THE PUBLIC SECTOR

Court deals blow to ability to discipline employee social media activity

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While employees are flocking to social media outlets to discuss their workplaces (and their bosses), employers must satisfy an increasingly high burden to justify their regulation and discipline of off-duty social media activity in unionized and nonunionized workforces. The U.S. 2nd Circuit Court of Appeals recently offered employers a reminder of that when it affirmed a decision by the National Labor Relations Board (NLRB).

NLRB finds protected activity in Facebook posts

Jillian Sanzone and Vincent Spinella worked at Triple Play Sports Bar and Grille. Sanzone and another employee discovered that they owed state income taxes because of Triple Play's alleged incorrect withholding practices. Management then scheduled a staff meeting to review withholding calculations with employees. Before the meeting occurred, however, Sanzone and Spinella engaged in a Facebook discussion with former employee Jamie LaFrance. LaFrance posted the following status update on his 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 employees and customers joined the conversation. Spinella clicked the "Like" button under LaFrance's initial post, and Sanzone commented, "I owe too. Such an asshole," referring to one of the owners who allegedly made the miscalculation. Triple Play learned of the conversation and fired Spinella and Sanzone for being disloyal and for engaging in defamatory remarks.

The NLRB reversed the employees' discharge. The Board found that (1) the employees engaged in protected concerted activity and (2) their communications were insufficiently "disloyal" or "disparaging" to lose protection under the National Labor Relations Act (NLRA). Triple Play appealed.

2nd Circuit ups the ante

On appeal, Triple Play argued that the employees' discharge was lawful under the ruling in *NLRB v. Starbucks Corp.*, 679 F.3d 70, 77 (2d Cir., 2012), which the NLRB ignored. Specifically, the restaurant claimed the employees' online activity lost protection because it contained obscenities (i.e., LaFrance's "WTF" status update, which Spinella "Liked," and Sanzone calling one owner an "asshole") and was viewed by customers. The court disagreed.

In *Starbucks,* the court held that the NLRB incorrectly concluded that Starbucks violated the NLRA by terminating an employee who used obscenities within earshot of customers during a prounion protest in a public area of the shop. The court found that the Board erred by "disregard[ing] the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers."

However, the court concluded it would be inappropriate to apply the *Starbucks* standard to Facebook posts because it would chill virtually all employee online speech because all Facebook posts can potentially be viewed by customers. The court explained that while Triple Play customers saw the Facebook discussion, it wasn't directed toward any customers and didn't reflect the employer's brand. But the court went even further—saying the NLRB's decision that the employees' online speech didn't lose protection simply because it contained obscenities and was viewed by customers "accords with the reality of modern-day social media use."

The court likewise disposed of Triple Play's arguments that the employees' communications were disloyal and defamatory. The court agreed with the NLRB that the communications sought to provide support regarding an ongoing labor dispute rather than disparage Triple Play or undermine its reputation. It further found that even if Sanzone made a knowingly false statement about her tax withholdings, it wasn't necessarily deliberate or maliciously false and had no bearing on her conceivable belief that Triple Play may have erroneously withheld other employees' taxes.

The 2nd Circuit also affirmed the NLRB's determination that Triple Play's Internet/blogging policy violated the NLRA because it chilled employees from exercising their Section 7 rights. The policy stated that by "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." *Three D, LLC v. N.L.R.B.*, No. 14-3284, (2d Cir., Oct. 21, 2015).

Bottom line

The 2nd Circuit has broadened the extent to which employees can use social media to complain about the workplace without repercussion. First, online posts that contain obscenities and may be viewed by the public/customers are insufficient, by themselves, to strip employees of protection under the NLRA. Second, proving that employees' concerted activity is unprotected requires employers to satisfy the heavy burden of proving the employees acted with actual malice.

While this decision interprets the NLRA, we can expect that it will have equal application to public-sector employers. Indeed, public employers are also susceptible to a First Amendment retaliation claim.

Separately, you should inspect your policy manuals and employee handbooks. Courts have consistently refused to uphold policy language that is vague or overly broad or that imposes subjective (i.e., "inappropriate") rather than objective standards.

Finally, note that Triple Play didn't appeal the NLRB's holding that clicking "Like" constituted protected concerted activity. Until the Board's holding is overruled, you should be cautious in disciplining employees who use this Facebook feature.


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