NLRB Marches On

The National Labor Relations Board ("NLRB") has been very active over the past year or two reviewing social media policies, workplace conduct and broadening its reach into employer-employee issues heretofore untouched. While companies that don't have unions may believe they are immune from decisions of the NLRB the fact is they may not be depending on the nature of the case. Below is a sampling of cases the Board has recently undertaken.

Workplace Conduct

In *Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014) the NLRB found that the employer violated the NLRA by terminating an employee for a profanity laced outburst directed at the company's owner. After complaining to the office manager about the employee's pay, the owner called the employee into a closed door meeting and told the employee he was talking negatively to other employees and asking too many questions. The owner then went on to tell the employee that "he had to follow the employer's policies and procedures and that he should not be complaining about his pay". The employee had been with the company only two months. He also spoke with other employees about the Company's policies relating to breaks, restroom facilities, and compensation. The owner then twice told the employee that if he did not trust the owner he did not have to work there. At that point the employee lost his temper and in a raised voice started berating the owner calling him a "f.....g mother f...er," a "f...g crook," and an "a..hole". During the outburst the employee stood up in the office, pushed his chair aside, and told the owner that if he fired him, the owner "would regret it". The owner then fired the employee.

The employee filed an unfair labor practice charge against the Company. The Administrative Law Judge concluded that although the employee was engaged in protected activity he lost that protection by his belligerent behavior. However, the Board ruled in favor of the employee and stated that the "threat" was not credible. The company appealed the decision to the 9th Circuit Court of Appeals which ultimately remanded the case to the NLRB with instructions to consider a four prong test as set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979). These factors consist of (1) the place of the discussion, (2) the subject matter, (3) employer provocation, and (4) the nature of the outburst. The Court of Appeals concluded that the NLRB erred in its initial assessment of the nature of the outburst weighed in favor of protection under the NLRA. On remand the NLRB concluded that the nature of the outburst did not include a physical threat and therefore the employee did forfeit protection under the Act.

(over)

Employer Policy Prohibiting Negativity

Employers have struggled for many years to create a working environment free from consternation, distractions, and internal strife. In order to achieve that goal many employers have enacted policies setting standards for employee conduct. However, in *Hills and Dales General Hospital and Danielle Corlis,* No. 07-CA-053556 the NLRB found the policy adopted by the employer violated the NLRA. At issue were three provisions in the policy which stated that employees would:

- Not make negative comments about our fellow team members including coworkers and managers;
- Will not engage in or listen to negativity or gossip;
- Will represent the company in the community in a positive and professional manner at every opportunity.

The policy was adopted with employee involvement in their development and each employee was asked to sign copies.

The Board concluded that these rules were overly broad and ambiguous and could not be saved by the involvement of the employees in their development. The Board found that the first two rules could be construed by employees to prohibit protected, concerted activity. The Board also ruled that the third rule was unlawful because it may be construed to prevent employees from engaging in public protests of unfair labor practices or terms and conditions of employment.

"Liking" on Facebook

The NLRB recently determined that "liking" a Facebook comment is critical of an employer in calculating withholding is protected concerted activity under the NLRA. *Three D, LLC d/b/a Triple Play Sports Bar and Grill and Jillian Sanzone,* No. 34-CA012915.

The employees of Three D were upset to learn that the Company has miscalculated their tax withholding and they may owe more money. Some of the affected employees took to Facebook and expressed their anger about the situation. In some cases the comments were of a sarcastic nature or simply agreeing with comments that had been posted. After the employer learned of the comments, he fired the participating employees.

The NLRB quickly determined that posts involved terms and conditions of employment and were protected under the NLRA. In addition the Board went so far as to invalidate the employer's social media policy.

Summary

These decisions clearly demonstrate that employers should have their employee handbooks and policies reviewed by counsel to ensure that they are up to date in a fast changing area of the law.