National Labor Relations Board

Continuing Developments in Board Law Pertaining to Social Media and Other Electronic Forms of Protected, Concerted Communication by Employees

By Judith Champa

An employee, at home and on his own time, using his personal computer, signs into his Facebook account. He notices his Facebook friend and coworker has posted a lengthy rant decrying the tactics of a supervisor at their common workplace. As the employee has experienced similar problems with this supervisor, without much forethought he clicks the "like" button and moves on to other things. Unbeknownst to the employee who "liked" his coworker's comment, the original post is ultimately discovered by the supervisor in question through a chain of common friends and public or semi-public Facebook profiles. The next day, his employer terminates his employment for "liking" his coworker's Facebook comment, claiming the original comment was disparaging to the supervisor and the "like" showed the employee's support of such disparagement and a lack of loyalty to the respondent. Is the employer's action in this scenario lawful under the National Labor Relations Act?

> In a society where not much thought is put into reactions or comments to a coworker's posts on social media sites, employees should be aware that such communications may be interpreted in ways not intended by them, with significant consequences for their livelihoods.

Protected concerted activity in the context of social media

Under Section 7 of the National Labor Relations Act, employees have a statutory right to act together to improve their terms and conditions of employment, which includes using social media to communicate with each other and with the public for that purpose.[1] To constitute protected concerted activity under Section 7 of the act, employee conduct that is not union related must be engaged in for the purpose of "mutual aid or protection" (for the purpose of improving terms and conditions of employment) and must be "concerted" (involving at least two employees).[2] Conversely, certain employee communications can affect legitimate employer interests, including the "right of employers to maintain discipline in their establishments."[3] Neither the employee's right to engage in Section 7 activity nor the employer's right to maintain discipline is "unlimited in the sense that [it] can be exercised without regard to any duty which the existence of rights by others may place upon employer or employee."[4]

Triple Play Sports Bar & Grille: The rejection of *Atlantic Steel* in social media situations removed from the workplace

One of the more recent significant National Labor Relations Board cases involving social media issues is *Triple Play Sports Bar & Grille v NLRB*.[5] In *Triple Play*, in January 2011, several employees developed concerns about state tax deductions from their paychecks and complained to the respondent. On January 31, 2011, former employee Jamie LaFrance posted a status update on her Facebook page stating, "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...."

Friends of LaFrance, including customers and employees of the respondent, commented on her status. In particular, employee Vincent Spinella hit the "like" button on LaFrance's original status update and said nothing more. Employee Jillian Sanzone also posted: "I owe too. Such an a***hole!"[6] One of Triple Play's co-owners, Thomas Daddona, learned about the Facebook comments from his sister, who was a Facebook friend of LaFrance and an employee of the respondent.[7]

On February 2, Sanzone was discharged on the basis of her Facebook comment, which the respondent had interpreted as disloyal. The following day, Spinella was also discharged for "liking" LaFrance's original comment. The employer ultimately decided that Spinella's "like" made it apparent he would rather work elsewhere.

There was no dispute as to the protected, concerted nature of the Facebook conversation. Thus, the only issue was whether the comments lost the protection of the National Labor Relations Act in any way. While the administrative law judge applied the test set forth in *Atlantic Steel Company*,[8] the board determined that an *Atlantic Steel* analysis was not appropriate under the particular facts. More specifically, the board noted that *Atlantic Steel* weighs protected concerted activity against an employer's interest in maintaining order in the workplace. Since the Facebook comments did not occur in the workplace, the board felt a more appropriate standard

Fast Facts:

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The National Labor Relations Board noted that *Jefferson Standard* and *Linn* have typically been applied in situations in which communications were between third parties and the public, and were thus more appropriately applied to social media communications occurring outside of the workplace.

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was established in *National Labor Relations Board v Local Union 1229 International Brotherhood of Electrical Workers (Jefferson Standard)*[9] and *Linn v United Plant Guard Workers of America, Local 114*.[10] The board noted that *Jefferson Standard* and *Linn* have typically been applied in situations in which communications were between third parties and the public and were thus more appropriately applied to social media communications occurring outside of the workplace.[11]

Under *Jefferson Standard* and *Linn*, protected concerted communications remain protected unless comments are so disloyal, reckless, or maliciously untrue as to lose the act's protection. Under the *Jefferson Standard* test, the board distinguishes between disparagement of an employer's product and "the airing of what may be highly sensitive issues."[12] Communications that would otherwise be protected under the act do not lose their protection simply because the activity is, or could be, prejudicial to the employer.[13] The board has stated that it will not find a public statement unprotected unless it is "flagrantly disloyal, wholly incommensurate with any grievances which [employees] might have."[14] Further, the board has held that "[t]o lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence 'a malicious motive.'"[15] The board in *Triple Play* concluded that Sanzone's comments did not lose the protection of the act, noting that they did not disparage the respondent's products or services.[16] The board added that the posts were made on an individual's Facebook page as opposed to a company website, and were comparable to the type of conversations that may be overheard by a patron or other third party versus comments made directly to the public, as in *Jefferson Standard*.[17]

Pier Sixty, LLC: The totality of the circumstances test

In *Pier Sixty, LLC*, the board adopted an administrative law judge's decision applying a totality of circumstances analysis, finding that the circumstances present weighed in favor of protection.[18] *Pier Sixty, LLC* was decided after *Triple Play*, and without overturning its earlier decision, the board reiterated that *Atlantic Steel* was not the appropriate analysis in such cases but instead found that the totality of the circumstances test used by the judge was appropriate.[19] The different standard used in *Pier Sixty, LLC* suggests that the board has not created a bright-line rule that all social media cases must be decided according to *Jefferson Standard* and *Linn*, but rather has suggested that more than one approach may be appropriate. A primary factor appears to be the forum in which the communication occurred and to whom it was directed.

Conclusion

The answer to the question posed above—whether an employee can be fired for simply "liking" a Facebook comment—is both yes and no. If the original comment amounts to protected concerted activity, which is not so flagrantly disloyal or malicious so as to lose the protection of the National Labor Relations Act, a "like" by a second employee will also be protected activity pursuant to *Triple Play*. If the original comment is neither protected nor concerted in nature, "liking" this comment would similarly carry no protection under the act. However, it is unclear at this time how the board would interpret an ambiguous "like" of a comment containing both protected and unprotected comments. Therefore, in a society where not much thought is put into reactions or comments to a friend's or coworker's posts on Facebook or other social media sites, employees should be aware that such communications may be interpreted in ways not intended by them, with significant consequences for their livelihoods. ■

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ENDNOTES

1. *Triple Play Sports Bar & Grille v NLRB*, 629 F Appx 33 (CA 2, 2015), citing *Valley Hospital Medical Center*, 358 Fed Appx 783 (CA 9, 2009); see also *Republic Aviation Corp v NLRB*, 324 US 793, 798; 65 S Ct 982; 89 L Ed 1372 (1945).
2. *Fresh & Easy Neighborhood Market, Inc*, 361 NLRB No 12; slip op at 3 (2014).
3. *Triple Play*, 629 F Appx 33.
4. *Id.*, citing *Republic Aviation*, 324 US 793.
5. *Triple Play*, 629 F Appx 33.
6. *Id.* at 35.
7. *Id.* at 36–37.
8. *Atlantic Steel Co*, 245 NLRB 814 (1979).
9. *NLRB v Electrical Workers Local 1229*, 346 US 464; 74 S Ct 172; 98 L Ed 195 (1953).
10. *Linn v Plant Guards Local 114*, 383 US 53; 86 S Ct 657; 15 L Ed 2d 582 (1966).
11. *Triple Play*, 629 F Appx 33.
12. *Valley Hospital Medical Center v NLRB*, 358 F Appx 783 (CA 9, 2009).
13. *Jimmy John's*, 361 NLRB No 27, slip op at 4, n 15 (2014).
14. *MasTec Advanced Technologies*, 357 NLRB 103 (July 21, 2011).
15. *Jimmy John's*, 361 NLRB No 27, citing *Valley Hospital Medical Center*, 358 F Appx 783.
16. *Triple Play*, 629 F Appx at 36.
17. *Id.*
18. *Pier Sixty, LLC*, 362 NLRB No 59; slip op at 2 (2015).
19. *Id.* at 3.