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How A Tweet With No Words Could Impact NY Labor Law

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When now-former New York Post "sportswriter and occasional sports columnist"[1] Bart Hubbuch sued his former employer on Feb. 8, he roused Section 201-d of the New York Labor Law from its slumber.[2] The labor law, which became effective on Jan. 1, 1993, grew out of efforts by tobacco lobbyists to prevent employers from discriminating against employees who smoked.[3] In sum and substance, the labor law protects employees from discipline (including discharge) based on their "recreational activities" outside of the workplace.

There is limited decisional law discussing this statute with many cases exploring whether dating constitutes a "recreational activity," and concluding it does not.[4]

Few New York employers are likely aware that such a law even exists and it remains to be seen whether media attention from the Hubbuch case will motivate attorneys who represent employees to add the law to their toolbox.

Comparing President Donald Trump's inauguration to tragic dates in American history, Hubbuch tweeted "12/7/41. 9/11/01/. 1/20/17." (the tweet). At the Post's suggestion, Hubbuch promptly removed the tweet and issued an immediate apology.[5] Despite this, days later he was fired and the lawsuit followed.[6] The complaint notes that the tweet was made by Hubbuch "on his own time, from his own computer, and from his own home."[7] This language was purposefully chosen to align itself with Section 201-d(2)(c) of the labor law which provides:

> Unless otherwise provided by law, it shall be unlawful for any employer … to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of: ***
>
> c. an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; …[8]

The complaint sets the tweet against the backdrop of the Post's proclivity for sensational journalism and argues that the paper could not have been justifiably outraged by it.[9] Instead, it maintains that the termination was pretextual to punish an employee who had spoken ill of the president, with whom the Post might be aligned for various economic and other reasons.[10]

It is easy to see how free speech advocates and those supporting free expression on the blank canvas

that social media provides can be concerned about a tweet that, in the scheme of things, should not have offended the employer, much less resulted in the termination of an employee.

But the Hubbuch case has a twist that either simplifies or complicates the matter depending on your perspective. Subsection 2(a) of the labor law similarly makes it unlawful to discharge an employee because of:

> an individual's *political activities* outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal, provided, *however, that this paragraph shall not apply to persons whose employment is defined in paragraph six of subdivision (a) of section seventy-nine-h of the civil rights law, ….*
>
> (Emphasis added).[11]

Seemingly directly on point, this subsection appears to provide a shorter and more direct route to the winner's circle for Hubbuch. Why did he not take that path? The answer resides in the largely inconspicuous Section 79-h((a)(6) of the New York Civil Rights Law which provides a statutory definition of the term "professional journalist."[12] Hubbuch undoubtedly meets that definition.

Thus, what Section 201-d(2)(c) gives to employees, subsection 2(a) takes away from professional journalists engaged in "political activities." The complaint steers clear of the professional journalist exclusion, invoking only "Section 201-d," omitting reference to any subsection, and does not allege that Hubbuch was a "professional journalist" or that he was engaged in "political activities" by posting the tweet.[13]

The express exclusion of professional journalists suggests that they cannot circumvent the exclusion by framing their pleadings against the broader protections of subsection 2(a). After all, if subsection 2(a) applies to all employees then the professional journalist exclusion in subsection 2(c) would be rendered meaningless.

So Hubbuch's "recreational activities" under subsection (a) are protected, unless he (plainly a professional journalist) was engaging in "political activities." under subsection (c). Is the tweet — impliedly about the president — within the definition of "political activities"? Section 201-d(1)(a) defines "political activities" as:

> (1) running for public office, (2) campaigning for a candidate for public office, or (3) participating in fundraising activities for the benefit of a candidate, political party or political advocacy group;[14]

With none of these criteria applicable here, the tweet cannot be viewed as "political activities" and the complaint avoids the professional journalist exclusion. But does subsection 2(a) save the day? This depends on whether tweeting — unheard of when the labor law took effect — is a "recreational activity." The labor law defines "recreational activities" as:

> any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material;[15]

If the case continues through the litigation process, whether the tweet was a recreational activity may be outcome determinative. If the tweet was not a "recreational activity," absent protections of an employment agreement or collective bargaining agreement, Hubbuch's employment was at-will and his termination was lawful.

But the question runs deeper because if "tweeting" is a "recreational activity" at what point — if any — does the employment at-will doctrine yield to an employee's right to use tweeting (or other forms of communication on social media) to say whatever they want? Stated another way, does subsection 2(a) preclude an employer from disciplining or discharging an employee who "recreationally tweets" information or beliefs disapproved by or even harmful to the employer? If so, then does the labor law indirectly render recreational tweeting a "protected characteristic" (like age and gender, for example) and create a new form of employment discrimination?

The labor law applies to recreational activities "unless otherwise provided by law" and only covers "legal recreational activities."[16] These qualifiers offer little help. Since tweeting itself is undoubtedly legal, employers sued by current or former employees are left to focus on the content of the tweet, in attempting to prove that the labor law does not apply because of the "otherwise provided by law" qualifier.

One can conjure up tweets and then debate whether or not they were somehow made improper by another law. Courts and common sense would likely help define those boundaries in extreme cases. For example, the labor law would not likely protect an employee who tweeted a defamatory statement that violated the common law, or a threat of physical violence that violated the criminal law. But the innumerable facts and circumstances that could exist make a bright-line test impractical, suggesting a "case-by-case" approach and, therefore, a steep climb for employers to summary judgment.

In interpreting the National Labor Relations Act, the National Labor Relations Board has for several years been wrestling with the question of whether speech on social media amounts to "protected activities" under Section 7 of the act. Disciplinary action taken against employees who are engaged in "protected and concerted activities" enjoy statutory protection and the NLRB can obtain reinstatement, backpay and other remedies for aggrieved employees.[17] Some of the NLRB's decisions have been surprising, demonstrating the breadth of how that agency interprets the act.[18] If the act provides broad protections on "protected" speech, employees by analogy can argue that the labor Law could not have been intended to curtail federally protected rights. This gives tweeting employees broad license, and an argument that if their tweet was protected under the act, as a benchmark, the "otherwise provided by law" restriction would not apply.

One bright spot for employers is that the labor law is violated only when the adverse employment action is taken "because of" an employee's lawful recreational activities.[19] A plain reading suggests that the employee must establish that "but for" the tweet the adverse action would not have occurred. Oddly enough, in some instances employers might rush to concede that the tweet was a contributing or even motivating factor, but not the sole (i.e., but-for) cause. In reality that might come too late.

It is easy to envision an unhappy employer in a termination meeting focusing only on the tweet as justifying the discharge decision; unaware that such emphasis backs them into a corner where the labor law lays in wait. Defense counsel might point to written policies contained in handbooks, agreements or even prior discipline as a means of showing that the decision was made "because of" several factors, not only the tweet. But if that is not what the employer said at the time of termination, opposing counsel would likely view this as a belated tactic to backfill "better facts" into the termination meeting, i.e., what

defense counsel wished their client had said at the time.

While the "but for" standard is high for plaintiffs, attorneys who defend discrimination cases under the Age Discrimination in Employment Act, and retaliation claims under Title VII of the Civil Rights Act of 1964 can attest that it is far from impossible to reach. Those laws apply the "but for" standard,[20] and where the employer has already cornered itself during the termination meeting, the former employee has a head start towards meeting its burden.

If nothing else, the threat of a lawsuit under the labor law — arguably now a form of employment discrimination — may complicate termination decisions and give aggrieved employees greater leverage in negotiating severance packages. The ripple effects of Hubbuch's lawsuit remain to be seen. What is certain is how the intersection of a tweet containing not a single word — just numbers — and a law originally enacted to protect smokers may alter the employment law landscape for New York employers.

—By Laurent S. Drogin, Tarter Krinsky & Drogin LLP

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[1] Verified Complaint at ¶ 1, Hubbuch v. NYP Holdings Inc., Index No. 151259/2017 (Feb. 8, 2017) ("Complaint").

[2] N.Y. Lab. L. §201-d.

[3] See McCavitt v. Swiss Reinsurance Am. Corp., 89 F. Supp. 2d 495, 498 (S.D.N.Y. 2000), aff'd, 237 F.3d 166 (2d Cir. 2001).

[4] See McCavitt v. Swiss Reinsurance Am. Corp., 237 F.3d 166,169 (2d Cir. 2001); McCavitt , 89 F. Supp. 2d at 498; State of New York v. Wal-Mart Stores, 207 A.D.2d 150, 152 (3d Dep't 1995); Bilquin v. Roman Catholic Church, Diocese of Rockville Ctr., 286 A.D.2d 409 (2d Dep't 2001).

[5] Complaint, at ¶_13.

[6] Id. at ¶_1.

[7] Id. at ¶_1.

[8] N.Y. Lab. L. § 201-d(2)(c) (2017).

[9] Complaint, at ¶¶ 3-6.

[10] Id. at ¶¶ 13, 15, 25-26, 29.

[11] N.Y. Lab. L. § 201-d(2)(a).

[12] N.Y. Civil Rights Law. § 79-h(a)(6). "'Professional journalist' shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication."

[13] Complaint, at ¶¶ 59-63.

[14] § 201-d(1)(a).

[15] § 201-d(1)(b).

[16] § 201-d(2)(c).

[17] 29 U.S.C. §§ 157, 160(c) (2017).

[18] See https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (linking to reports issued by the general counsel on the NLRB's position relating to employer social media policies). The NLRB focuses on two broad concepts: "Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees. An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees." Id.

[19] § 201-d(2).

[20] Gross v. FBL Fin. Servs. Inc., 557 U.S. 167, 176 (2009) (disparate treatment claims require showing that age was the "but-for" cause of the employer's adverse decision); University of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2528 (2013) ("Title VII retaliation claims require proof that the desire to retaliate was the "but-for" cause of the challenged employment action.").
