Antisocial Media- Union Not Liable For Threatening Facebook Posts

Insights
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Imagine if you will, that a company-sponsored website allows employees to post comments. During the course of a union strike, an employee who chooses to cross the picket line posts a comment threatening to kill union members who try to stop him. The company does not disavow the post. Would the National Labor Relations Board (NLRB) find that the company is liable?

We don't know for sure, since that issue has not yet been addressed, but we know the result if the website is a union Facebook page.

Molotov Cocktails
On February 12, the NLRB decided that a labor union did not violate the National Labor Relations Act (NLRA) when it allowed its union members to post statements on its official Facebook page suggesting loss of union representation and physical violence for crossing a picket line. The comments – which the union did not disavow and did not remove from its Facebook page – included:

· "THINK that the union will protect you. They may have to represent you, but will they give it 100%?"

· "If u cross bill you will lose your eyesight but from the 2 black eyes …" (in response to an employee's comment he was concerned about losing insurance due to eye injections needed to save his eyesight)

· Can we bring the Molotov Cocktails this time?

Remarkably, an ALJ found that the union had no duty to disavow these statements, even though they were made on the union's official Facebook page to which access was controlled by the union. In affirming the decision of the ALJ, a three-member panel of the Board found that the union did not violate the Act by failing to remove the comments from its Facebook page or failing to disavow the comments. Two members (Chairman Pearce and Member Hirozawa) even found that the comments were not threats under the NLRA. *Amalgamated Transit Union Local 1433 (Veolia Transp. Serv.)*

Comments From "Friends"
The Amalgamated Transit Union represents a unit of bus drivers employed by Veolia Transportation Services, a private contractor that provides public bus services for the city of Phoenix. In March 2012, the union commenced a six-day strike. The union established and controlled a Facebook page,

which only accepted "friend" requests from union members in good standing. This was enforced by checking the friend requests against the union's list of members in good standing.

Because of the strike, union members began posting the comments referred to earlier on the union's Facebook page. The comments clearly threatened loss of union representation for employees who failed to support the union-approved strike, as well as threats of physical violence. One was made in response to the union vice-president's comment that the union knew where the "scabs" [replacement employees] were housed ("Can we bring the Molotov Cocktails this time?").

An individual employee filed an unfair labor practice charge with the Board alleging the union restrained and coerced employees in violation of the National Labor Relations Act by threatening employees with less favorable representation and physical harm for refusing to participate in the union's strike against the employer. A complaint was issued.

The then-acting general counsel, Lafe Soloman, argued that a union may be held liable for the misconduct of members participating in a union picket line if the labor organization fails to take corrective action or disavow misconduct. Thus, the general counsel argued the union was liable for the employee members' posts because the union's Facebook page was "an electronic extension" of the picket line.

Is Facebook An "Electronic Extension" Of The Picket Line?

Administrative Law Judge Keltner Locke rejected the "electronic extension" argument on the basis that the union's official Facebook page was established before picketing occurred and therefore "the Facebook page did not grow out of the strike." Additionally, the ALJ concluded that the Facebook page did not amount to an extension of the picket line because it was "not created for that purpose." The ALJ concluded that the union "fashioned the website to be a forum for the sort of unfettered, candid discussion which typifies the internet."

Although the ALJ recognized that the Board's remedial authority includes the power to order a union to retract its unlawful words, the ALJ concluded that imposing a duty on the union to disavow opinions posted by others would "impose a substantial burden on the free speech rights of this one type of organization, a burden not borne by others on the internet." ALJ Locke noted that he need not and did not consider whether the union members possessed real or apparent authority to speak on the union's behalf because that theory was not alleged in the complaint, but opined that he did not believe any reasonable person would mistake the members' statements for the union's own pronouncements.

The judge also addressed an issue not raised by the parties, the Communications Decency Act, which generally provides that a user of an interactive computer service shall not be treated as the publisher or speaker of any information provided. The ALJ reasoned that, because the union could not be considered a "publisher or speaker," it followed that the union had no duty to disavow the statements of union members on its Facebook page. Thus, the ALJ found only that the union was

responsible for an executive union official's statement that the union would not represent those who participated in the strike.

The Board affirmed the ALJ's ruling that the union's failure to remove member postings was not an unfair labor practice, but found it was not necessary to rely on the Communications Decency Act to reach its conclusion. Chairman Pearce and Member Hirozawa found the comments were not threats and also found it significant that the persons who posted the comments were neither alleged nor found to be agents of the union. Member Miscimarra relied solely on the lack of agency, stating the statements would not have been permissible if made by agents of the union.

A Black Eye For Employees

This case of first impression applies the "refusal-to-disavow" theory of liability to statements made on an internet website. Although the Board routinely holds employers responsible for the statements of even very low-level supervisors, the Board concluded that a union is not responsible and does not even have to disavow the statements of rank-and-file union members when those statements are made through the official Facebook page of the union.

The decision seems to draw an artificial distinction between social media and other forms of communication which does not accurately reflect the reality of how people communicate today. Is posting the above statements on an official union Facebook page really that much different from a union member sending an e-mail or letter threat to an employee and copying the union business agent?

It appears that, as far as Facebook is concerned, the current Board is willing to protect union member attacks on other union members as long as they are cloaked in the realm of social media. It will be interesting to see if the Board uses the same reasoning and allows employers to ignore and fail to disavow threats against other employees on an official company website. But I think we all know the answer to that.

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