"TWEET!" You're Fired.

5-16-2011 by Steve Palazzolo

Remember back in February when we were talking about the National Labor Relations Board's view of protected concerted activity and social media? What do you mean you don't remember? See it here: http://zomichiganemploymentlaw.wnj.com/?p=316. Anyway, to remind you – back in February the NLRB settled a complaint it had filed against a Connecticut ambulance company that had fired an employee, basically for calling her boss a psych patient on her Facebook page. In its Press Release on the settlement the Board said:

"An NLRB investigation found that the employee's Facebook postings constituted protected concerted activity, and that the company's blogging and Internet posting policy contained unlawful provisions, including one that prohibited employees from making disparaging remarks when discussing the company or supervisors and another that prohibited employees from depicting the company in any way over the Internet without company permission. Such provisions constitute interference with employees in the exercise of their right to engage in protected concerted activity."

Not much help if you are trying to draft a policy, is it? Well, we recently got a bit more help. In an Advice Memo issued on April 21, 2011, the NLRB opined that it was legal for the Arizona Daily Star to fire a reporter who posted "inappropriate and offensive Twitter postings that did not involve protected concerted activity." The memo also had some important things to say about social media policies.

You see, the reporter did not dispute that he actually posted the Tweets or even that they were offensive. Instead, he claimed that the Daily Star's social media policy was unlawfully overly broad. What did the policy say? See, that is the confusing part – the Daily Star had no written policy. Instead, the reporter claimed that during disciplinary meetings leading up to his termination he was told by various management officials to "stop making inappropriate comments" and "stop airing his grievances or commenting about the employer in any public forum." He was told that he was "not allowed to Tweet about anything work related," and that he should "refrain from using derogatory comments in any social media forums that may damage the goodwill of the company."

The NLRB ultimately held that these statements did not amount to an oral "policy," and even if they did, the reporter was fired for making offensive comments and not engaging in protected concerted activity – but again, so what?

What is important and instructive about this particular Advice Memo is that the NLRB acknowledged that "in warning the [reporter] to cease his inappropriate Tweets . . . the Employer made statements that could be interpreted to prohibit activities protected by Section 7." That's right, what the Advice Memo basically says is, if your social media policy contains any of the prohibitions above it is an unlawful restriction and violates the NLRA.

So go check your policy. See any of those restrictions? Do you prohibit commenting in a public forum? Tell people they can't comment on work on social media sites? If so, let's take a look and if necessary get them changed before the NLRB does it for you.