CLIENT ALERT: Second Circuit Upholds NLRB Decision that Employer Unlawfully Terminated Employees for "Liking" and Commenting on Facebook Posting

In one of the first appellate court decisions to weigh in on the National Labor Relations Board's ("NLRB") expansive view of what constitutes protected concerted activity under the National Labor Relations Act (the "Act") in the social media context, the U.S. Court of Appeals for the Second Circuit affirmed a NLRB decision which held that a non-union employer violated the Act by terminating two employees for participating in a Facebook discussion in which they criticized the employer's failure to withhold the proper amount of state income tax from their paychecks. *Three D, LLC d/b/a Triple Play Sports Bar & Grille v. NLRB*, —Fed. Appx.—, 2015 WL 6161477, at *1 (2d Cir. Oct. 21, 2015) (Summary Order).

Factual Background

This case arose after a former employee of Triple Play Sports Bar and Grille ("Triple Play") posted a "status update" on her Facebook page criticizing Triple Play's failure to properly complete tax withholding paperwork causing the former employee to owe the state of Connecticut money. The former employee posted the following: "[m]aybe 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!!!!" A waitress/bartender for Triple Play commented: "I owe too. Such an a**hole." A cook for Triple Play clicked the "Like" button as to the original post from the former employee. Several other Triple Play employees and customers, who were Facebook friends with the employees, also posted comments in the thread. The sister of one of Triple Play's owners saw the posts and notified the owners.

Subsequently, Triple Play terminated the waitress/bartender and the cook because of their Facebook activity. Triple Play claimed it terminated the waitress/bartender for the Facebook comment because it demonstrated that she was not "loyal enough" to work for Triple Play, and terminated the cook because the company interpreted his "Like" of the comment to mean that he "liked the disparaging and defamatory comments" about the company. Triple Play also threatened him with a defamation lawsuit, although no suit was filed.

NLRB Decision

Both employees filed charges with the NLRB alleging that they were terminated in retaliation for engaging in protected concerted activity. In reviewing the Administrative Law Judge's decision, the NLRB held that Triple Play violated Section 8(a)(1) of the Act by interrogating the employees about their Facebook activity, informing the employees they were being discharged because of their

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Facebook activity, threatening legal action for engaging in that activity, and ultimately discharging them. *Triple Play Sports Bar and Grille*, Nos. 34-CA-012915, 34-CA-012926 (N.L.R.B. Aug. 22, 2014).

The NLRB held that the Facebook activity in this case was "concerted" because it involved four current employees and was "part of an ongoing sequence of discussions that began in the workplace about [Triple Play's] calculation of employees' tax withholding." The NLRB concluded that the Facebook activity was "protected" because "the discussion concerned workplace complaints about tax liabilities," i.e., terms and conditions of employment.

The Board rejected Triple Play's argument that because the employees' conduct was disloyal and/or defamatory, it lost protection under the Act, and, instead, found that the comments did not disparage Triple Play's products or services, and Triple Play failed to establish that the comments were maliciously untrue.

Moreover, the NLRB found that Triple Play's "Internet/Blogging Policy" which prohibited employees from engaging in "inappropriate discussions about the company, management, and/or co-workers," "when internet blogging," or in "chat room discussions, e-mail, text messages, or other forms of communication" violated Section 8(a)(1) of the Act. The NLRB concluded that the policy was overbroad because it could be construed by employees to discourage protected concerted criticism of the employer and constituted an unlawful effort to chill protected concerted activity.

Second Circuit Holding

On appeal, while conceding that the employees' online activity was protected concerted activity, Triple Play argued that because the employees' Facebook activity contained obscenities that were viewed by customers, the NLRB should have found that this activity lost the protection of the Act based on a prior Second Circuit decision, *NLRB v. Starbucks Corp.* 679 F.3d 70 (2d Cir. 2012).

In the *Starbucks* decision, in which Starbucks fired an employee who yelled obscenities at a supervisor while in the store and within earshot of customers, the Second Circuit remanded the NLRB's decision finding that the NLRB disregarded Starbuck's legitimate concern to not tolerate employee outbursts containing obscenities in the presence of customers. The unanimous panel of the Second Circuit, however, rejected Triple Play's reliance on the *Starbucks* decision as misplaced and reasoned that – based on the "reality of modern-day social media use" – "accepting Triple Play's argument that *Starbucks* should apply because the Facebook discussion took place 'in the presence of customers' could lead to the undesirable result of chilling virtually all employee speech online. Almost all Facebook posts by employees have at least some potential to be viewed by customers."

Further, in distinguishing the *Starbucks* decision, the Second Circuit noted that the Facebook discussion was not directed toward customers and did not reflect the employer's brand, and, therefore, the employees' comments were not disparaging or defamatory.

With respect to Triple Play's "Internet/Blogging Policy, the Second Circuit affirmed the NLRB's finding that the policy was unlawfully overbroad.

Notably, the Second Circuit rejected the NLRB's request to publish the summary order to give it

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precedential authority. However, given the NLRB's aggressive scrutiny of employers' social media policies and its interest to ensure that these policies do not inhibit workers' rights to engage in concerted activity, it's inevitable that a circuit court will issue a precedential decision, and employers should take notice.

Key Takeaways

This decision serves as an important reminder that employers, both unionized and non-unionized, can be found to violate the National Labor Relations Act if any employment policy, including a social media policy, is interpreted as interfering with the rights of employees to discuss wages and working conditions with co-workers. As such, employers should ensure that their policies are carefully drafted and implemented so that they do not run afoul of the law. Furthermore, employers should tread cautiously when disciplining employees for their social media activity. Accordingly, employers should contact a MBJ attorney with any questions regarding their policies, potential disciplinary decisions related to their policies, and the necessary steps they should take to protect themselves.

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