Protected Concerted Activity or a License to Sabotage: Can Employers Protect Themselves Against Disparagement by Employees?

by Jack Blum

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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.

After one of the discharged technicians filed an unfair labor practice charge with the NLRB, the NLRB found that the technicians had engaged in protected concerted activity by participating in the television broadcast and DirecTV's and its contractor's termination of the technicians violated the NLRA by interfering with and restraining the technicians' § 7 rights.[3] The D.C. Circuit affirmed this finding, reasoning that because the technicians' participation in the broadcast was related to an ongoing labor dispute, was not wholly incommensurate with the technicians' grievance about their pay structure, and because any inaccuracies in the technicians' statements were not made with actual malice, DirecTV and its contractor could not take retaliatory action against the technicians. Accordingly, the contractor was required to reinstate the

terminated technicians, make them whole for any loss of earnings or benefits stemming from the termination, rescind certain provisions of its employee handbook, and post certain notices at its facility. For its participation, DirecTV was held jointly and severally liable for the technicians' back pay and was required to provide a notice to its contractor for posting at the contractor's facility.

As *DIRECTV* illustrates, the NLRA provides employees with wide leeway to make negative public statements about their employer. While *DIRECTV* involved a traditional media forum, employers should be concerned because social media provides any employee with a platform to potentially reach a wide audience. An employee's social media criticism of his or her working conditions has the potential to go viral and become a *cause célèbre* read by hundreds of thousands or millions of people, as occurred with the Feb. 19, 2016, open letter posted by a former Yelp employee alleging that the company failed to pay many employees a living wage.[4] The NLRB aggressively moved to protect employee access to social media as a forum for engaging in protected activity, issuing three memoranda detailing its general counsel's approach to social media cases, as well as a fourth memorandum on employee handbook provisions that could limit the concerted activity right.[5]

Fortunately for employers, the case law and the NLRB's general counsel memoranda do set forth certain circumstances in which an employer retains a remedy against disloyal employee criticism. In analyzing an employee's criticism of the employer to a third party, the NLRB has utilized a two-pronged approach: (1) looking to whether the communication indicates it is related to an ongoing employment dispute; and (2) looking to whether the communication is so disloyal, reckless, or maliciously untrue as to lose the NLRA's protection.[6] The application of these factors requires a careful review of the facts surrounding the employee's communication to determine what protection it may be entitled to.

The beginning of the analysis is the context of the employee's criticism. The employee's statement must take place during the pendency of an employment dispute and reference the dispute.[7] The reasoning behind this requirement is that third parties exposed to the statement can appropriately weigh the statement if they have knowledge of its partisan nature.[8] The employee's criticism must also reflect *concerted* activity by or on behalf of a group of employees, rather than one employee's individual gripe that is not a call for broader action.[9] The NLRB's social media memoranda look to facts like whether the employee's criticism arises out of prior discussions among employees and the extent to which co-workers respond to a single employee's posting.[10] Problematically, these facts may be either unknown (e.g., prior employee discussions) or unavailable (e.g., subsequent employee engagement) to an employer considering rapid action.

The content of an employee's criticism can render it ineligible for protection. First, the communication must demonstrate that its purpose is to improve the employees' terms and conditions of employment, and not to criticize other aspects of the employer's operations.[11] If the statement addresses terms and conditions of employment, courts then look to whether the criticism is "wholly incommensurate" to the employee's grievance. This standard historically prohibited employees from disparaging the employer's products or services, but the NLRB has moved away from that view.[12] More recent cases have permitted disparagement and focused primarily on the relation, if any, between the criticism and the underlying dispute. Accordingly, in *DIRECTV* the technicians' actions were not wholly incommensurate with their grievance because DirecTV's alleged misleading of consumers was directly related to the technicians' complaint that they could not earn a suitable level of pay without resorting to underhanded tactics. In another case, letters written to a school district requesting it to rebid a government contract to preserve the incumbent employees' pay and benefits were found to be narrowly tailored to the employees' dispute with the new contractor over their prospective pay and benefit levels.[13]

An employee's criticism also loses the protection of the NLRA if it is defamatory. The NLRB and courts, however, have applied the demanding actual malice standard of *New York Times Co. v. Sullivan*,[14] which is applicable to criticism of public officials, to contentions that an employee's criticism is defamatory. This standard requires that the statement was made with actual knowledge of its falsity or reckless disregard for whether the statement was true or false. In *DIRECTV*, this standard ensured that the technicians' statements remained protected even though DirecTV identified several ways in which the statements were inaccurate, misleading, or incomplete.

Another way that an employee's criticism of an employer can lose concerted activity protection is by revealing the employer's confidential information.[15] If the confidential information in question is employee wage data or other information about the terms and conditions of employment, however, the NLRB does not recognize the same employer interest in confidentiality as exists for an employer's other proprietary business information.[16]

Finally, there is also some potential that the content of an employee's concerted activity communication could be deemed so vulgar or inflammatory as to lose NLRA protection. In most cases involving criticism of an employer to third parties, however, this exception is unlikely to offer employers relief. Employee statements to media and on social media are typically unlikely to involve objectively threatening words or behavior given that they are not made in the context of a face-to-face encounter with management, and the NLRB and courts have frequently excused the use of vulgarity and insults by employees engaging in concerted activity,[17] particularly when the employee's actions can be characterized as impulsive.[18]

Where an employee's criticism involves claims of discrimination based on Title VII, additional considerations are present. Courts have found that an employee's complaint to a third party, such as the employer's customer, about an employer's allegedly discriminatory conduct can qualify as opposing an unlawful employment practice under Title VII.[19] Any adverse employment action taken against the employee as a result of such a complaint could constitute retaliation. However, Title VII offers employees less leeway than the NLRA in making complaints, as an employee's opposition to discriminatory practices must be reasonable.[20] Practitioners should also avoid separating the two analyses, as conduct opposing a Title VII violation could concurrently qualify as NLRA concerted activity if it involved the concerns of multiple employees.

While employers are by no means powerless, the NLRA can provide employees with significant protection in work-related disputes with their employers. Employers seeking to discipline employees for public criticism must carefully consider the nature and circumstances of the criticism and what protection it may garner under the NLRA or other law. ⊙

Endnotes

[1]29 U.S.C. § 157 (emphasis added).

[2]*DIRECTV Inc. v. Nat'l Labor Relations Bd.*, 837 F.3d 25 (D.C. Cir. 2016).
[3]*MasTec Advanced Tech.*, 357 N.L.R.B. No. 17 (2011).
[4]*See* Talia Jane, *An Open Letter to My CEO*, Medium (Feb. 19, 2016), medium.com/@taliajane/an-open-letter-to-my-ceo-fb73df021e7a#.kuwd1nayd.
[5]Memorandum from the National Labor Relations Board, Office of the General Counsel No. OM 11-74, Report of the Acting General Counsel Concerning Social Media Cases (Aug. 18, 2011); Memorandum from the National Labor Relations Board, Office of the General Counsel No. OM 12-31, Report of the Acting General Counsel Concerning Social Media Cases (Jan. 24, 2012); Memorandum from the National Labor Relations Board, Office of the General Counsel No. OM 12-59, Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012); Memorandum from National Labor Relations Board, Office of the General Counsel No. GC 15-04, Report of the General Counsel Concerning Employment Rules (Mar. 18, 2015).
[6]*In re American Golf Corp.*, 330 NLRB No. 172 (2000).
[7]*Id.*
[8]*Sierra Publ'g Co. v. N.L.R.B.*, 889 F.2d 210, 217 (9th Cir. 1989).
[9]NLRB Memo. OM 12-31 at 7, 12 (statements reflecting employee's personal workplace issues not concerted activity).
[10]*Compare* NLRB Memo. OM 12-31 at 5, 21 (co-workers responded and engaged with Facebook posting), *with id.* at 32-33 (statement unprotected where it received no likes or responses from co-workers), NLRB Memo. OM 11-74 at 14-15 (same); NLRB Memo. OM 11-74 at 8 (post protected where it arose out of offline employee discussions).
[11]*Five Star Transp. Inc.*, 349 NLRB No. 8 (2007) (criticism of employer's safety record with respect to non-employee third parties was not protected concerted activity).
[12]*See Diamond Walnut Growers Inc. v. Nat'l Labor Relations Bd*, 113 F.3d 1259, 1277-78 (D.C. Cir. 1997) (describing trend in cases) (Wald, J., concurring in part and dissenting in part).
[13]*Five Star Transp. Inc. v. Nat'l Labor Relations Bd.*, 522 F.3d 46, 54 (1st Cir. 2008); *see also Cmty. Hosp. of Roanoke Valley Inc. v. Nat'l Labor Relations Bd.*, 538 F.2d 607, 609 (4th Cir. 1976) (nurse's comment linking lack of ability to care for all patients with pay and benefits levels was protected concerted activity).
[14]*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[15]*Nat'l Labor Relations Bd. v. Knuth Bros. Inc.*, 537 F.2d 950, 956 (7th Cir. 1976).
[16]NLRB Memo. GC 15-04 at 4-6 (discussing permissible scope of confidentiality rules).
[17]NLRB Memo. OM 12-31 at 3 (use of expletives didn't forfeit protected activity status); NLRB Memo. OM 11-74 at 14-15 (personal insults toward supervisor did not cause statement to lose status).
[18]*Coors Container Co. v. Nat'l Labor Relations Bd.*, 628 F.2d 1283, 1288 (10th Cir. 1980).
[19]*E.g.*, *Hicks v. ABT Assocs. Inc.*, 572 F.2d 960, 970 (3d Cir. 1978) (complaint to government agency that funded employer's project).
[20]*Rollins v. State of Fla. Dept. of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989).

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was not rendered moot by the parties' settlement agreement.[51] The court distinguished the case from *U.S. Bancorp*, where the litigants agreed to vacatur as part of the settlement.[52] Thus, according to the district court, the issue in *U.S. Bancorp* was whether settlement of a case during an appeal constitutes sufficient grounds by itself for an appellate court to vacate a judgment of an inferior court.[53]

In its decision, the district court discussed *Major League Baseball Properties*, which involved alleged trademark violations.[54] In that case, the district court denied Major League Baseball (MLB) Properties' motion for injunctive relief, which was then appealed to the Second Circuit.[55] While on appeal, the parties reached a settlement that contemplated vacatur of the district court's order.[56] The Second Circuit explained, apropos to the matter before the district court in *Board of Trustees of the University of Alabama*, that "Pacific strongly desired a settlement to avoid [specific] financial consequences of [defending the appeal]" and that "MLB was agreeable to a settlement but needed a vacatur because, in the course of defending its marks, it ... had to be concerned about the effect of the district court's decision in future litigation with alleged infringers. Under trademark law, MLB must defend its mark against all users or be subject to the defense of acquiescence."[57] The Second Circuit further explained that "[t]he only damage to the public interest from such a vacatur would be that the validity of MLB's marks would be left to future litigation,"[58] which warranted the finding that "exceptional circumstances" contemplated by *U.S. Bancorp* were present.

As further recounted by the Second Circuit, in *Motta*, the First Circuit vacated a district court's decision finding the existence of "exceptional circumstances." In *Motta*, Immigration Naturalization Services (INS) had appealed from a judgment that stayed a deportation pending a decision on a motion to reopen deportation proceedings.[59] The First Circuit, like the Eleventh Circuit in *Hartford*, encouraged the INS to settle the case given that settlement was in the parties' interests.[60] However, the INS believed that it could not settle absent vacatur of the district court's decision given that it was a "repeat player before the courts" and could not relinquish its right to appeal a decision that might harm it in future litigation.[61] The First Circuit concluded that these facts constituted "exceptional circumstances," and that the interest in settlement outweighed the social value of precedent being vacated.[62]

After the district court rejected claimed distinctions with *Major League Baseball*—including a prescient hat tip to the Eleventh Circuit's decision in *Hartford* involving the court's suggestion of mediation—and noted that settlement was conditioned on vacatur, the defendants could not afford to continue litigating, the plaintiffs wanted to get whatever they could through settlement, and the TABB was bound by the district court's consent judgment. The district court therefore found that "exceptional circumstances" warranting vacatur existed.[63]

Conclusion

Although by no means universal, there is ample authority, including recent circuit court authority, supporting the proposition that where parties to litigation have valid reasons to settle, and make vacatur of a prior order(s) an express condition to settlement, they have a fair shot at convincing a federal court to approve the settlement and, in so doing, finding "exceptional circumstances" contemplated by *U.S. Bancorp* despite the Supreme Court's forceful language about the sanctity of precedent. The key is to focus on the equitable nature of