National Labor Relations Board Restricts Employers' Ability to Discipline Employees For Publicly Disparaging Statements Directed to Customers

Client Advisories

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The National Labor Relations Board ("NLRB"), in a decision affecting both unionized and non-unionized workplaces, continued its recent pattern of restricting employers from disciplining employees for making public statements. The decision was based on Section 7 of the National Labor Relations Act, which prohibits virtually all employers from interfering with employees' "protected activity." This recent pattern has caused an inherent friction between that Act and employers' rational desire to expect basic standards of employee conduct, such as loyalty.

Section 7 of the Act protects an employee's right to communicate with the public about an ongoing dispute about the terms and conditions of employment, but, historically, this right was not viewed as unlimited. Communications that are disloyal, reckless or maliciously untrue have traditionally been considered sufficiently egregious to lose their protected status, and thus permit the employer to take disciplinary action against those employees, including termination. However, in recent years, the NLRB has issued notable decisions expanding the scope of "protected activity" and limiting employers' right to discipline for public statements, such as recent decisions finding that an employer may not discipline an employee for social media postings critical of a supervisor.

In the most recent decision - *MikLin Enterprises* - the NLRB has even further limited employers' ability to discipline employees for seemingly disloyal public statements. In that case, the employer ("MikLin") operated 10 "Jimmy John's" sandwich restaurants. MikLin terminated six employees who put up posters in the restaurants which questioned the safety of the restaurants' food. The posters showed photos of two sandwiches, one appealing and one essentially rancid. The posters stated that MikLin's employees were not permitted to call out sick or receive paid sick days, and strongly implied that MikLin's customers risked food-borne illnesses by eating

tainted sandwiches prepared by sick employees. The posters ended by asking customers to "Help Jimmy John's workers win sick days."

Previously, the U.S. Supreme Court in the *Jefferson Standard* case held that employees are not protected when they make "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation." Despite this general standard, because the posters addressed a dispute about a term and condition of employment - paid sick leave - the NLRB found that MikLin violated the employees' Section 7 rights when it fired these employees, and ordered MikLin to reinstate the employees with full back pay.

In doing so, the NLRB acknowledged, but then downplayed, the inaccuracy of the posters and particularly the posters' rather obvious linking of a lack of sick leave and food-borne illnesses. (There was no evidence of any customers getting sick at these establishments). According to the NLRB, this was "protected hyperbole" because the posters did not specifically claim that customers had become sick. As a result, the NLRB held that the posters were not maliciously untrue and did not lose protection under *Jefferson Standard*. As even stronger evidence of the NLRB's leanings, in a footnote, the Board also overruled a 1970 NLRB decision which held that striking employees who intentionally instilled fear in customers were not protected under Section 7.

Although this decision is likely to be appealed to the courts, *MikLin Enterprises* demonstrates the expansive approach that the NLRB is taking with respect to Section 7 rights. Until this case is fully decided and appealed, employers must be extremely cautious before discharging employees even for arguably untrue public statements about the business, **if** those statements arguably involve "terms and conditions" of employment.

If you have any questions about the consequence of this NLRB decision or any issues of discipline in connection with public statements, or other labor and employment matter, please contact any member of the Labor and Employment Department of Archer in Haddonfield, N.J., at (856) 795-2121, in Philadelphia, Pa., at (215) 963-3300, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, or in Wilmington, Del., at (302) 777-4350.

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