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A Beacon of Hope for Employers: Facebook Posts Go Too Far For NLRB

By Alejandro Valle

Cutting against a trend of decisions which have gone against employers, with respect to employment decisions based upon Facebook and other social media posts, the National Labor Relations Board (the "Board" or "NLRB") recently upheld a decision to fire and withdraw offer letters from two individuals who had described detailed plans for insubordination within a Facebook exchange.

The case is *Richmond District Neighborhood Center and Ian Callaghan*, and the decision in question was issued on October 28, 2014. While the decision at first appears significant for its assessment of a profanity-laden exchange between the two individuals at issue, the true basis for the decision appears to be not the language used but instead the specific plans for insubordination that are discussed.

Ian Callaghan alleged in his charge that the employer had violated Section 8(a)(1) of the National Labor Relations Act (the "Act" or "NLRA"). This Section provides that an employer may not discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities. In turn, Section 7 of the Act provides that employees have the right to engage in concerted activities for their mutual aid and protection, and employees having no bargaining representative and no established procedure for presenting grievances may take action to spotlight complaints and obtain remedies. The Act protects

employees who engage in individual action that has the objective of initiating or inducing group action.

The employer here was, at all relevant times, a non-profit corporation in California, engaged in the operation of community programs including after school and summer programs for youth. Callaghan was a teen activity leader at the employer's Beacon Teen Center, where Kenya Moore worked with him as the teen center program leader. On July 30, 2012, Callaghan was sent a re-hire letter as a teen activity leader, and Moore was demoted from the program leader position but sent a re-hire letter for another teen activity leader position. Thereafter, on August 2, 2012, Moore contacted Callaghan through Facebook, in a friends-only conversation. The Facebook conversation, which was subsequently forwarded to the non-profit's management, included the following excerpts:

> "I don't want to ask permission, I just want to be LIVE. You down?"
>
> "...let them figure it out and they start loosin' kids I aint' help'n HAHA"
>
> "ha ha ha. Sweet. Now you gonna be one of us. Let them do the numbers, and we'll take advantage .... [T]each kids how to graffiti up the walls and make it look cool .... Let's f*** it up. I would hate to be the person taking your old job."
>
> "...this year all I wanna do is s*** on my own. Have parties all year and not get the office people involved."
>
> ***
>
> "hahaha! F*** em. Field trips all the time to wherever the f*** we want!"

The employer terminated Callaghan and Moore on August 6, 2012, and rescinded their re-hire offers shortly thereafter, citing the Facebook conversation and concerns that they would not follow the directions of management and could endanger youth.

Prior to the Facebook exchange, Callaghan and Moore had been participants in a meeting where they were asked by the employer to identify concerns regarding the center. They argued after filing their charge that the Facebook conversation was merely a continuation of the complaints made in that meeting, and thus was protected activity. The Board agreed, but also took its analysis one step further. The true issue, according to the Board, was whether the individuals' conduct was so egregious as to take it outside of the protection of the Act, or of such character as to render the employees unfit for further service. The Board explained that "[e]mployees are

permitted some leeway for impulsive behavior when engaged in concerted activity, as the language of the shop is not the language of polite society." Merely "stinging and harsh" language, on its own, did not remove the Act's protections.

However, the Board found it to be significant that the employer received grants and other funding from the government and private donors, and was accountable to the middle schools and high schools that it serviced. The employer believed that the Facebook comments demonstrated a danger to the subject program's funding, and to the safety of the youth it serves. There was also a concern that funding agencies and parents of students would see the Facebook remarks. There was no indication in the Board's reasoning that the "harsh" language used in the Facebook posts was, in and of itself, the basis for the employer's lawful termination and its offer rescission decisions. Instead, the Board was persuaded by the argument that the Facebook comments in question were detrimental to the teen center's eligibility for grants and other funding, by suggesting that Callaghan and Moore would "not seek permission" and would, among other activities, "have 'clubs' and take the kids."

While employers must always be careful to not overestimate the significance of any single ruling when making their own employment decisions, the *Richmond District Neighborhood Center* case does stand as a beacon of hope for employers who had been led to believe that their employees had virtually unfettered liberty under the NLRA to discuss even matters which consisted of specific plans for insubordination, and other subjects detrimental to the respective employers and the communities they serve. Case-by-case analysis nevertheless remains essential, and employers with questions on a particular situation should consult with experienced labor and employment counsel.