

Protected Concerted Activity or a License to Sabotage?

Can Employers Protect Themselves Against Disparagement by Employees?

By Jack Blum, former Associate

Your client calls, emails, or walks into your office incensed that one of its employees has blogged, tweeted, or given an interview to the press in which the employee bashes the employer and criticizes its business practices. The client is convinced that the employee's conduct is disloyal, insubordinate, and in violation of several of the employer's handbook policies. Even worse, the employee's statements could have been made to specific customers or government agencies with which the employer has business, thus directly threatening some or all of the company's important relationships. Plus, the client fears that its other employees may see the negative statements, which could create workplace dissent.

While the client in this scenario is likely contemplating immediate disciplinary action against the employee, most experienced labor and employment lawyers will recognize the need to dissuade the client from immediate action until a full analysis of the employee's circumstances can be completed. Circumspect action is required because any retaliatory discipline imposed by the employer in this type of situation could run afoul of § 7 of the National Labor Relations Act (NLRA), which protects the rights of union *and* non-union employees "to engage in concerted activities for the purpose of collective bargaining *or other mutual aid or protection*" and constitute an unfair labor practice.¹ Moreover, even companies that work through contractors and do not directly employ the employee in question can be held liable.

The Sept. 16, 2016, decision from the U.S. Court of Appeals for the District of Columbia Circuit in *DIRECTV Inc. v. National Labor Relations Board*^[2] (NLRB) illustrates the risks employers and companies that hire contractors face from concerted activity charges. In *DIRECTV*, the satellite television provider imposed negative financial incentives on one of its contractors to promote the connection of DirecTV's satellite receivers to users' landline telephone connections. The contractor passed these incentives along to its technicians by changing their pay structure, and a bitter dispute arose. After talks between the technicians and contractor were unfruitful, a group of more than 20 technicians went on a local television news broadcast to complain about both the new pay structure and DirecTV's and its contractors' business practices.

While the broadcast discussed the change in the pay structure, the main thrust of the segment was a claim that DirecTV misled its customers into agreeing to accept the landline connections, tying the landline connection issues to a previous DirecTV settlement to resolve consumer deceptive practices claims. During the segment, technicians made statements that they were instructed to lie to customers, told to inform customers that their receivers would explode if not connected to a landline, and told that if they did not lie to customers they would lose money under the new pay structure. According to DirecTV and its contractor, all of these statements were false, and after DirecTV learned of the broadcast it instructed the contractor that the technicians in the broadcast could no longer represent DirecTV to customers. The contractor then fired most of the technicians appearing in the broadcast.

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