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Second Circuit Says Clicking Like on Facebook is Protected Activity

The National Labor Relations Board (the "Board") continues to focus on protecting employee activity in social media outlets, as reflected by the Board's protected concerted activity page. Last week, the Second Circuit Court of Appeals decided a case that will likely further that enforcement activity.

In *Three D, LLC, d/b/a Triple Play Sports Bar & Grille v. National Labor Relations Board*, the Second Circuit upheld the Board's decision that an employee's use of the Facebook "like" and comment features can be protected activity under the National Labor Relations Act ("NLRA"). In *Triple Play*, two employees were terminated after engaging in social media activity on Facebook that was negative towards their employer. The first employee "liked" a Facebook status update by a former employee who stated, "[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...!!!!" The second employee commented on the same status update, referencing the owner by stating, "I owe too. Such an [a**h***.]"

The Board found, and the Second Circuit agreed, that the conduct of both employees was concerted protected activity under the NLRA, because it involved current employees discussing working terms or conditions. The Second Circuit also agreed with the Board's conclusion that the comments at issue were not so disloyal or defamatory as to lose protection under the NLRA. The Second Circuit noted that the comments "did not even mention Triple Play's products or services" and were not defamatory.

Importantly, the Second Circuit refused to accept Triple Play's argument that the comments at issue lost protection under the NLRA based on the comments containing obscenities and having been viewed by customers. The Court stated that, because almost all Facebook posts have some potential to be viewed by customers, holding that this causes a loss of NLRA protection would have the undesirable result of chilling virtually all employee speech online.

In light of the NLRA's continued focus on protected concerted activity, employers should continue to exercise caution in implementing social media policies that may "chill" protected activities, as we discussed earlier this year in our post on employer handbook rules. In addition, employers should be cautious before

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taking adverse actions against employees if their social media activities appear to include discussions related to their employment terms, conditions or environment.