Insight

IN-DEPTH DISCUSSION

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Second Circuit Upholds NLRB's Triple Play Decision, Expanding Section 7 Protections for Employees' Social Media Activity

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Obscenities alone—even when viewed by an employer's customers—do not deprive employees engaged in protected concerted activity of the National Labor Relations Act's ("NLRA" or the "Act") protections. So held the U.S. Court of Appeals for the Second Circuit when recently affirming the National Labor Relations Board's ("NLRB" or "the Board") decision in *Three D, LLC (Triple Play),* 361 NLRB No. 31 (2014). The court also affirmed the Board's decision to require an employer to meet a high standard of proof to justify terminating employees who make critical, and even false, statements about the employer while engaging in Section 7 activity in social media. Consequently, *Triple Play* has broadened employees' ability to use social media to complain about work with impunity.

Since issuing its ruling, the Second Circuit has denied the Board's request to publish its unpublished summary order so that it can serve as precedential authority. Regardless of the Second Circuit's decision not to publish this decision, employers should take heed of this important case, particularly when evaluating an employee's social media activity.

The NLRB's Decision in *Triple Play*

The Board's decision in *Triple Play* centered on the employer's—Triple Play Sports Bar and Grille, a non-union bar and restaurant—termination of two employees for their Facebook discussion about the company's tax-withholding practices. A former employee initiated the discussion by posting 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 current Triple Play employees and a customer posted sympathetic comments. Then, a coworker selected the "Like" option under the initial status update. In response to a subsequent comment by the initial poster accusing one of Triple Play's owners of criminal conduct, a second

employee added: "I owe too. Such an asshole." After learning about the Facebook discussion from another employee, Triple Play terminated both employees.

On review, the Board agreed with the Administrative Law Judge's finding that the "Like" and the second employee's comment constituted protected concerted activity under Section 7 of the NLRA, and Triple Play's termination of the employees based on those posts was unlawful. The Board's decision clarified that off-duty social media exchanges that disparage the employer should be analyzed in accordance with the Supreme Court's decision in *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953) (Jefferson Standard). Under that standard, disloyal statements lose the Act's protections if they "amount to criticisms disconnected from any ongoing labor dispute." The Board also held that allegedly defamatory, off-duty social media posts should be analyzed in accordance with the Court's decision in *Linn Plant Guards Local 114,* 383 U.S. 53 (1966). Under that standard, posts would lose protection if they were made "with knowledge of [their] falsity, or with reckless disregard of whether [they were] true or false."

Applying these standards, the Board found that the employees' comments were neither disloyal nor defamatory. Although a customer witnessed the comments, the Board analogized the employees' discussion to "a conversation that could potentially be overheard by a patron or other third party," as opposed to a conversation that was clearly directed to the general public.

The Board also held that the restaurant's Internet/Blogging Policy in its employee handbook violated the Act by unreasonably chilling employees' Section 7 rights. The policy provided, in pertinent part, that employees were prohibited from *"engaging in inappropriate discussions about the company, management, and/or co-workers."*

The Second Circuit's Ruling

Notably, Triple Play did not appeal the Board's determination that the first employee had engaged in protected concerted activity merely by clicking on Facebook's "Like" or thumbs-up icon without adding any comment. Thus, while open to challenge at the appellate level in another case that raises the issue, Board precedent now establishes employees are entitled to Section 7's protections merely by clicking an icon that implies their agreement with a co-worker's comment related to terms and conditions of employment.

Because the restaurant conceded on appeal that Section 7 protected the employees' Facebook speech, it was left to argue that the employees' speech should have been stripped of the Act's protection because it was obscene, disloyal, and false. Triple Play spearheaded this attack by citing *NLRB v. Starbucks Corp.,* 679 F.3d 70 (2d Cir. 2011). There, the court held that the Board had "improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers" when the Board ruled (incorrectly) that Starbucks had violated the Act by terminating an employee who used obscenities during a pro-union protest in a public area of the company's store.

The Second Circuit readily distinguished *Starbucks*, noting that its decision in that case was based on the Board's failure to consider a legitimate employer concern. The Board's decision in *Triple Play* did not present this concern: the Board had applied the *Jefferson Standard* and *Linn* standards because it recognized "that an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation … from defamation."

The Second Circuit also reasoned that *Starbucks* would reach too broadly if that case were extended to all social media communications by employees. The court articulated this point as follows:

> Almost all Facebook posts by employees have at least some potential to be viewed by customers. Although customers happened to see the Facebook discussion at issue in this case, the discussion was not directed toward customers and did not reflect the employer's brand. The Board's decision that the Facebook activity at issue here did not lose the protection of the Act simply because it contained obscenities viewed by customers accords with the reality of modern-day social media use.

The court then rejected Triple Play's fallback position that, even if the Board had correctly applied the *Jefferson Standard* and *Linn* (instead of applying *Starbucks*), the employees' comments still should be stripped of the Act's protections. According to Triple Play, the evidence demonstrated that the employees endorsed disparaging and false comments about Triple Play and its owners, and therefore their comments

lost the Act's protections. In particular, Triple Play argued that the second employee's comment that she "owe[d] too…" was knowingly false, as she did not believe that Triple Play had made any errors with respect to her income tax withholdings. The court, however, found that "[a]lthough [the employee] may not have believed that Triple Play erroneously withheld her taxes, that has no bearing on the truth of her statement 'I owe too' or her conceivable belief that Triple Play may have erroneously withheld other employees' taxes."

The court ended its opinion by upholding the Board's conclusion that Triple Play's Internet/Blogging Policy violated the Act. The court found that employees could reasonably interpret the company's Internet/Blogging Policy as proscribing any discussions about their terms and conditions of employment that Triple Play deemed inappropriate.

Takeaways for Employers

The Second Circuit's ruling in *Triple Play* provides several useful takeaways for employers:

1. Because a "Like" standing alone can be protected, employers should consider consulting with counsel before disciplining employees based on their selection of the "Like" button.
2. An employee's mere use of obscenities in a social media post that may be accessible by customers/clients is not enough, by itself, for the employee's communications to lose the protection of the Act.
3. Employers should consider consulting with counsel before firing an employee for disparaging or defamatory speech when that speech takes place in the course of a group discussion in social media about work.
4. Employers should recognize that policy language that is general or establishes subjective standards, such as "inappropriate discussion," will raise a red flag for the Board and reviewing courts, unless accompanied by examples that make it clear to a reasonable employee the general language is not intended to encompass protected speech.