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Employee Social Media Use and the National Labor Relations Act: Employers Have (a Small) Reason to Smile

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In recent years, the National Labor Relations Board has increasingly addressed employee speech on social media and when it constituted protected concerted activity.[1] Essentially, protected concerted activity is when employees discuss the terms and conditions of employment with one another. Seemingly, the growing trend in Board jurisprudence had been that almost all employee online speech—no matter how expletive-laden or disparaging of supervisors—was protected under the National Labor Relations Act (the Act).

So, when can an employer discipline an employee based on the employee's social media activities? A recent Board decision guides employers on when employee speech on social media gains—and loses—protection under the Act.

The Case: Richmond District Neighborhood Center

In August 2012, the Richmond District Neighborhood Center rescinded rehire offers for two of its employees, Ian Callaghan and Kenya Moore.[2] Richmond, a nonprofit corporation that operates a teen center offering after-school activities to students at a local high school, had originally employed Callaghan and Moore during the 2011-2012 school year and offered them continued employment for the subsequent school year.

During the 2011-2012 school year, Callaghan had worked as an activity leader and Moore as a program leader. In May 2012, the end of the school year, a supervisor at the teen center solicited feedback from its employees. Specifically, the supervisor wanted to know the pros and cons of working at the teen center. The employees obliged, anonymously submitting eight pros and 23 cons. The cons highlighted issues such as staff turnover, a lack of supervision or support and a need to take youths on better field trips.

After their submissions, employees reported getting the cold shoulder from their supervisor. All attempts from both Callaghan and Moore to schedule a follow-up meeting went unheeded. Despite this apparent change in their working relationships, both Callaghan and Moore continued to work for Richmond during the summer—Callaghan at an off-site summer camp and Moore as a program leader. At the end of that July, the two received their rehire notices, though Moore was of-

[1] *See e.g.*, *Three D LLC*, 361 N.L.R.B. No. 31 (Aug. 22, 2014) (holding employer erred when it discharged an employee for liking the status of another employee that was critical of the employer, as that was protected activity); *Pier Sixty LLC*, No. 02-CA-068612 (N.L.R.B. A.L.J. Apr. 18, 2013) (holding that employee's expletive-laden Facebook post that a supervisor was a "NASTY M***** F***R . . . What a LOSER!!! Vote YES for the UNION" was protected and concerted activity because it was part of ongoing events involving employee protests and was an activity taken on behalf of other employees); *Hispanics United of Buffalo Inc.*, 359 N.L.R.B. No. 37 (Dec. 14, 2012) (employer's discharge of employees over Facebook comments was unlawful because the comments, which centered around complaints about a fellow employee who threatened to report them to management, were concerted activity).

[2] *Richmond Dist. Neighborhood Ctr.*, 361 N.L.R.B. No. 74 (Oct. 28, 2014).

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fered a demotion due to a negative performance review during the summer.

A few days later, Moore's demotion sparked an exchange on Callaghan's Facebook page. The two, along with occasional comments from a former student, discussed returning to work at the teen center. During the conversation, Callaghan stated he was going to return only if he and Moore would ''be ordering sh*t, having crazy events at the [teen center] all the time. I don't want to ask permission, I just want it to be LIVE.'' He went on to say ''[l]et them do the numbers, and we'll take advantage, play music loud, get artists to come in and teach the kids how to graffiti up the walls . . . Let's do some cool sh*t, and let them figure out the money. . . Let's f*ck it up,'' and ''field trips all the time to wherever the fuck we want!''

Moore expressed similar sentiments, noting, ''when [the teen center] start loosn kids I aint helpn HAHA,'' ''I AINT GOBE NEBER BE THERE,'' and ''we gone have hella clubs and take the kids :)''

At the time, Callaghan's privacy settings were set to ''just my friends,'' meaning his page was not viewable by the general public. Nonetheless, Callaghan was friends with another Richmond employee who saw the exchange. That Facebook friend sent screenshots of the conversation to management the next day. Less than two weeks later, Richmond rescinded Callaghan and Moore's offers, noting that ''[t]hese statements give us great concern about you not following the directions of your managers in accordance with RDNC program goals. . . . We have great concerns that your intentions and apparent refusal to work with management could endanger our youth participants.''[3]

Administrative Law Judge:

Callaghan filed an unfair labor practice charge, alleging he and Moore's employment was terminated because they engaged in protected, concerted activity in violation of Section 8(a)(1) of the Act.[4] To this end, employees who do not have an established procedure for pursuing their grievances may take action to press and remedy their complaints.[5] As such, the Board has consistently held that an employer may not discipline, threaten, coerce or otherwise interfere with employees because they have engaged in such statutorily protected concerted activity.[6]

Here, the ALJ held that the May 2012 conversation in which the employees gave feedback to Richmond was a protected concerted activity, as the employees acted in concert to voice their concerns with Richmond's program. And the ALJ also found that the August Facebook conversation was an extension of the May protected activity; Callaghan and Moore continued to discuss their complaints about Richmond's staff and the supervisor's failure to respond to employee concerns. As such, the Facebook exchange fell under the purview of the Act.

Further, the ALJ noted that employees generally have leeway for ''impulsive behavior'' while engaged in concerted activity,[7] and that inaccuracy of employee statements was not a bar to the Act's protections, as long as they did not rise to the level of deliberate falsehood of maliciousness.[8]

Unfortunately for Callaghan and Moore, the ALJ found that, although the Facebook conversation was concerted activity protected by the Act, it was so egregious that it took the conduct outside the protections of the Act. Indeed, the ALJ held that the employees were unfit for further service and that Richmond's two reasons for discharging Callaghan and Moore—that the remarks could jeopardize its sources of funding and endanger the safety of its participants—were reasonable. Specifically, the ALJ pointed to Callaghan's remarks that he would have crazy events without permission, play loud music and graffiti the walls and Moore's remarks that she would have fun, never be there and would not help if the center lost kids as evidence supporting Richmond's decision. As such, the ALJ held that Richmond acted lawfully when it rescinded the employees' offers of reemployment.

Appeal to the Board:

The ruling was appealed to the full Board, which confirmed the ALJ's order. The Board agreed with the ALJ's conclusion that Callaghan and Moore's conduct was objectively ''so egregious as to lose the Act's protection'' and render the two unfit for further service.[9] The Board pointed to specific comments that evidenced that Callaghan and Moore were advocating insubordination[10], such as their plan to refuse to obtain permission before organizing youth activities; disregard specific rules; undermine leadership; neglect their duties; and jeopardize the future of the teen center. Thus, the Board rejected the argument that, because the Facebook conversation was a continuation of the May 2012 protected activity, and neither Callaghan nor Moore had a history of insubordination, the posts could not reasonably be seen as proposing insubordinate conduct.[11] The Board also held that Richmond was not required to wait for Callaghan and Moore to follow through on their threatened misconduct, a ''risk a reasonable employer would refuse to take.''[12]

The Takeaway

Notwithstanding this employer victory, companies should still be cautious about acting on employee comments on social media. Particularly when the activity references work and there are multiple employees involved, it is more likely than not that such discussions are protected by the Act. Except in extreme circumstances such as this one, postings that can be consid-

[3] *Id*.

[4] This section makes it an unfair labor practice for an employer to ''interfere with, restrain, or coerce employees in the exercise of the rights'' guaranteed in Section 7 of the Act. Section 7 grants employees the rights to, *inter alia*, ''engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .''

[5] *Richmond Dist.*, *supra* note 2 (citing *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 12-15 (1962)).

[6] *Id*.

[7] *Id*. (citing *Dries & Crump Mfg.*, 221 N.L.R.B. 309, 315 (1975); *Phoenix Transit Sys.*, 337 N.L.R.B. 510, 514 (2002)).

[8] *Id*. (citing *CKS Tool & Eng'g Inc. of Bad Axe*, 332 N.L.R.B. 1578, 1586 (2000); *Delta Health Ctr.*, 310 N.L.R.B. 26 (1993)).

[9] *Id*. at *3.

[10] *Id*. (citing cases).

[11] *Id*.

[12] *Id*.

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ered to be a concerted activity are unlikely to lose protection of the Act.[13]

With that in mind, employers now have a clearer idea of the (rare) circumstances in which speech will lose protection and the factors the Board will consider when evaluating such claims. In pointing to specific comments made by Callaghan and Moore, the Board demonstrated factors it considered relevant, such as:[14]

1. pervasive advocacy of insubordination;
2. number of comments;
3. detailed descriptions of specific acts;
4. wide variety of planned insubordination; and
5. whether the comments were inconsistent with workplace culture.[15]

Of course, the Board did not make any of this explicit. However, in consistently pointing to the fact that Callaghan and Moore's discussions were detailed and lengthy, it is safe to say that such considerations are key in its analysis.[16]

Additionally, the Board made another finding that is good for employers when it held that Richmond did not need to wait for Callaghan and Moore to make good on their threats; the ''magnitude and detail'' of the insubordinate acts discussed in their conversation was enough to give Richmond a reasonable basis to terminate their employment.[17] Of course, although this does not do away with an employee's ''I was just venting'' defense, it should allow an employer to rest a bit easier when it takes reasonable preemptive action.

Overall, the *Richmond District* decision should allow employers to breathe a bit easier. The Board has not only recognized that some employee speech on social media is outside the protection of the Act, but it's decision has also given employers some guidance as to when such circumstances could arise.

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[13] This is especially the case as the NLRB has consistently held that employees' ''profanity or disparaging characterization of [their employers]'' are not a solid basis for finding the comments are outside the protection of the Act. *Id*. at fn 9.

[14] *Id*.

[15] In its conclusion, the Board cited to a case, *Leasco Inc.*, 289 N.L.R.B. 549, 549 fn. 1 (1988), in which the employee did not lose protection of the Act when he told a company official, ''if you're taking my truck, I'm kicking your ass right now,'' because it was not a serious threat ''*in the context of the workplace's culture*'' (emphasis added). As in all personnel matters, context is key, and it seems that employee speech on social media is no different.

[16] In so holding, the Board also differentiated these comments from ''brief comments that might be more easily explained away as a joke, or hyperbole divorced from any likelihood of implementation.'' *Richmond Dist.*, *supra* note 2.

[17] *Id*.