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NLRB "Likes" Employees' Facebook Argument

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The NLRB recently ruled that "liking" a Facebook comment is protected, concerted activity under the National Labor Relations Act (NLRA). Thus, firing an employee for "liking" what the company deemed to be a disparaging remark regarding tax withholdings was unlawful. The decision can be found here. In short, employees of a bar & grille were not happy when they found out that their employer had miscalculated tax withholdings (meaning they still owed money), so they did what more and more folks seem to be doing these days: they aired their grievances on Facebook. After a former employee posted an initial sarcastic comment regarding the issue, a waitress from the bar commented on the post, expressing her agreement with the sentiments and a cook "liked" the initial post. The employer caught wind of this Facebook activity and let the employees know their services were no longer needed. Because the conversation as a whole involved the terms and conditions of employment, the NLRB had no trouble finding the subject matter protected under the NLRA (*i.e.* the employees were engaging in "concerted activities for the purposes of mutual aid or protection"). While the waitress's comments, which "effectively endorsed [the former employee's] complaint" were clearly protected, the Board found that the cook's "'like" was "more ambiguous, [but] we treat it for purposes of our analysis as expressing agreement with [the former employee's] original complaint." Further, although others had chimed in with some harsher language (like calling the employer an "***hole"), the NLRB rejected the contention that the fired employees could be "held responsible for any of the other comments posted in this exchange." In other words, the "like" only pertained to the specific comment given the thumbs up, and not anything else – after all, reasoned the Board, the cook could have "liked" those comments as well if he had wanted. In addition, the Board found that the comments were not so disloyal or maliciously untrue as to lose their protection under the NLRA. For good measure, the NLRB went on to invalidate the bar & grille's social media policy banning "inappropriate discussions" about the employer, co-workers and management. The Board thought this prohibition was too broad and might chill employees from properly discussing terms and conditions of employment. Beyond the technicalities of the case – and remember that this decision applies to both union and non-union shops – this ruling is a good reminder of the perilous nature of firing employees because of off-duty Facebook activity. When these issues arise, employers should take a deep breath – and perhaps watch a viral Facebook video or two of animal-human reunions after a tour of duty or being released into the wild for a few years – before making quick decisions that might prove very costly down the road.

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