebook page and scalded her supervisor with electronic invective. Members of Souza's social network, some of whom were also AMR employees, a key fact, responded with support and agreement. Sometime thereafter AMR discharged Souza, stating her dismissal was because of patient complaints.

Though AMR had attempted to frame the debate in terms of "patient complaints" rather than social media use, the NLRB's complaint took square aim at AMR's social media policy. Among other things, AMR's policy prohibits employees from "disparaging" their "superiors." Such vague and stratifying language is not likely to endear itself to an NLRB with a union orientation. It also provides employers with a cautionary tale on how speaking in terms of "respecting colleagues" may shield them from being considered low hanging fruit for test cases. In addition, though disclaimers are generally clunky and of limited practical value, in uncharted waters such as these a policy provision that states that a particular policy is not intended and will not be applied to restrict or interfere with the right of employees to engage in legally-protected activities may, on balance, be advisable. Ultimately, as part of AMR's settlement with the NLRB, AMR agreed to significantly revise its social media policy.

Policies may be amended with little difficulty. However, the settlement leaves unanswered the larger question of whether the NLRB will continue its recent trend of extending the NLRA's protections to what some see as ad hominem attacks by angry employees on individual owners and supervisors. Last August the NLRB's decision in Plaza Auto Center, Inc. conferred the NLRA's protections upon an employee who verbally attacked the owner of a company in the most acidic and personal of terms. Not too long ago, such an attack would have been found to be an interpersonal grievance rather than protected concerted activity for employees' mutual aid and protection. The AMR case was a missed opportunity for the NLRB to clarify whether failing to hang together no longer means hanging separately. Instead, now we're all hanging.

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