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NLRB Rules That "Liking" A Facebook Comment Is Protected Activity

By Candice T. Zee and Jeffrey A. Berman

The National Labor Relation Board ("Board") issued its latest decision on social media issues on August 22, 2014. In *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014), the Board ruled that a Facebook discussion regarding an employer's tax withholding calculations and an employee's "like" of the discussion constituted concerted activities protected by the National Labor Relations Act ("Act"). The Board also held that the employer's internet and blogging policy violated the Act.

The employer, Triple Play Sports Bar and Grille, is a bar and restaurant. In 2011, at least two employees discovered that they owed more in state income taxes than they expected. Employees discussed the situation at work and complained to Triple Play, which had planned a staff meeting to discuss the employees' concerns. Prior to the meeting, a former employee posted the following "status update" to her Facebook page:

> Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money…Wtf!!!

Several Facebook friends posted comments in response to the status update, including two of Triple Play's employees. One employee commented, "I owe too. Such an asshole." A second employee "Liked" the former employee's status update, but posted no comment. When Triple Play discovered that two of its employees had participated in the Facebook discussion, it terminated their employment for disloyalty.

The Board held that Triple Play violated the Act by terminating the employees' for engaging in activities protected by the NLRA. In its analysis, the Board first determined that the Facebook discussion at issue should not be analyzed under the *Atlantic Steel Co.*, 245 NLRB 814 (1979) standard. To determine whether an employee loses the Act's protection under *Atlantic Steel*, the Board balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by the employer's unfair labor practices. The Board noted that the first factor alone supported its conclusion that *Atlantic Steel*'s framework is tailored for workplace confrontations with the employer, and not for the type of employee activities in this case.

Instead, the Board applied the standards set forth by the US Supreme Court in the *Jefferson Standard* and *Linn* cases. In *Jefferson Standard*, the Court upheld the discharge of employees who publicly attacked the quality of their employer's product and business practices without relating their criticisms to a labor controversy. *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 US 464 (1953). In *Linn*, the Court limited state-law remedies for defamation in the course of a union-organizing campaign to instances where the complainant could show that "the defamatory statements were circulated with malice" and caused damage. *Linn v. Plant Guards Local 114*, 383 US 53, 64-65 (1966).

Applying *Jefferson Standard* and *Linn* to the facts of the case, the Board determined that both the employees' comments and "like" in response to the Facebook post constituted a dialogue among employees about working conditions that was protected by the Act. The Board determined that the evidence did not establish that the discussion was directed to the general public. Although the record did not establish the former employee's privacy settings on Facebook, the Board noted that the comments were posted on an individual's personal page rather than a company page providing information on its products or services. The Board concluded that the employees' comments were not "so disloyal as to lose the Act's protection" because they did not disparage their employers products or services, or undermine its reputation. The Board also held that the comments were not defamatory, but simply a statement of a negative personal opinion of Respondent's owner.

The Board also found that the Triple Play's Internet/Blogging policy in the employee handbook violated Section 8(a)(1) of the Act. The policy warned that "engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment."

The Board held that the policy was overly broad and unlawfully chilled employees in the exercise of their Section 7 rights. It further noted that Triple Play's subsequent termination of the employees who engaged in the Facebook discussion further demonstrated the employer's improper prohibition of Section 7 activity. The Board ordered Triple Play to discontinue using the policy.

In his dissent, Member Miscimarra agreed with his colleagues that Triple Play unlawfully discharged the employees and questioned them about their Facebook activity. He disagreed, however with the finding that the Internet/Blogging policy violated the Act. Member Miscrimarra noted that the language of the policy did not expressly or implicitly restrict Section 7 activity, and was not applied to restrict protected activity. Specifically, Triple Play did not apply or refer to the policy when it discharged the employees.

What does this mean for employers? Employers must tread lightly before disciplining employees for social media comments that might appear to be critical of their employer. Employers should also review their social media policies to make sure that they are not in violation of the Act. Remember, the employees in this case were not a part of any union or labor organization.

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