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EMPLOYMENT LAW

NLRB: Calling Employer Vulgarity OK in Context of Complaint

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Special to the Legal

Usually, an employee who tells a co-worker that his boss is an "asshole" can expect to be collecting unemployment compensation benefits shortly thereafter. But, depending upon the context and the medium, such a comment, even made by a non-union employee, may be "protected concerted activity," and therefore entitled to legal protection, after the National Labor Relations Board's recent decision in *Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (Aug. 22, 2014).

FACEBOOK DISCUSSION OF WITHHOLDING

Triple Play Sports Bar and Grille is a sports bar in Watertown, Conn. Jillian Sanzone worked for Triple Play as a waitress and Vincent Spinella was a cook. In January 2011, Sanzone and at least one other co-worker discovered that she owed more income taxes than she had expected, which she blamed on Triple Play's owners. Sanzone spoke about this with co-workers and the bar's owners, who planned a meeting with their payroll provider to discuss the issue. Before the meeting, Sanzone and Spinella, along with a former co-worker and a mutual "friend" (who was a customer of the bar's), took to Facebook to complain about the bar's owners and to preview the meeting.

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During the Facebook conversation, Sanzone referred to one of the owners as "such an asshole," while Spinella "liked" a comment that the owner had "fucked up the paperwork … as per usual."

TERMINATION FOR DISLOYALTY

When the conversation came to the attention of the owners, Sanzone was called to the office and fired for not being "loyal enough to be working for [Triple Play] because of her Facebook comment." The next day, Spinella was terminated because he "'liked' the disparaging and defamatory comments" on Facebook, which, according to Triple Play, made it apparent that he wanted to work somewhere else.

Spinella and Sanzone filed an unfair labor practice charge with the NLRB, claiming that their terminations violated the National Labor Relations Act's prohibition against retaliation for engaging in so-called "Section 7 rights." Section 7 of the NLRA provides that employees will have the right, in relevant part, to "engage in ... concerted activities ... for the purpose of ... mutual aid or protection." The rights are not exclusive to union members and include the "statutory right [for employees] to act together to improve terms and conditions of employment or otherwise improve their lot as employees." In recent years, the NLRB has increasingly applied Section 7 rights to employees using social media to communicate with each other.

SECTION 7 RIGHTS

The matter was initially heard by an administrative law judge, who found that the employees' Section 7 rights had been violated, and ordered reinstatement. The NLRB heard Triple Play's appeal.

The parties initially agreed that the underlying conversation, involving four current employees, was "concerted" activity, in that it was "part of an ongoing sequence of discussions that began in the workplace about the [bar's] calculation of employees' tax withholding." Because the discussion involved the upcoming staff meeting and possible avenues of complaints to

governmental entities, the ALJ found (and the parties did not dispute) that the employees were "seeking to initiate, induce or prepare for group action."

'CONCERTED' BUT IS IT 'PROTECTED'?

Section 7 rights, however, have limits. The board has recognized that "online employee communications can implicate legitimate employer interests, including the right of employers to maintain discipline in their establishments. ... An employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation ... from defamation." When communications cross this line, while they may still be "concerted," they lose the protection under the act. The issue addressed was whether the comment of Sanzone and the action of Spinella had crossed this line.

The board largely upheld the ALJ's finding. Specifically, in a 2-1 decision, it found that "in the context of the ongoing dialogue among employees about tax withholding, Sanzone's comment ["I owe too. Such an asshole."] effectively endorsed" another comment about owing additional taxes. The board also found that Spinella's "like" was "more ambiguous" than Sanzone's targeted comment, but was essentially expressing agreement with the co-worker's complaint about owing taxes.

The board rejected Triple Play's arguments that the disparaging nature of the comments, targeted specifically at one of the bar's owners, deprived the employees of the act's protection. The board found that the comments were made on an individual's personal Facebook page (and not, for example, on the company's website, which could be viewed by the public) and concerned an "ongoing labor dispute." The board observed that the "discussions are clearly more comparable to a conversation that could potentially be overheard by a patron or other third party than [cases where the conversations lost protection because they] were clearly directed at the public."

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CONTEXT RULES

This part of the decision reinforces that to this board, context is paramount. Essentially, so long as disparaging personal comments about the boss are couched in a broader discussion of employee rights, an employer will be required to grin and bear it. As a practical matter, it is difficult to imagine how Triple Play could continue to employ Sanzone knowing her opinion of the owners, particularly where she admitted that, in fact, she had no idea whether she had been personally affected by the apparent miscalculation. Employers will be in the untenable position of having to employ someone who believes the boss to be an "asshole" or terminating the employee at the risk of reinstatement and lost wages.

INTERNET/BLOGGING POLICY

The board then turned to the propriety of Triple Play's Internet/blogging policy, which, in relevant part, stated that "when [the use of social media] extend[s] to employees revealing confidential and proprietary information about the company or engaging in inappropriate discussions about the company, management or co-workers, the employee may be violating the law and is subject to disciplinary action."

The issue addressed was whether the policy "would reasonably tend to chill employees in the exercise of their Section 7 rights." The ALJ found the policy valid, but the board disagreed, finding that the ambiguous prohibition on "inappropriate discussions"—and more specifically, the use of the term "inappropriate" was "'sufficiently imprecise' that employees would reasonably understand it to encompass discussions and interactions protected by Section 7." The board found that "employees would reasonably interpret the [company's] rule as proscribing any discussions about their terms and conditions of employment deemed 'inappropriate' by the [company]."

PRECISION IS KEY

The finding that Triple Play's policy violated the act is in line with recent board decisions finding a rule prohibiting "negative comments" and "negativity"; as well as a rule prohibiting "discourteous or inappropriate attitude or behavior" to be unlawfully overbroad. The fact that the policy contained a "general savings clause"—that it should be read in conjunction with "state or federal law"—was not sufficient to maintain the policy's legality.

The policy discussion reinforces that Internet policies must be precisely drawn and narrowly applied. Previous decisions have focused on the need for specific examples to define the type of conduct and language that will be permissible and prohibited. •