Thursday, November 5, 2015

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials & TRIBULATIONS

Second Circuit upholds NLRB social media ruling

On a cold January morning in 1959, seven non-union employees walked out of a Baltimore machine shop. The unheated shop was so cold, one employee claimed that an icicle had formed on the spot welder that he was operating. ("High Court Upholds Seven-Man Walkout," The New York Times, May 29, 1962.)

In January 2011, likely from the comfort of her home, an employee read a Facebook comment on a disgruntled former employee's Facebook page. That comment referred to the employer as a "shady little man" who likely pocketed money from employees. The employee responded to that post, referring to her employer as an "a**hole."

What do these occurrences have in common? The employees were terminated for their conduct, and in both cases, the National Labor Relations Board found that these terminations violated the National Labor Relations Act.

The NLRB's recent foray into social media use and employer policies regarding such use has been reflected both in guidance issued by the agency and in a series of decisions by the board. Of particular concern to some employers is the NLRB's intense evaluation of employer policies related to social media use and new perceived limitations on an employer's ability to regulate employee conduct, even when that conduct is profane or occurs in the presence of customers.

By SARAH SNYDER MERKEL
Daily Record Columnist

Until recently, no Court of Appeals had completed its review of an NLRB order addressing social media use or policies. On Oct. 21, 2015, the Second Circuit became the first Court of Appeals to issue such a decision. While the court affirmed the board's decision, it specifically elected to issue a summary order, without precedential effect.

Triple Play Sports Bar and Grille – The NLRB decision and order

Section 7 of the National Labor Relations Act establishes employees' rights to organize and to "engage in other concerted activities for the purpose of … mutual aid or protection," 29 U.S.C. § 157. Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights, Id. at § 158(a)(1). The board found that Triple Play Sports Bar and Grille, a nonunion employer, violated Section 8(a)(1) by terminating two employees after they made negative comments on social media, and by promulgating a workplace policy that could be construed as restricting protected activity.

After receiving complaints that employees' state income tax liabilities were greater than expected, Triple Play scheduled a staff meeting with its payroll provider and employees. Before this meeting took place, a former employee posted a message on her personal Facebook page, noting the withholding issue, and complaining, "Now I OWE money…Wtf!!!!" Triple Play Sports Bar and Grille, 361 NLRB No. 31, p. 2.

A customer, who was a Facebook "friend" of the former employee, then posted a comment in response. The resulting string of comments complained about the owner of Triple Play, with the former employee suggesting that the owner "pocketed" the money, and a current employee then using an explicative to refer to him. Two customers of Triple Play were also involved in the exchange.

The owner discovered these comments after his sister, who was also a Facebook "friend" of the former employee, reported the postings. Both employees who were involved in the Facebook discussion were terminated. One of these employees was also "interrogated" by Triple Play regarding the Facebook conversation thread, *Id.* at p. 3. At that point, the owner threatened to take legal action for defamation against anyone involved.

Continued …

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Continued ...

The NLRB found that the Facebook discussion amounted to concerted activity under the Act. The thread involved four current employees and was tied to a discussion about the employer's calculation of employees' tax withholdings. This discussion began in the workplace, and appeared related to issues that the employees either intended to raise at a staff meeting or as a complaint to government entities.

The NLRB likewise found that this concerted activity was protected under the Act, because the discussion revolved around workplace complaints concerning tax liabilities, the employer's withholding calculations, and a former employee's claim that she was owed back wages. The board also held that a current employee who "Liked" certain comments was simply expressing "his support for the others who were sharing their concerns and 'constituted participation in the discussion that was sufficiently meaningful as to rise to the level of' protected, concerted activity," *Id*.

The employer argued that this protected, concerted activity lost any protection under the Act, because the comments were made in a public forum, in the "presence" of customers, and were defamatory and disparaging. The NLRB rejected this argument, finding that the terminated employees' conduct was indeed protected under the Act.

It should be noted that the overall conversation thread was extremely negative. The thread included comments by the former employee suggesting that the owner of Triple Play was a "shady little man" who probably "pocketed" the disputed money "from all our paychecks," *Id*. at p. 2. While the board generally construed the conversation in the context of a dispute about tax withholdings, the board evaluated only the character of the actual employee comments.

For example, following the "shady little man" posting by the former employee, a then current employee, Jillian Sanzone, responded, "I owe too. Such an a**hole," *Id*. The NLRB did not consider the extent to which Sanzone may have been echoing a comment accusing her employer of being "shady" and of stealing money from employees. Instead, the board found that this comment only endorsed the former employee's complaint that her withholdings had been miscalculated. Likewise, the board was not troubled by Sanzone's use of an explicative to refer to her employer, finding that this post was simply the profane "voicing of a negative personal opinion," *Id*. at p. 6.

Thus, the specific comments made by employees, including the decision to "Like" a comment made by the former employee, were not so "disloyal" as to lose protection under the Act. The fact that other aspects of the thread included potentially non-protected comments made by others was irrelevant to the board's determination.

The NLRB also evaluated Triple Play's Internet/Blogging policy set forth in its employee handbook. The policy included language indicating that when an employee discloses confidential information or engages in "inappropriate discussions about the company, management, and/or co-workers," the employee "may be violating the law and is subject to disciplinary action."

The board found that the policy did not explicitly restrict protected activity. However, the rule was "unlawfully broad" because employees could "reasonably interpret" the rule "to encompass protected activities," *Id*. at p. 7. According to the board, its finding that the language of the rule was "sufficiently imprecise" was buttressed by the fact that Triple Play ultimately terminated two employees for engaging in the Facebook conversation.

The Second Circuit's opinion

The Second Circuit found that the board's order was supported by substantial evidence, and its legal conclusions were neither arbitrary nor capricious. The court rejected Triple Play's argument that postings which included obscenities and were viewed by customers were not protected under the Act. Accepting such an argument could "chill virtually all employee speech online," since almost all Facebook posts could potentially be viewed by customers, *Three D, LLC v. N.L.R.B*., No. 14-3284, 2015 WL 6161477, at *3 (2d Cir. Oct. 21, 2015).

Triple Play also argued that the NLRB erred in failing to evaluate the employees' comments in context with the other negative comments by the disgruntled former employee, which were then endorsed by employee Sanzone. Unpersuaded, the court held that these comments were in the context of a complaint about tax withholdings. Thus, anyone who saw Sanzone's statement could evaluate it "critically in light of that dispute," *Id*.

With respect to the company's Internet/Blogging policy, the court simply found that the NLRB applied the correct standard, and that it "reasonably applied that rule to the facts of this case," *Id.* at 4.

The NLRB seeks an order with precedential effect

Two days after the court issued its opinion, the NLRB moved for publication of the order. The board argued that order provided "important clarification to the standards applicable to employee speech in the social media context," NLRB Motion for Publication, p. 3. The board predicted that "[b]ecause this case

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Continued ...

involved protected concerted activity in the social media context, an ever-expanding area of employee communications, the same or similar arguments are likely to be litigated in future cases," *Id*. at pp. 3-4. The court rejected this application, and its order remains without precedential effect.

Conclusion

This case illustrates the pitfalls surrounding disciplining employees for expressing anti-employer sentiments. Statements that seem disloyal, and downright defamatory, may be construed as protected, concerted activity. Moreover, seemingly neutral policies can be construed as restricting an employee's Section 7 rights, especially in light of actual employer discipline.

Not surprisingly, it is sometimes difficult for employers to maintain detached composure when faced with readily accessible and highly negative social media postings. However, before resorting to discipline, employers who wish to avoid NLRB scrutiny should review their social media policies and attempt to dispassionately consider whether the employee's conduct is indeed protected under the act.

Sarah Snyder Merkel is a partner with The Wolford Law Firm LLP, a firm focused exclusively in the area of litigation. The firm handles both civil and criminal matters.