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Liking Facebook Page May Not Earn NLRA Protection

In late April of 2012, the United States District Court for the Eastern District of Virginia ruled on a case involving claims of retaliation brought by two former deputies against the Sheriff of the City of Hampton, Va. (the Bland v. Roberts opinion can be found here). The deputies alleged that their First Amendment rights were violated and they were unlawfully retaliated against when they were terminated for supporting the Sheriff's opponent in a recent election. Each former deputy claimed to have made protected "statements" on the opponent's Facebook page.

Upon examination of the record, the court concluded that the only evidence of support for the opponent's candidacy from the deputies was the "liking" of his Facebook page. The court specifically held: "Simply liking a Facebook page is insufficient. It is not the kind of substantive statement that has previously warranted constitutional protection. The Court will not attempt to infer the actual content of [the deputy's] posts from one click of a button on [the opponent's] Facebook page."

The facts of this ruling do not translate directly to the private sector, as those employees, unlike their public sector counterparts, do not have a First Amendment freedom of speech right vis-à-vis their employer. The ruling, however, does raise a significant issue regarding enforcement of Section 7 of the National Labor Relations Act (NLRA) and the rights of private sector employees to engage in concerted activity and to discuss rates of pay, hours and working conditions. To date, the National Labor Relations Board (NLRB) seems to determine whether Facebook postings constitute protected concerted activity based upon some involvement of coworkers who respond to the postings. See Employment: New NLRB Report on Social Media Limits.

The fundamental issue is whether "liking" a Facebook page or particular post would constitute a sufficient response to trigger protection in the view of the NLRB. The Bland v. Roberts decision appears to discount the weight of a simple "like", but that ruling was not in the context of an NLRA matter. It's certainly possible the NLRB would conclude differently, or perhaps it would depend on the specific post and the number of "likes" it received. For now, employers viewing employee Facebook posts are advised to pay attention, not only to the posts and any substantive responses, but also to the number of "likes".

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