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A Reminder From The NLRB To Scrutinize Your &!^@$) Policies

May 26, 2015 | | Social Media And Technology, Currents - Employment Law

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We have written often at BT Currents, including here and here, about the National Labor Relations Board's (NLRB) intense focus on employer policies that assertedly might be viewed by an employee as restricting employees' – in union and non-union workplaces alike – to communicate with each other about the terms and conditions of their employment, i.e. engaged in "concerted activity." This past week I was part of a panel on various labor law topics including a union-side lawyer and representatives from Regions 8 and 9 of the NLRB. This was one of the topics the panel discussed, and I was struck by the contrast between two aspects of the NLRB's view on concerted activity. On the one hand, with these employer policies, the NLRB is thinking of very subtle ways that policies could be interpreted – angles that experienced labor and employment attorneys would have trouble thinking of. They find issues in social media and at will and confidentiality and other policies that employees supposedly might read as inhibiting them that one has to look *very* hard to even see. On the other hand, the NLRB in the *Pier Sixty* decision a few weeks ago concluded that employee Herman Perez was engaging in statutorily protected activity when he posted the following about his supervisor on Facebook: *Bob is such a NASTY MOTHER F****** don't know how to talk to people!!!!!! F*** his mother and his entire f****** family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!* It was unlawful for the company to terminate Mr. Perez for that post, the Board found. While a "savings clause" in an employer policy that says the policy is not intended to inhibit the employee's communications rights is not sufficient unless it is highly specific; Mr. Perez's "vote yes" at the end made his profane rant (he did not use asterisks by the way) acceptable. Do we think the author of that post is reading employer policies with the fine-toothed comb that the NLRB's lawyers are? I don't. In any event, for the time being employers remain well advised to make sure labor and employment counsel are consulted regarding (1) the policies that are hot buttons for the NLRB and (2) a termination of any employee based on social media communications.

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