October 2015

Court "Likes" NLRB's Determination that Facebook Posts Are Protected under the NLRA

The Second Circuit Court of Appeals recently upheld the National Labor Relations Board's (NLRB) decision that employees' Facebook posts are protected by the National Labor Relations Act (NLRA). *Three D, LLC d/b/a Triple Play Sports Bar and Grille v. National Labor Relations Board*.

The case involved two employees and a former employee engaged in a Facebook discussion regarding their employer's alleged improper tax withholdings. A former employee posted this: "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…[expletive]!!!!" A second employee "liked" that comment while a third employee commented: "I owe too. Such an [expletive]."

The Court upheld the NLRB's determination that the one employee's "like" and the other employee's comment were protected under the NLRA and that the employer improperly terminated the two current employees. Under the NLRA, employees have the right to engage in concerted activities for the purpose of mutual aid and protection, and employers are prohibited from interfering, restraining, or coercing employees in the exercise of that right. Because the Facebook posts were made among current employees in the context of workplace complaints about tax liabilities, tax withholding calculations, and claimed owed back wages, the Court affirmed the NLRB's conclusion that the employees were engaged in concerted, protected activity.

While employers have a legitimate interest in protecting their reputation and services or products from disparagement and harm, the Court agreed with the NLRB that the employees' posts were not sufficiently disloyal or defamatory to lose protection under the NLRA. Specifically, no evidence existed that the statements were made with knowledge of their falsity or reckless disregard of whether they were true or false. Nor did the statements refer to the employer's products or services or otherwise disparage the employer.

Finally, responding to the employer's argument that the Facebook posts contained obscenities that could be seen by customers, the Court responded, "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."

In light of the Court's decision, before disciplining or discharging employees for their social media use,

employers may choose to consider whether the comments are protected under the NLRA.

For more information or if you have questions about how the issues raised in this update affect your policies and practices, please contact one of the following members of our Labor, Employment, Benefits + Immigration Group:

Natale V. Di Natale | Matthew T. Miklave | Peter A. Dagostine | Susan N. Masters

For insights on legal issues affecting various industries,
please visit our Thought Leadership page and subscribe to any of our newsletters or blogs.

Boston | Hartford | New York | Providence | Stamford | Albany | Los Angeles | Miami | New London | rc.com

---