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Second Circuit Holds Facebook "Likes" Protected by NLRA

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Recently, the U.S. Court of Appeals for the Second Circuit ("Second Circuit") released a summary order and held that an employee's "like" on Facebook can be protected by the National Labor Relations Act ("NLRA").

By way of brief background, in *Three D, LLC d/b/a Triple Play Sports Bar and Grille v. National Labor Relations Board,* former and current employees of Triple Play Sports Bar and Grille ("Triple") discovered that they owed additional state income tax. One of the former employees posted on Facebook complaining about the alleged failure on the part of Triple's owners to withhold sufficient payroll taxes. Several other current and former employees, as well as some customers, responded angrily to the post by attaching "comments" on the original post.

Several of these angry "comments" contained profanities and defamatory statements about Triple and Triple's owners. Jillian Sanzone and Vincent Spinella, current employees of Triple at the time, participated in the angry discussion on Facebook. Specifically, Sanzone "commented" on the post, and Spinella "liked" the original post and several other comments. Upon learning of Sanzone and Spinella's activities on Facebook, the owners of Triple terminated Sanzone and Spinella.

Section 7 of the NLRA provides rights to employees engaged in "concerted activity for the purposes of collective bargaining or other mutual aid or protection…." Such protected activities under Section 7 include communications among employees about work conditions, pay, or hours. However, this protection under Section 7 is not without limits. If an activity is found to be "so violent or of such serious character as to render the employee unfit for further service," Section 7 would not protect such an activity. For example, the National Labor Relations Board ("NLRB") has found that an employee's statements calling his supervisor a "lying son of a bitch" or a "mother fucking liar" were unprotected under Section 7 because the employee was not provoked and the workplace did not normally tolerate such a language.

In *Three D*, the administrative law judge ("ALJ") found that Triple's termination of Sanzone and Spinella violated the employees' rights to engage in "concerted activity for the purposes of collective bargaining or other mutual aid or protection" under Section 7 of the NLRA. Triple appealed the ALJ's decision to the NLRB, which affirmed the ALJ's decision. Triple then appealed the decision to the Second Circuit.

The Second Circuit agreed with the NLRB that Sanzone's "comment" and Spinella's "like" constituted a "concerted activity" because their Facebook activities involved current employees and were part of a discussion about

Triple's miscalculation of the employees' state tax withholding. The Second Circuit also agreed with the NLRB that the Facebook activities were "protected" because of the online discussions related to workplace complaints. In fact, the Second Circuit did not find that Sanzone's "comment" and Spinella's "like" were so disloyal or defamatory to lose Section 7 protection.

This case once again illuminates the inescapable fact that employers should be cautious in implementing social media policies that may prohibit protected activities on social media and be mindful of taking adverse actions against employees if their activities appear to address topics related to their employment.

If you have any questions or concerns regarding employment or education-related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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