THE PUBLIC SECTOR

Talia Jane's lament: Internet rants as protected concerted activity

by Jeff Sloan
Renne Sloan Holtzman Sakai LLP

The now-infamous online rant "Open Letter to My CEO" authored by a disgruntled young woman named Talia Jane against her now-former employer, Yelp/Eat 24, has elevated employer concerns about the impact of employees' online criticisms and exposure of sensitive information. Perhaps going to the National Labor Relations Board (NLRB) to protest her discharge was the last thing on Jane's mind after she was fired (immediately after posting her rant). But what if she had? Why wouldn't she have done so? And how different would the answer to these questions be if she had been a public-sector worker?

Theory: protected concerted activity

Jane's lament complained bitterly about her subsistence-level wages. At first blush, it seems implausible that this individual gripe could get on the map with an NLRB charge. But her tirade actually fell within the range of what the Board could find to be "protected" under today's social mores.

The NLRB has erected a high bar that employers need to surmount to claim that employee speech is unprotected. In the relatively recent *Triple Play* case, two workers' Facebook criticisms about their employers were disparaging and to a degree obscene, but they were protected because they weren't deliberately or maliciously false, weren't directed toward customers, and were in accordance with "the reality of modern-day social media use."

In a similar case from 2011 (*Knauz BMW*), the NLRB held that a car salesman's mocking and sarcastic Facebook posting wasn't sufficiently disparaging to be rendered unprotected (although his later Facebook posting depicting a car accident was unprotected, enabling the employer to lawfully terminate him). Therefore, Jane's tirade was probably protected activity.

But that's only half the battle. To prevail at the NLRB, Jane would need to show not only that her rant was protected, but also that it was concerted. Was the open letter for "mutual aid and protection" under Section 7 of the National Labor Relations Act (NLRA)? Stretching the meaning of the word "concerted," the NLRB has long said that individual activity under some circumstances can qualify for NLRA protection—two or more individuals don't have to act in unison. However, nothing in Jane's letter suggests she was seeking to initiate, induce, or prepare for group action or bring a group complaint to management's attention. Indeed, I read her rant as being personal and not tied to any collective action or strategic plan.

However, a good union lawyer could make a case for the proposition that Jane's open letter courageously spoke out about the low pay and working conditions she and her coworkers received and endured and that it could reasonably be viewed to stimulate the support of similarly situated low-paid workers at Yelp/Eat24. Therefore, if Jane filed an unfair practice charge with the NLRB, she would have an uphill battle but still a fighting chance that it would issue a complaint.

Reality: risks in seeking NLRB protection

Even though Jane's case might have a shot legally, not many people in her shoes would go to the NLRB. Tech workers are typically self-reliant rather than collective-action-oriented; good tech companies are usually good employers, and unions haven't made many inroads into that sector.

And there's always the reality that a tech worker who files an unfair labor practice charge against a tech company isn't likely to be viewed as a good candidate for a job with another tech company. This is heightened by the reality that when employers are considering applicants for many forms of employment, they often check what is within the public domain on the Web.

Public-sector differences

Contrary to the approach that Yelp/Eat 24 took (terminating Jane immediately after she posted her rant), public-sector employers typically err on the side of being less intrusive and more tolerant of employees' out-of-work communications. After all, unlike in the private sector, the First Amendment applies in the public-sector workplace, amply protecting employee speech, except in relatively extreme circumstances.

Moreover, almost all nonmanagerial public-sector workers have job protection ("for cause" rather than

"at will") after completing their probationary periods. And, significantly, most public-sector workers are unionized, with unions that are quick to file grievances and unfair labor practice charges. In short, it's very doubtful that a public employer would have fired Jane for such comments.

Bottom line

This case emphasizes the vast difference in job protections between public- and private-sector workers. Cases like *Triple Play* and *Knauz BMW* have put well-advised private employers on the alert about the NLRB's high tolerance for social media use in light of recent Board cases. Private and public employers should be sensitive to the risks associated with terminating employees for speech-related conduct.

There's sometimes a high price to pay when employees feel mistreated and aren't compensated or rewarded for their good work. But then one wonders, in modern times, whether the public debate stirred up by Jane's posting might have been punishment enough for the employer.

The author can be reached at Renne Sloan Holtzman Sakai LLP in San Francisco, jsloan@rshslaw.com. ✤