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Recent Case Clarifies NLRB Approach to Social Media Comments

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As we have [written](#) about [previously](#), one of the ongoing struggles for employers has been grappling with the confluence of the nearly 80-year-old National Labor Relations Act (the "Act") and new and constantly changing technology. Prototypical "water cooler conversations" have moved online where, depending on the privacy settings of the employees, they are available for anyone, including customers, to see. And while the National Labor Relations Board ("NLRB") is typically seen as the adversary or antagonist of employers, it too has struggled to adopt its rules to new technology, seemingly erring on the side of broad application of the law whenever possible. A recent NLRB decision, however, while perhaps not "welcome" news for employers, provides some clarification for how the NLRB will evaluate whether employee social media speech is protected concerted activity.

The case in question, *Three D, LLC d/b/a Triple Play Sports Bar and Grille* (Aug. 22, 2014), involved a [non-union workforce](#) and the discharge of two employees, Jillian Sanzone and Vincent Spinella, for comments made in a discussion thread on the Facebook page of a fellow employee. In January 2011, Sanzone discovered that she

owed more in state income taxes than originally expected. She then went into work and discussed the matter with other employees, and employees complained to management, which planned to hold a staff meeting with its payroll provider so that the employee concerns could be addressed. Prior to the meeting, however, a former employee posted to her Facebook page the following comment: "Maybe 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!!!!!"

The subsequent discussion spurred comments from other Triple Play employees complaining about the putative tax situation. Triple Play customers, who happened to be Facebook friends with the employees, also posted comments in the thread. Sanzone and another employee, Vincent Spinella, also participated. First, after a subsequent comment from the original poster (and former employee) that she was calling the "labor board" to look into alleged back wages owed to the poster, Spinella "Liked" the original Facebook comment. Second, later in the discussion thread - which also included comments from customers who were friends of the employees - Sanzone posted a comment, in reference to an owner of Triple Play, "I owe too. Such an a**hole." As it happened, the sister of one of Triple Play's owners was a Facebook friend of the original poster, and when she saw the thread she immediately alerted the owners.

When Sanzone next reported to work she was informed that she was being terminated for her Facebook comment because it demonstrated she was not "loyal enough" to be working for Triple Play. When Spinella next reported to work, he was met by the owners, who questioned him on whether he had a "problem" with them or the company, on the identity of the other Facebook posters, and on whether he had written anything negative about them. He was then told that the company interpreted his "like" of the comment to mean that he "liked the disparaging and defamatory comments" about the company, and therefore he was also being fired. One of the owners then told Spinella he would be hearing from the company's lawyers. Although the attorney never contacted Spinella, the attorney did contact Sanzone by letter and raised the possibility of an action for defamation by the company against Sanzone.

Perhaps not surprising, both employees filed unfair labor practice charges against the company. An administrative law judge found that the actions of the employees on the Facebook discussion page constituted protected concerted activity under the Act and that Triple Play violated Section 8(a)(1) of the Act by terminating them.

On appeal to a three-member NLRB panel, Triple Play did not contest the finding that the online activity was protected concerted

activity. Indeed, neither the administrative law judge nor the NLRB panel had any difficulty reaching that conclusion, as the Facebook thread concerned employee complaints about wages and taxes. Even Sanzone's "liking" of the original Facebook comment was found to be protected because it expressed agreement with the original posting complaining about alleged tax and wage practices. Rather, Triple Play argued that Spinella and Sanzone lost the protection of the Act because they adopted the original poster's comment - which Triple Play said was defamatory and disparaging. It was in this context that the NLRB panel outlined its view on how such comments should be analyzed.

As the panel stated, the NLRB has "long recognized that an employer has a legitimate interest in preventing the disparagement of its products or services and, related, in protecting its reputation (and the reputation of its agents as to matters within the scope of their agency) from defamation." Thus, in certain situations, otherwise protected concerted activity can lose the protections of the Act and be grounds for termination or other action by the employer. One common framework for analyzing whether activity loses its protection is the *Atlantic Steel* framework (named after the case *Atlantic Steel Co.*, 245 NLRB 814 (1979)), which balances four factors: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was in any way provoked by the employer's unfair labor practice. The *Atlantic Steel* framework was created in a world where "direct, face-to-face communications" were the norm, typically between an employee and a supervisor on or near the employer's premises. According to the panel, *Atlantic Steel* "generally has not been applied to communications by employees with third parties or the general public," and because the framework's inquiry into the "place of the discussion" is "clear[ly] inapplicable" to online discussions, the *Atlantic Steel* framework, which had been utilized by the administrative law judge in the Triple Play matter, will typically be inappropriate for determining whether online comments lose the protection of the Act.

Instead, the NLRB panel looked to the Supreme Court cases of *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) and *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966) and their standards for whether conduct loses the protections of the Act. Under *Jefferson Standard*, the Supreme Court upheld an employer's discharge of employees who publicly attacked the quality of the employer's products and business practices when those attacks were unrelated to a labor controversy. Here, however, the NLRB found the comments plainly connected to wage and tax disputes, and thus even if the comments were disparaging, *Jefferson Standard* did not apply. Additionally, because the comments took place on a private Facebook page, they were not "directed to the general public," unlike if they were, for example, made on the

employer's public Facebook page. Thus, they were more akin to a private conversation that "could potentially be overheard by a patron or third party."

Under *Linn*, the Act's protection is lost where "defamatory statements [are] circulated with malice" and cause the employer harm. In this context, "malice" means "with knowledge of its falsity, or with reckless disregard of whether it was true or false." Applying this standard, the NLRB found that the actions of Sanzone and Spinella were still protected. The panel found that neither Sanzone nor Spinella expressly accused the employer of stealing money from employees or endorsed any comment to that effect. Moreover, according to the panel, neither could "be held responsible for any of the other comments posted" in the thread. Based on this analysis, the Board affirmed the earlier decision that the terminations violated the Act.

For employers, *Triple Play* provides both clarification and warning. The decision helps provide additional guidance on how the NLRB will interpret online comments. But the decision also shows that employers must tread carefully when dealing with unfavorable Facebook comments and discussions, even where those discussions involve customers. The terminations were also not the only violations of the Act found here. The act of telling Spinella and Sanzone they were being terminated for their Facebook comments was itself a violation of the Act, as was the employer's threat to Sanzone that he would "hear from" the company's lawyer. And even while the clarification from *Triple Play* is helpful, it is yet another reminder of the issues posed with applying old law to new technology. The Supreme Court cases used by the panel to make its decision were from 1953 and 1966 - hardly cases from the Internet age - and their application to the realities of Facebook and the pervasiveness (and persuasiveness) of online communication is inexact at best.

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