Legal Sidebar

NLRB Weighs In on Insulting Facebook Posts Cases

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In the age of Facebook and Twitter, the National Labor Relations Board (NLRB or Board) is trying to adapt the National Labor Relations Act (Act) – which was enacted eighty years ago – to the contours of employee-employer relations within the social media world. In recent years, the Board has been asked to consider a variety of new issues, including whether the Act applies to public Facebook conversations, and whether informality and vulgarity in social media comments deprives employees of protection. Recent decisions suggest that the Board will extend the Act's protections to comments made through social media.

For example, in one 2012 case, *Hispanics United of Buffalo (HUB), Inc.*, the Board construed section 7 of the Act to protect employee discussions about their job performance on Facebook. Section 7 of the NLRA recognizes the right of employees to engage in collective bargaining and to engage in other concerted activities for the purpose of mutual aid or protection. In this case, an employee posted to Facebook a message refuting a colleague's suggestion that HUB employees lacked in work ethic, writing: "[A] coworker feels that we don't help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?" Four other employees joined the discussion, agreeing with the original poster. On the next workday following this Facebook conversation, the original poster and the four other commenters were discharged for "bullying and harassing" their coworker. The original poster filed a complaint with the NLRB.

The Board unanimously held that the Facebook discussion was protected concerted activity, arguing that it was done for the "purpose of mutual aid or protection." The Board concluded that by seeking to join together to provide a common defense against any charge that they did not work hard enough, the Facebook commenters had engaged in activity that is protected by law, and therefore their discharge was unlawful.

In a more recent 3-1 decision, the Board went further to hold that even Facebook comments that are vulgar and insulting towards a supervisor could still find protection under the Act. The case, *Pier Sixty, LLC*, involved the organizing efforts of service employees at a catering company in New York. They were motivated by alleged mistreatment by management, claiming that managers took their anger out on the staff and didn't treat them with respect. Two days before the union representation election (which was ultimately successful), one supervisor allegedly chastised several employees in a loud harsh voice. One of the employees thereafter posted a message on Facebook addressing his frustration with the supervisor in "obscene and vulgar language" (referencing the supervisor as well as his family), and ending with: "Vote YES for the UNION!!!!!!!" The message was brought to the attention of the company's human resources department and they decided to terminate the employee, citing the message and claiming it violated company policy. The employee then filed a complaint with the NLRB over his discharge and other alleged violations of the Act.

The Board found that the Facebook comment was protected by the NLRA. It found no difficulty in saying that the comments were subject to protection under section 7 because the employee was complaining about mistreatment by management and imploring his co-workers to seek redress by voting for union representation. However, the Board also had to consider whether the nature of the comments went so far as to exceed the NLRA's protections. The Board considered a broad set of factors, noting that the employer had demonstrated hostility to the union activity; the supervisor's alleged conduct provoked the response; the response was impulsive; the employer tolerated the "widespread use of profanity" among employees and profanity directed by supervisors towards employees; and the employer never before discharged an employee for the use of similar language. The Board also found that the employer did not specify exactly how the posting violated company policy (or even provide the employee with a copy of that policy). Based on these factors, the Board concluded that the employee's Facebook post was still protected by the Act regardless of the comment's vulgar nature. One Board member dissented in part, finding that the comments had lost the Act's protection due to their vulgar and obscene nature.

Pier Sixty arguably illustrates that the NLRB will continue to construe the NLRA to extend protection to comments on social media about work conditions and union activity, and that the use of vulgar or insulting language will not necessarily cause such comments to lose protected status. The relevance to union activity was potentially more evident in *Pier Sixty*, but the Board has also held in a 3-1 decision that 'liking' another's Facebook message could be protected activity. These recent cases could mark a new trend as the NLRB tries to fit the world of social media into the provisions of a law passed well before the creation of the Internet.