

# PUBLICATION

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## An NLRB Decision Employers Will Not "Like"

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**On August 22, 2014, the National Labor Relations Board ("NLRB") issued a 3-member panel, unanimous decision that the termination of two employees because of their Facebook activity violated the National Labor Relations Act. The case is *Three D, LLC d/b/a Triple Play Sports Bar and Grille*; Cases 34-CVB-012915 and 34-CA-012926. In that case, the bar and restaurant terminated Jillian Sanzone, waitress and bartender; and Vincent Spinella, cook after a Facebook exchange.**

Specifically, Jamie LaFrance, a former Triple Play employee, posted the following status update:

Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money ... Wtf!!!!

After the initial post, LaFrance, a Triple Play customer, and two other Triple Play employees continued discussing frustrations with the tax situation, placing blame on Ralph DelBuono, one of the owners. Spinella "liked" the original post, but made no other comments. Sanzone commented, "I owe too. Such an asshole," referring to DelBuono.

When Sanzone reported to work, she was told she was being discharged as she "was not loyal enough" because of her Facebook comment. When Spinella reported for work, he was interrogated by both owners as to the meaning of his "like" selection, the names and identities of the others on the comment string, and whether he had written anything negative about either owner. He was terminated because he "liked the disparaging and defamatory comments." One owner threatened Spinella with legal action for defamation.

The NLRB found that the Facebook discussion was "concerted activity" protected by Section 7 of the NLRA. Section 7 gives employees the statutory right to collectively act "to improve terms and conditions of employment or otherwise improve their lot as employees" and that includes the right to use social media for that purpose.

Triple Play did not dispute that the employees had engaged in concerted activity and that they had the right to use social media. Triple Play argued, however, that this concerted activity lost any protection because the comments were allegedly defamatory and disparaging, the comments were made in a public forum, the comments undermined the owner's authority in the workplace, and the comments adversely affected Triple Play's public image.

The Board did recognize that "an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation (and the reputations of its agents as to matters within the scope of their agency) from defamation." The Board limited its review of the comments only to Sanzone's comment and Spinella's "like." In reviewing only those two items from the Facebook exchange, the Board held that the discussion clearly dealt with an ongoing labor dispute concerning Triple Play's tax-withholding practices, that Sanzone's and Spinella's comments were not directed to the general public, and that there comments were not "so disloyal ... as to lose the Act's protection ... ." Specifically, the Board held, that "[w]here, as here, the purpose of employee communications is to seek and provide mutual support looking

toward group action to encourage the employer to address problems in terms or conditions of employment, not to disparage its products or services or undermine its reputation, the communications are protected." The NLRB ordered Triple Play to re-instate the two employees and make them whole for any loss earnings. The NLRB also ordered injunctive relief including revising the Company's Internet/Blogging policy to remove the prohibition that employees may not engage in "inappropriate discussions about the company, management, and/or co-workers."

Lesson Learned: Be extremely careful when basing a disciplinary action on Facebook and other social media postings. Know that employees can use Facebook and other social media outlets to engage in concerted activity. If you believe the employee's comments have "crossed the line," consult with your Baker Donelson labor attorney.