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EMPLOYMENT ADVISORY

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Two Recent Decisions Signal the Limits of Protected Social Media Speech

Earlier this year the National Labor Relations Board issued several rulings that extended protection to negative comments made by employees regarding a supervisor or an employer's employment practices. On July 19, 2011 the Office of General Counsel for the NLRB issued two decisions that highlight the fact that not all speech is protected. (Martin House, 34-CA-12950 7-19-11) (Wal-Mart, 17-CA-25030 7-19-11). In the Martin House case, the discharged employee had worked at a non-profit residential facility for homeless people. She was fired after posting comments on her Facebook wall that communicated what activities the clients were engaged in, while she was working. When alerted to the posts, the employer fired her, reasoning that the posts had occurred during work hours and the information should have been treated as confidential. The Office of General Counsel rejected the employee's claim that her termination was unlawful and found that the employee's comments had nothing to do with her conditions of employment and could not be viewed as concerted activity that would be protected by the law.

In the second decision, an employee of Wal-Mart posted the following comment on his Facebook page: "Wuck Falmart! I swear if this tyranny doesn't end in this store, they are about to get a wakeup call because lots are about to quit!" The employee removed the posting after being disciplined by the store manager and warned that he could be fired. After removing the posting, the employee filed a charge with the National Labor Relations Board complaining that Wal-Mart had violated his rights. The Office of the General Counsel held that the employee's statements were "mere griping" and were not protected. Because the statements were not part of a group activity, the statements were not concerted activity protected by federal labor law.

For employers the decisions serve to confirm that an employee does not have a free pass to disparage his or her employer using social media as the delivery system. That said, the content of the message is critical when deciding what action, if any, to take in response to a posting that the employer feels crosses the line.

Terminated HR Employee Has Viable Disability Claim

In a recent federal court ruling, the U.S. Court of Appeals for the First Circuit ruled that a human resources employee alleging disability discrimination could proceed to trial. (Valle-Arce v. Puerto Rico Ports Authority, No. 10-1102 1st Cir. 7-8-11). The plaintiff, an employee of the Puerto Rico Ports Authority, was diagnosed with Chronic Fatigue Syndrome ("CFS") in 2000 and requested an accommodation consisting of flexible work schedule. For several years the employer accommodated the request. The plaintiff alleged that when a new head of Human Resources was appointed in 2005, her conditions of employment changed and she was "harassed" by multiple requests for documentation and her supervisor's efforts to monitor her job performance. The plaintiff was ultimately terminated by the employer allegedly for using confidential information to appeal a reprimand she received. During the trial, the District Court ruled for the employer, reasoning that the plaintiff's regular attendance was an "essential function" of the job and her absences were unduly burdensome.

On appeal the First Circuit Court of Appeals rejected the District Court's reasoning. The First Circuit held that there was sufficient evidence to support the plaintiff's claims and that a jury could find that she was able to do her job when given the reasonable accommodation of a flexible schedule.

The case highlights the fact that issues related to reasonable accommodation can be some of the most complicated that an employer must solve. The law and facts warrant caution.

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