Advisory

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Second Circuit Sides with NLRB in Facebook Dispute

As employees continue to flock to social media in droves, employers have been craving additional guidance about how, if at all, they can regulate work-related posts. While it is no secret that employees in unionized and non-unionized workplaces can discuss, and even complain about, the terms and conditions of their employment under Section 7 of the National Labor Relations Act ("NLRA"), the Second Circuit Court of Appeals—which covers Connecticut, New York, and Vermont—has affirmed the NLRB's position that Section 7 rights extend to Facebook, Facebook "likes," and other forms of social media. The case, *Triple Play Sports Bar & Grille v. National Labor Relations Board*, furthers the trend of pro-employee decisions in this area.

In February 2011, Triple Play fired two employees for being critical of the restaurant on Facebook. The discussion had been initiated by a former Triple Play employee who received paperwork showing that she owed more in state income taxes than expected. The former employee went on Facebook to suggest that someone buy the restaurant from its current owners because they "can't even do the tax paperwork correctly!!! Now I OWE money…Wtf!!!!" A cook, Vincent Spinella, responded by "liking" the former employee's post. Jillian Sanzone, a waitress, responded by commenting "I owe too," and went on to call one of the restaurant's owners "an asshole." Triple Play discovered these postings and promptly terminated Spinella and Sanzone's employment for "disloyalty." Spinella and Sanzone challenged their terminations at the NLRB, who found that the Facebook comment and the act of 'liking' the post were concerted activities protected by the NLRA because they pertained to terms and conditions of Spinella and Sanzone's employment. In a lengthy summary order, the Second Circuit concluded there was sufficient evidence to support the Board's conclusion that the employees' conduct was protected by the NLRA. Triple Play's primary contention was that the employees' speech transcended Section 7 because it was viewed by customers and contained obscenities. Citing Second Circuit precedent in a case involving Starbucks, Triple Play argued that employee speech is not protected by the NLRA when it involves obscenities made in the presence of customers, even if the employees are not readily identifiable as employees when the activity takes place.

The Second Circuit was unpersuaded, however, saying the cases were not even on par. The *Starbucks* ruling arose when an employee had an obscenity-laced argument with a manager in the presence of customers, whereas *Triple Play* involved statements made on social media. The Court reasoned that the distinction was necessary to "accord with the reality of modern-day social media use. Almost all Facebook posts by employees have at least some potential to be viewed by customers," and if they are to be construed as occurring in the presence of customers, it "could lead to the undesirable result of chilling virtually all employee speech online." Thus, even

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though a customer might view potentially obscene comments on social media, employers cannot preclude employees from expressing themselves on these forums—even if that expression is limited to "liking" a post—when the matter being discussed arguably relates to the terms and conditions of the workers' employment.

This case presents a stern reminder for employers to proceed with caution when seeking to place restrictions on employee social media postings, or making adverse employment decisions based on those postings. Indeed, the Second Circuit also agreed with the NLRB that Triple Play's "Internet/Blogging Policy," which stated, among other things, that employees could be disciplined for "engaging in inappropriate discussions about the company, management, and/or co-workers" online, could be reasonably construed as prohibiting lawful Section 7 activity. The decision should also trigger further review of social media policies to ensure they do not restrict an employee's ability to use these platforms for protected activities, and to remind managers to avoid knee-jerk disciplinary actions in response to an employee's social media activity.