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Facebook: Second Circuit "Likes" Employee Rights Under the NLRA

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Employers should continue to proceed with caution before disciplining employees for their Facebook activity. In *Three D, LLC d/b/a Triple Play Sports Bar and Grille v. NLRB,* the Federal Appeals Court for Connecticut, New York and Vermont recently upheld a National Labor Relations Board decision that found that one employee's "liking" another employee's comments about the terms and conditions of their employment deserved protection under the National Labor Relations Act. The Court upheld the Board's decision that terminating those employees was illegal.

In *Three D, LLC*, the employees of a sports bar had a discussion on Facebook about their employer's alleged mishandling of their tax withholding. The exchange included both negative comments about their workplace and profanity. One of the employees joined into the conversation by writing a response, while another simply "liked" a co-worker's statements. The employees happened to be Facebook friends with the bar's owner's sister, who told the owner about the post. The owner fired the employees, some of whom were interrogated about the posting and threatened with legal action before their termination. The Board found that this was illegal, and the Employer appealed to the Second Circuit.

In recent years the NLRB has been very open about focusing its efforts on the non-unionized workforce. Many employers assume that because they do not have a union, they do not have to worry about the National Labor Relations Act. However, the Act protects the rights of all employees-unionized or not-to engage in concerted activities for their mutual aid or protection. This includes talking together about their working conditions, wages, and even criticizing management. Interfering with that right may be considered an unfair labor practice.

Before the decision in *Three D, LLC*, the Board had held that the Act protected Facebook posts/conversations about working conditions. The Board did not make clear whether or not simply "liking" a post constituted enough employee participation to count as protected activity. *Three D, LLC* made clear that at least in Connecticut, Vermont and New York, such activity merits NLRA protection.

An Employer naturally wants to act when its employees post negative or obscene comments about their workplace or their supervisor on Facebook. It is a public forum that the Employer cannot control, and interesting messages can go viral. Three D, LLC does not change the law that Employers have an interest in preventing negative comments about their products or services and protecting their business reputation. An employee's public communications may lose protection of the Act if sufficiently disloyal or defamatory. This can happen if the statements are not connected with an ongoing labor dispute or are made maliciously and with knowledge of their falsity. However Employers must tread carefully before disciplining employees for their social media use to air workplace grievances.

All in all, Employers should continue to take a close look at their actions in response to employee Facebook posts, even if they do not "like" it.

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