Insight

IN-DEPTH DISCUSSION

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NLRA Protections for Derogatory Statements and Four-Letter Words Attacking a Company and its Managers

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More and more employers, union and non-union alike, are getting ensnared in efforts by the National Labor Relations Board (NLRB or "Board") to aggressively expand employee rights under the National Labor Relations Act ("Act"), to the detriment of employers. While employees have the express right under Section 7 of the Act "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," such as discussing their terms and conditions of employment or lodging complaints about the workplace, the NLRB continues to condone bad behavior as "protected behavior" so long as it is tangentially related to concerted activity under the Act.

Dissemination of Posters Implying Sandwich Shops' Food was Prepared by Sick Workers Held to be Protected Concerted Activity

Perhaps one of the most striking decisions of late involves the Jimmy John's sandwich shop chain. On March 25, 2016, the U.S. Court of Appeals for the Eighth Circuit, in *MikLin Enterprises, Inc. d/b/a Jimmy John's v. NLRB*, affirmed the NLRB's 2014 decision (361 NLRB No. 27 (2014)).

MikLin operates 10 Jimmy John's franchises in the Minnesota area. Starting in 2007, the Industrial Workers of the World (IWW) attempted to organize employees at the 10 sandwich shops. A large component of the IWW's campaign was attacking MikLin's attendance policy and lack of a paid sick leave policy (if employees were too sick to work, they were required to seek and find replacements for their shift or risk receiving discipline).

In 2011, the IWW intensified its attack on MikLin by placing posters on community bulletin boards in the MikLin stores. The poster displayed side-by-side pictures of the same sandwich. Over the picture of the sandwich on the left was the heading "Your Sandwich Made By A Healthy Jimmy John's

Worker." Over the picture of the sandwich on the right was the heading "Your Sandwich Made By A Sick Jimmy John's Worker." Below the pictures was the text:

> Can't Tell the Difference?
>
> That's Too Bad Because Jimmy John's Workers Don't Get Paid Sick Days. Shoot, We Can't Even Call In Sick.
>
> We Hope Your Immune System Is Ready Because You Are About To Take the Sandwich Test...
>
> Help Jimmy John's Workers Win Sick Days.

A month or so later, the IWW sent a letter to MikLin threatening to publicly disseminate the sandwich poster outside of the Jimmy John's stores unless the owner agreed to meet with the IWW. MikLin refused to give in to the IWW's threat, and the IWW posted the sandwich poster in various public places within blocks of each MikLin store. MikLin discharged six employees and disciplined three others who it believed participated in the poster campaign. Unfair labor practices were filed in response to that action.

In response to the charges filed by the IWW, the Board held the employees had engaged in protected concerted activity by disseminating the posters and ordered their reinstatement. The Board reasoned that the employees' use of the posters was a means to "improve their lot as employees through channels outside the immediate employee employer relationship." The Board rejected MikLin's argument that the employees' actions were disloyal and lost the protection of the Act under *NLRB v. Electrical Workers Local 1229* (Jefferson Standard), 346 U.S. 464 (1953). Under the *Jefferson Standard*, whether employee communications to third parties lose protection of the Act depends on whether: (1) the communications indicate they are related to an ongoing labor dispute and (2) whether they are "so disloyal, reckless or maliciously untrue as to lose the [Act's] protection." The Board found that the sandwich posters were related to an ongoing labor dispute as the employees expressed their concerns about the need for paid sick days. The Board then went on to find that the sandwich posters did not lose the Act's protection based on disloyalty, recklessness or malicious untruth.

Under the Board's view, use of the posters was not disloyal because it did not occur at a critical time in the initiation of the business, the messaging on the posters was within the context of the ongoing labor dispute, no evidence existed that the purpose of the posters was to inflict harm on MikLin's business, and the employees did not act "recklessly without regard for the economic detriment" to the business. Furthermore, the Board found that the sandwich posters did not rise to the level of being maliciously untrue or made with reckless disregard of their truth or falsity. In this vein, the Board said it was factually accurate the employees did not get paid sick days and the phrase on the poster "Shoot, we can't even call in sick" fell short of being maliciously false as a reasonable reader would view such statement as "the kinds of hyperbole expected and tolerated in a labor dispute."

Thus, the Board concluded that MikLin unlawfully terminated six and disciplined three employees who it believed participated in the sandwich poster campaign. Accordingly, MikLin was ordered to reinstate the discharged workers with backpay, and rescind the discipline issued to all nine employees. Also, the Board held that MikLin violated the Act by encouraging employees to remove the posters that were posted outside of the stores.

MikLin's appeal to the Eighth Circuit failed. Under the deferential standard applied by reviewing courts, the Eighth Circuit affirmed on appeal the Board's decision that MikLin infringed upon employees' Section 7 rights to engage in protected concerted activity. Focusing on the statement "Shoot, We Can't Even Call in Sick," the court reasoned that there was substantial evidence supporting the Board's finding that the statement characterized the practical impact of the MikLin sick leave policy that employees could not call in

sick—as opposed to a purposefully false statement made by employees. Moreover, the court rationalized the NLRB's decision by viewing the statement in the context of the poster's purpose of obtaining paid sick leave. More concerning perhaps is the court's support for the poster on the basis that "[e]xaggerated rhetoric is common in labor disputes and protected under the Act." Such a factor being legitimized by the court is concerning to employers.

The Eighth Circuit also rejected MikLin's argument that the employees lost protection of the Act under *Jefferson Standard* because their actions were maliciously motivated with an intent to injure MikLin's business reputation and income as opposed to enlisting public support for their efforts to obtain paid sick leave. The court held "[w]e cannot say the Board majority erred in finding that the statements fell short of unprotected disloyalty and disparagement." It reasoned that the sandwich posters were tied to the employees' effort to obtain paid sick leave from MikLin, the posters did not "use language intended to degrade or humiliate," the posters were all posted within a two-block radius of MikLin stores, and MikLin sandwiches had previously been cited on two occasions as having been linked to a public norovirus outbreak.

Posting on Facebook that Manager is Nasty Mother F***er Held to be Protected Concerted Activity

The NLRB continues to shield questionable employee actions from discipline under the guise of protected concerted activity. In *Pier Sixty, L.L.C.*, 362 NLRB No. 59 (2015), the Board held that an employee's profanity-filled posting on Facebook during his shift about his manager was protected concerted activity. The underlying facts are that a catering service company's manager approached on-duty servers during an event and told them to "spread out, move, move." Apparently upset with this manager's manner of speaking to employees, a server posted on his personal Facebook page later in his shift:

> Bob [the manager] is such a NASTY MOTHER F***ER don't
>
> know how to talk to people!!!!!! F**k his mother and
>
> his entire f**king family!!!! What a LOSER!!!! Vote
>
> YES for the UNION!!!!!!!

This posting was available to co-workers and the public. Following an investigation, the company terminated the server's employment due to his Facebook comments.

The Board found that the posting was protected concerted activity for mutual aid and protection under the Act because the server's comments were directed at his manager's treatment and "were part of a sequence of events involving the employees' attempts to protest and ameliorate what they saw as rude and demeaning treatment" by managers. The Board also rejected the company's position that the Facebook posting was so egregious that it lost the Act's protection. To reach that conclusion, the Board applied a "totality of circumstances" analysis instead of the established *Atlantic Steel Co.*, 245 NLRB 814 (1979), precedent previously used to determine whether workplace outbursts lose their protection under the Act. (The Board's decision has been appealed to the Second Circuit.)

Recommendations

These decisions are reminders that the NLRB will continue its enhanced scrutiny of employer personnel decisions and workplace policies to expand the confines of Act. The instincts of many employers, their in-house counsel and Human Resources professionals are that they: (1) would have terminated the employees who posted the sandwich posters in the *MikLin* case to protect the company; and (2) would have terminated the server for his Facebook rant against his manager as a means to quell further insubordination. However, the NLRB believes otherwise. To help managers prepare to handle similar situations, it is recommended that employers update their training programs, with an eye towards the expansive read of

what the Board will consider protected activity. Further, employers should evaluate discipline and discharge carefully in these types of circumstances. While the above decisions are troubling for employers, not all behavior is protected (although obviously much of it is) and some behavior may not be concerted in nature or involve a term or condition of work. Employers need to evaluate carefully all three of those requirements before a final discipline or discharge decision is made. A timely (pre-discharge decision) call to counsel who works regularly in this area may be wise given the challenges the Board is creating.