Alert

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COZEN O'CONNOR

#No Filter: Regulating an Employer's Social Media Posts

In this special edition of #No Filter, we will examine a recent May 20, 2022 decision from the Third Circuit Court of Appeals impacting the limits of permissible speech on social media. This time, however, we examine attempts to regulate an *employer's speech* on social media rather than the typical situation involving attempts to regulate an employee's speech.

FDRLST Media, LLC v. National Labor Relations Board[1]

The employer operates *The Federalist,* a right-leaning internet magazine that publishes commentary of cultural, political, and religious issues of current interest, including labor issues. There were a total of seven employees, six of whom were writers and editors of the online publication. On June 6, 2019, following a report that the staff of a left-leaning digital media company had walked off the job during labor negotiations, the employer's executive officer posted a tweet from his personal Twitter account that read: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine."

The following day, a Massachusetts resident with no connection to the employer filed an unfair labor practice complaint against the employer alleging the tweet "threatened employees with reprisals and implicitly threatened employees with loss of their jobs if they formed or supported a union." At least one employee viewed the tweet, but there is no evidence that any employees expressed concern over its message. Quite the contrary. Two employees submitted affidavits averring that they viewed the tweet as a funny, satirical expression, and did not perceive it to threaten any protected workplace activity. The employer's executive officer submitted an affidavit that he intended the tweet as satire, expressing his personal viewpoint on a contemporary topic of general interest.

Section 8(a)(1) of the National Labor Relations Act (NLRA) prohibits employers from engaging in practices that "interfere with, restrain, or coerce employees in the exercise" of their protected rights to organize, collectively bargain, or engage in other union activity.[2] An employer is not barred from communicating its views on unions—even anti-union views—to its employees, but cannot threaten employees with reprisals or promise them benefits in relation to unionization. But what constitutes a prohibited threat? To qualify as such, an employer's statement must warn of adverse consequences in a way that "would tend to coerce a reasonable employee" not to exercise their labor rights.

The National Labor Relations Board (NLRB) enforces the NLRA and issued a complaint against the employer. During a hearing on the merits before an administrative law judge, the General Counsel for the NLRB did not call any witnesses, rejected the notion the tweet would be understood as a joke, and argued that a reasonable reader could interpret the tweet only as a threat against employee unionization. The administrative law judge found the "a reasonable interpretation of the expression meant that working conditions would worsen or employee benefits would be jeopardized if employees attempted to unionize" and, as a consequence, the tweet violated the NLRA. The employer appealed the ruling to the NLRB, which affirmed the decision, stating the employer's intent and subjective employee perception were irrelevant to its inquiry. The employer petitioned the Third Circuit Court of Appeals for review and the NLRB requested enforcement of its order against the employer.

The Third Circuit found in favor of the employer and denied the NLRB's application for enforcement. In its decision, the Third Circuit noted an employer's conduct must be examined "in light of all the existing circumstances."[3] The appellate court noted that "[c]ontext is an important part of language, and that's especially true where, as in this case, pure speech is at issue."

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The context of the speech in this case was critically important. For example, the Court noted six of the seven employees of the employer were writers and editors of the publication; the "image evoked—that of writers tapping away on laptops in dimly-lit mineshafts alongside salt deposits and workers swinging pickaxes—is as bizarre as it is comical." The court went on to note that there was "no history of labor strike, no evidence of antagonism" and there was "no evidence any FDRLST Media employee perceived [the] tweet as a threat[.]" In fact, the initial charge was filed by an unrelated third-party. Although an employees' subjective impressions are not dispositive, they are not irrelevant.

The court additionally analyzed the satirical aspect of the tweet:

> "Employees' subjective impressions are especially helpful where, as here, the employer claims his statement was made in jest. Humor is subjective. What is funny to a fisherman may be lost on a farmer. A quip about New England winters is unlikely to get a laugh in Alaska… Excluding context and viewing a statement in isolation, as the Board did here, could cause one to conclude that 'break a leg' is always a threat. But when expressed to an actor, singer, dancer, or athlete, that phrase can reasonably be interpreted to mean only 'good luck.'"

The employer's business involved commentary on "contemporary and newsworthy and controversial topics…" Here, the executive officer used his personal Twitter account to promote the magazine's commentary, and there is no evidence he similarly used it to communicate with employees or that they were required to follow directive via his Twitter account. In the end, the Third Circuit observed "the Board spent its resources investigating an online media company with seven employees because of a facetious and sarcastic tweet by the company's executive officer. Because the Board lost the forest for the trees by failing to consider the tweet in context, it misconstrued a facetious remark as a true threat." As a result, the Third Circuit denied the NLRB's petition for enforcement and set aside its order against the employer.

Practical Advice for Employers

These cases illustrate how difficult, nuanced, and contextually important attempts to regulate social media speech can be. Employers considering discipline for misconduct occurring on social media outside of work should ask themselves a few basic question prior to taking action:

1. *Do I have a copy of the tweet or post?* Social media is user-controlled content and can be easily deleted when an employee learns they are under investigation. Preserving this evidence prior to taking action is critical to any complete investigation.
2. *Does the post relate to working conditions or wages?* The NLRA prohibits employers from taking action against employees acting together to improve their wages, hours, and/or conditions of employment.
3. *Would the post be considered harassment if said face to face?* Applying an employer's harassment and discrimination policy to offensive conduct requires evaluating the content and context of the speech. Consistently evaluating offensive conduct and taking action to correct it, irrespective of the venue where the conduct occurred, will help ensure uniform application of the employer's policies and help defendant against subsequent litigation.

[1] *FDRLST Media, LLC v. National Labor Relations Board,* No. 20-3434, 2022 WL 1594755 (3d Cir. May 20, 2022).

[2] 29 U.S.C. § 158(a)(1)

[3] *Wheeling-Pittsburgh Steel Corp. v. NLRB*, 618 F.2d 1009, 1020 (3d Cir. 1980)