NLRB Protects a New Kind of Employee Activity: Worrying About Your Job

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The National Labor Relations Board ("NLRB") has been on a roll in recent years, protecting such employee activity as complaining on Facebook or even hitting the "Like" button. In the case of *Sabo, Inc.*¸ the NLRB recently ruled that letting other employees know about an open position and speculating on terminations falls within a category of concerted employee activity protected by the National Labor Relations Act ("NLRA").[1]

In *Sabo*, the employee, LaDonna George, drove a route for a vending machine company. The day after attending her father's burial and upon learning that her request for a couple days off the following week was denied, she became emotional and unable to stay at work, scrawling a note to her employer and leaving early. On returning to the job the following week, George struck up a conversation with a fellow driver, Steve Boros, in which she mentioned having seen an employment ad online for a route driver, speculating that it was placed by their employer and implying that it might be because one of the route drivers was about to be fired. Boros believed that he was the one to be fired and approached the employer about it. The employer then subsequently fired George for other employment infractions as well as spreading gossip and telling the other employees they were about to be fired.

1 *Sabo, Inc.*, 362 N.L.R.B. 81

The three-member panel of the NLRB found that Section 7 of the NLRA protects George's right to discuss workplace conditions, and that by firing her, the employer violated Section 8(a)(1), which prohibits interfering with an employee's rights under Section 7. The panel held that employee communications that are held for the purposes of "mutual aid and protection" are protected, and certain conversations are "inherently concerted" for purposes of the law, such as discussions about wages, etc.[2] In this case, discussions about job security have the same status as wage discussions, and the NLRB panel found that George's discussion with fellow employees about whether the online job post signaled an upcoming firing is inherently concerted activity, protected by Section 7.

Of course, if this case seems familiar, it's because this decision, handed down in April of 2015, is a re-deciding of the same case in an opinion that came out from the NLRB panel in 2012. That panel had two members whose appointments were later found unconstitutional by the Supreme Court in *NLRB v. Noel Canning*, 573 U.S. ___, 134 S.Ct. 2500 (2014), so the panel released this new decision once panel members had been properly appointed. The new decision essentially tracks the outcome of the first decision, which contains the fact pattern and rationale for the decision.

The key takeaway for employers here is that the NLRB has expansively interpreted Section 7, providing broad protections to nearly all manner of employee speech as long as that speech concerns the workplace in any meaningful way. The NLRB does not read the language of Section 7 to include a discussion of future concerted action, further opening the door to categories of inherently concerted activity and speech. In other words, employment decisions based upon mere employee discussions in either the physical or the digital realm should be highly suspect.

2 *Sabo, Inc.*, 359 N.L.R.B. 36 at 3

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