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NLRB's Recent *Triple Play* Decision Tackles Two Critical Social Media Issues for Employers

By Philip Gordon and Zoe Argento

With the intersection between cutting-edge social media and the Depression-era National Labor Relations Act (NLRA or the Act) still relatively new, employers are looking for answers to some fundamental questions when it comes to regulating employees' off-duty social media posts about work. The National Labor Relations Board's (NLRB or the Board) recent decision in *Three D, LLC (Triple Play)*, 361 NLRB No. 31 (2014), answered two of those questions: (1) How far can employees go when posting social media content protected under Section 7 of the NLRA before their posts lose that protection?; and (2) Can employees who do nothing more than click on the ubiquitous thumbs-up icon to "Like" social media content claim the protections of Section 7 of the NLRA? In addition to answering these two critical questions, *Triple Play* provides useful guidance for employers on drafting a social media policy without raising a red flag for the NLRB.

The Board answered the above questions in response to the firing of two employees by Triple Play Sports Bar and Grille (the employer) for alleged disloyalty shortly after the owners viewed an exchange on Facebook among the employees, co-workers, a former employee, and customer that was highly critical of the owners. In its ruling, the Board (a) set a high bar for employers before they can terminate employees based on speech otherwise protected by Section 7, (b) determined that the "Like" in that case was protected, (c) reversed the employee's firing, and (d) found a key provision in the employer's social media policy to be unlawfully overbroad. While the employer in *Triple Play* suffered defeat, the Board's decision, for the reasons discussed below, should help other employers avoid a similar fate.

The Facebook Discussion and the Employees' Discharge

The employer is a non-union bar and restaurant in Watertown, Connecticut. While preparing their tax returns in January 2011, several employees discovered that they owed money to the state of Connecticut. Suspecting a mistake by the bar's owners when calculating their state tax withholding, some employees complained. The owners organized a staff meeting with the payroll provider to discuss the issue.

Before this meeting, Jamie LaFrance (LaFrance), a former employee who had recently left employment with the employer started a Facebook conversation by posting the following status update:

> "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 comments followed in which a customer and a current employee sympathized.

LaFrance continued by accusing the owners of making a mistake in calculating tax withholdings, and she expressed her intention to report the mistake to the state's "labor board." At that point, a current employee, Vincent Spinella (Spinella), selected the "Like" option under LaFrance's initial status update.

As the Facebook exchange continued, LaFrance verbally attacked one of the owners:

> "Hahahaha he's such a shady little man. He prolly [*sic*] pocketed it all from all our paychecks."

Another current employee, Jillian Sanzone (Sanzone), followed this statement by posting: "I owe too. Such an asshole." More comments followed, including a statement by another current employee that she planned to discuss the tax issue at a staff meeting.

After learning about the Facebook exchange from one of LaFrance's Facebook friends, a current employee who happened to be the sister of one of the owners, the owners questioned Spinella about his "Like." They told Spinella that it was "apparent" he wanted to work somewhere else because he had "liked the disparaging and defamatory comments" and terminated his employment.

Underlying Discussion Protected

The parties did not dispute, and the Board affirmed the Administrative Law Judge's (ALJ) finding, that Section 7 protected the underlying Facebook discussion about allegedly incorrect tax withholdings because the discussion related to terms of employment and was intended for employees' mutual aid and benefit. More specifically, the ALJ held the Facebook discussion was concerted activity because it involved current employees engaged in an ongoing sequence of discussions about a condition of employment, namely, the employer's calculation of employee tax withholdings. As additional support for this conclusion, the ALJ noted that the employees in their Facebook conversation were seeking to prepare for group action by discussing issues they intended to raise at a staff meeting and considering possible avenues for complaints to government authorities.

How to Determine When an Employee's Otherwise Protected Social Media Post Crosses the Line

Because it was undisputed that Section 7 protected the underlying Facebook discussion, the NLRB focused on the employer's contention that Spinella's "Like" and Sanzone's calling one owner an "asshole" lost the Act's protections as disloyal or defamatory statements. As a starting point, the Board rejected the ALJ's application of the factors taken from the Board's decision in *Atlantic Steel Co.*, 245 NLRB 814 (1979). The Board reasoned that those factors could not logically be applied to most social media discussions because they had been developed to balance employees' Section 7 rights in the context of an in-person discussion with supervisors in the workplace against an employer's interest in workplace discipline.

The Board determined that off-duty social media exchanges occurring outside the workplace are more properly analyzed under standards designed to balance employees' right to engage in Section 7 activity against the employer's interest in protecting its reputation. One of those standards, based on the Supreme Court's decision in *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953) (*Jefferson Standard*), applies to public statements that disparage the employer's products or services. Under that standard, mere disloyalty may lose the Act's protections. For example, in *Jefferson Standard*, the Supreme Court upheld the discharge of employees who publicly attacked the quality of their employer's product and its business practices without relating their criticisms to a labor controversy.

The other standard, based on the Supreme Court's decision in *Linn Plant Guards Local 114*, 383 U.S. 53 (1966), applies to allegedly defamatory comments about the employer and its employees. Under that standard, if the employee's social media post relates to an ongoing work dispute with the employer, the post will not lose its protection unless it is uttered "with knowledge of its falsity, or with reckless disregard of whether it was true or false." This is the well known "actual malice" standard first adopted by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to protect First Amendment rights. As *New York Times* and its progeny have demonstrated, the "actual malice" standard can be difficult to meet.

The Employees' Social Media Activity in *Triple Play* Did Not Lose its Protection

The Board determined in *Triple Play* that the employees' comments did not lose the Act's protection as disloyal or disparaging under *Jefferson Standard*. The Board found that "[t]he comments at issue did not even mention [the employer's] products or services, much less disparage them" but rather related to an on-going labor dispute. The Board also emphasized that the discussion was not "directed to the general public," even though one of the employer's customers had participated. According to the Board, because the communications took place on a personal Facebook profile rather than a more public social media venue, such as a company Facebook page, the discussion was "comparable to a conversation that could potentially be overheard by a patron or other third party." Notably, the NLRB concluded that, regardless of the participants' Facebook privacy settings, such a discussion was not public and suggested that anything less than disparagement in social media specifically directed to the general public would be adequately private to avoid losing protection for disloyalty under *Jefferson Standard*.

The Board also held that neither employee's comment lost protection under *Linn's* actual malice standard. After reviewing the entire Facebook exchange, the Board found the only potentially defamatory statement to be LaFrance's insinuation that the employer's owners had "pocketed" the employees' tax withholdings and concluded that neither Spinella nor Sanzone had adopted that statement. With regard to Spinella's "Like," the NLRB explained its conclusion as follows:

> We interpret Spinella's "Like" solely as an expression of approval of the initial status update. Had Spinella wished to express approval of any of the additional comments emanating from the initial status update, he could have "Liked" them individually.

In other words, because Spinella did not "Like" LaFrance's allegedly defamatory follow-up comment, although he could have done so, he could not be held responsible for the allegedly defamatory comment.

The Board followed similar reasoning in analyzing Sanzone's comment: "I owe too. Such an asshole." Despite the fact that Sanzone's comment immediately followed LaFrance's potentially defamatory statement, Sanzone had voiced agreement only with LaFrance's earlier-stated tax concern. More broadly, the Board "reject[ed] [the employer's] contention that Sanzone or Spinella can be held responsible for any other comments posted in the exchange."

The Board also rejected the employer's assertion of defamation for lack of proof. According to the Board, the employer had failed to produce evidence showing that either statement was knowingly false or made with reckless disregard for the truth. The Board also concluded that Sanzone's reference to one of the employer's owners as an "asshole" was not a statement of fact, but rather the expression of a personal opinion that cannot be false for purposes of Linn's actual malice standard.

A "Like" is Not Always Protected Under the NLRA

Throughout its decision, the Board assumed that Spinella's "Like," standing alone, was protected, but the Board did not state, or even suggest, that every "Like" is protected. To the contrary, the Board's analysis turned heavily on the context of the "Like." The Board emphasized that Spinella's "Like" in question related to LaFrance's initial status update complaining about the alleged tax withholding, and not to LaFrance's later, allegedly defamatory comment. In other words, *Triple Play* suggests that the Board will analyze each "Like" to determine the specific social media post for which it demonstrates support and then will decide whether the social media post that was adopted warrants protection under Section 7 of the NLRA.

In light of this method of analysis, employers should not assume that an employee agrees with every statement in a discussion posted on social media merely by selecting "Like." Instead, employers should look closely to see what specific posting the employee has "Liked" or otherwise endorsed.

Employer's Prohibition of "Inappropriate Discussions" Violated the NLRA

After reversing the employees' discharge, the Board turned to the employer's Internet/Blogging Policy and ruled that its prohibition on "inappropriate discussions" violated the NLRA. The policy read in relevant part as follows:

> "[W]hen internet blogging, chat room discussions, . . . or other forms of communication extend to employees … *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, up to and including termination of employment. . . . In the event state or federal law precludes this policy, then it is of no force or effect." (emphasis supplied).

Citing its opinion in *Lutheran Heritage Village*, the NLRB noted that a rule violates Section 8(a)(1) of the NLRA by unreasonably chilling employees' exercise of their Section 7 rights if (1) the rule explicitly restricts activities protected by Section 7; (2) employees would reasonably construe the language to prohibit Section 7 activity; (3) the rule was promulgated in response to union activity; or (4) the rule has been applied to restrict the exercise of Section 7 rights." 343 NLRB 646, 647 (2004). Finding the other prongs clearly inapplicable, the NLRB focused on the second prong and concluded that employees would reasonably interpret the phrase "inappropriate discussions" to encompass protected activities. The Board noted that the employer could have made the term "inappropriate" less imprecise by providing illustrative examples. The bare phrase, according to the Board, was unlawfully overbroad. The Board also refused to give any effect to the policy's savings clause.

In his dissent, Board Member Miscimarra disagreed with the majority's finding that the ban on "inappropriate discussions" violated the Act. With regard to overbreadth, Member Miscimarra rejected the proposition that imprecise catch-all phrases violate the Act. He noted that the Supreme Court in *Steelworkers v. Warrior & Gulf Navigation Co.*, espoused the need for broad terms to encompass those cases that a drafter cannot anticipate. 363 U.S. 574, 578–579 (1960). Moreover, in this particular case, Member Miscimarra found that the language of the employer's policy did limit the catch-all term. He interpreted the language—"the employee may be violating the law and is subject to disciplinary action"— to mean that the employee could be disciplined only if the employee's discussion violated the law. In addition, he noted that the inclusion of a savings clause in the policy reinforced the view that the employer intended the phrase "inappropriate discussions" to be interpreted in a lawful manner.

This criticism will undoubtedly strike a chord among employers struggling to make sense of the NLRB's general jurisprudence on lawful social media policy language. The term "inappropriate", in particular, has been subject to some of the most conflicting NLRB opinions. Depending on the context and extent of illustrative examples, different opinions have found the term "inappropriate" both unlawful and lawful.

Key Takeaways for Employers

The Board's decision in *Triple Play* provides the following 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. When analyzing whether a "Like" is protected speech, employers should refer to the specific post or comment to which the "Like" relates.
3. When analyzing whether otherwise protected social media posts have crossed the line and lost their protection, the Board will apply different standards to disparagement of the employer's products and services and defamation of the employer or members of its workforce.
4. The actual malice standard applicable to defamatory statements imposes a heavy burden on the employer to prove that the employee posted content knowing it was false or it was made with reckless disregard for the truth.
5. Employers should consult with counsel before firing an employee for allegedly defamatory or disparaging speech when that speech takes place in the context of a group discussion in social media related to work.
6. The Board continues to closely scrutinize social media policies. Employers should recognize that language which is general or establishes subjective standards, such as "inappropriate discussion," will raise a red flag for the Board unless accompanied by examples that make it clear to a reasonable employee that the general language is not intended to encompass protected speech. Relatedly, employers should expect the Board to closely scrutinize any disclaimer before relying on it to "save" policy language from invalidation. Such disclaimers have not been very helpful overall in terms of avoiding NLRB problems.

Philip Gordon, Co-Chair of Littler's Privacy and Background Check Practice Group, is a Shareholder in the firm's Denver office, and Zoe Argento is an Associate in the Denver office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Gordon at pgordon@littler.com, or Ms. Argento at zargento@littler.com.