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Happy New Year. Big things are in store for the Columbus Bar in 2023. Watch upcoming issues for details.

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MORE THAN EVER, YES EMPLOYEES CAN GRIPE ABOUT THE BOSS ONLINE

BY: BILL NOLAN

Two employer misconceptions stand out to me as the most common. One, "employees are not allowed to tell each other what they make." Two, "I can fire an employee for badmouthing the company on social media." Both are generally wrong, because of the National Labor Relations Act (NLRA), and "especially wrong" heading into 2023 with a very aggressive National Labor Relations Board (NLRB) enforcing that law.

The NLRA was passed in 1935, along with the Fair Labor Standards Act and the Davis-Bacon Act part of the first generation of federal labor and employment laws. It generally governs private sector union/management relations, but importantly Section 7 of the NLRA also applies to non-union employers in its protection of certain employee activity directed towards the terms and conditions of employment.

An NLRB advice memorandum from its General Counsel earlier this year is a good illustration of this concept and the NLRB's current aggressive approach. The memo recommended that NLRB Region 10 in Georgia file a complaint over an employee's termination that had followed workplace complaints raised on Facebook.

At issue was an employee of a medical practice who posted on Facebook blaming bad management for employee attrition. Two other employees commented on the post, one with a supportive message and the other with a supportive emoticon. The next day, the original poster was terminated for alleged patient complaints.

Generally, to be protected under Section 7 of the National Labor Relations Act, employee conduct must be both "concerted" and "for the purpose of . . . mutual aid or protection." The manner in which an employee's actions are linked to those of their coworkers determines whether the employee's activity is concerted.

The memo opined that the Facebook post was protected because it complained of a workplace issue and "elicited support from coworkers over these management practices and employee attrition—issues that had been topics of concern for the employees." The NLRB very much ebbs and flows in its positions on certain predictable issues as administrations change, but that position is not particularly surprising or new.

But the memo also took the position that the post was "inherently concerted activity," an argument that purports to expand protected activity by finding that even activity not calling for group action or "mutual aid or protection" can be protected if it discusses "vital categories of workplace life such as wages, scheduling, or job security."

In addition, the memo took the position that even if unprotected, the employer's action in terminating the employee was still unlawful as a "'preemptive strike' against future protected concerted activity." In short, the employer violated the act by terminating the employee so that other employees would not engage in similar activity.

These latter positions show the current NLRB's broad view of protected, concerted activity. Both unionized and non-union employers should be mindful of this broader approach when considering disciplinary action over any employee social media post. ■

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THIRD PARTY NEGLIGENCE CLAIMS CAN BE BENEFICIAL TO EMPLOYEES AND EMPLOYERS ALIKE

BY: ADAM SLONE

When a workplace injury occurs, employees are oftentimes limited to the exclusive remedy of a workers compensation claim, or in even rarer instances, an employer intentional tort. However, in some instances, injured employees may also pursue third-party negligence claims against those who have caused or contributed to the employee's injuries. Such claims can be advantageous to both the employee and employer alike.

Unlike workers compensation claims, third-party negligence claims generally allow for the employee to seek recovery for non-economic damages, such as permanency, pain, and the residual non-monetary complications caused by the injuries sustained. Employees also may pursue the recovery of all of their lost wages. Sometimes certain aspects of such claims may also provide additional coverage for necessary and related treatment, which may be denied in a workers compensation claim, thus allowing the employee to reach a quicker recovery.

Employers may also benefit from their employees' third-party negligence claims as such claims enable their employees to reimburse the State of Ohio for workers compensation benefits that were previously paid for the related incident. As a result of the State's recovery – technically, the satisfaction of its subrogation interests the detrimental impact upon the employer's premiums (as a result of its employee suffering a workplace injury) may be decreased or eliminated.

There are multiple ways a third-party can be responsible for an on-the-job injury. Below are just a few examples of common third-party negligence claims:

- **On-the-job Car Accidents** — An employee is injured in a car accident caused by another person while driving for work.
- **Construction Accidents** – An employee is injured because of a negligent subcontractor or because of a dangerous condition on a construction site, such as incorrect scaffolding installation.
- **Defective Equipment** — A laborer or construction worker is injured as a result of defective or faulty equipment or machinery, or safety equipment which another party fails to provide.
- **Negligent Property Owners** — Employees who are injured because of a negligent property owner and/or a dangerous condition or hazard that exists on the property.
- **Other Factors** – Additional considerations may also present third-party negligence claims. For example, a third-party claim may arise when postal workers are injured from a dog attack.

The common factor in third-party negligence claims is that another entity or individual, who does not work for the employee's same company, caused or contributed to the injury that the employee sustained.Those who have had a workplace injury should contact an experienced injury attorney to determine the viable claims and applicable insurance coverages, as well as the best strategic options for pursuing recovery for his or her losses. ■

Those who have questions about third party negligence claims or who may be seeking assistance are welcome to contact Adam Slone.