Zinsergram a/k/a Legal Update

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KENTUCKY NEWSPAPER CARRIER IS AN INDEPENDENT CONTRACTOR

On October 12, 2015, Warren Circuit Court Judge John Grise granted the Motion for Summary Judgment of *The Daily News* in Bowling Green, Kentucky. Specifically, the Court ruled that the newspaper carrier whose status was at issue was an independent contractor for purposes of tort liability in Kentucky.

Finding that the newspaper carrier was an independent contractor as a matter of law, the Court relied upon many factors, including the following:

- The carrier executed a written Agreement that expressed the clear intent that the parties were creating an independent contractor relationship;
- Under the contract, the carrier purchased the newspapers at a wholesale rate and resold them to subscribers – the difference being the carrier's profit;
- *The Daily News* exerted very little control over the details of the carrier's deliveries, only requesting that the papers be delivered by 5:00 p.m. in a dry, readable condition;
- The carrier controlled the sequence of delivery;
- The carrier provided the vehicle needed to deliver the newspapers and paid all expenses therefore;
- The carrier had the right to purchase supplies from any source;
- No taxes were withheld from any payments made to the carrier;
- The carrier had the right to charge a retail price different than the suggested retail price of *The Daily News*;
- *The Daily News* did not designate any particular or specific place where the paper was to be placed; and
- If the carrier did not want to service a customer because the customer would not pay enough, was rude, or for any other reason, that was the decision of the carrier.

INADEQUATE VOTER LIST PROMPTS SECOND ELECTION

NLRB Region One (Boston) Director Jonathan B. Kreisberg issued a Decision on October 16, 2015 and directed a second election because of the Company's failure to properly produce a Voter List – formerly known as an "Excelsior List."

The new Rule requires that the union be provided an alphabetized list of full names, work locations, shifts, job classifications, and contact information – including home addresses, *available* personal e-mail addresses, home telephone numbers, and cellular telephone numbers.

The election for Danbury Hospital was held on June 19, 2015. Of the 766 potential voters, 739 cast ballots; 346 were in favor of the union, and 390 were against it. There were three challenged ballots.

The Company originally produced 94% of the cellular telephone numbers for the eligible employees. The Company only searched its general Human Resources database to produce this contact information. The objections by the union noted that the Company failed to produce telephone numbers contained in the Staffing Offices' separate employee database, the Emergency Department's electronic messaging system, and additional printed lists maintained by separate Departments.

The Regional Director determined that producing most of the lists was not enough, without exhausting searches in these additional available database and information locations. The Regional Director took a broad view of the Rule, finding that the Employer was required to make a "reasonably diligent" search of its files and databases. The Rule does not specify that a "diligent " search is required or define what constitutes a "diligent search"; however, the Regional Director took the position that all of the systems to which the Employer had access should have been included.

A new election was ordered, with the Regional Director ignoring the fact of 94% of the cell numbers were provided, and no evidence that the union was prejudiced in any way. Danbury Hospital has appealed the Regional Director's Decision.

"OPEN DOOR" POLICIES INTERPRETED

In a recent case interpreting the National Labor Relations Act, an employee handbook stated the following:

> Voice your complaints directly to your immediate supervisor, or to Human Resources, through our 'open door policy.' Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all.

The National Labor Relations Board ruled that the policy violated the NLRA because it would reasonably tend to chill employees and their exercise of activities protected by the Act. The NLRB's position is that employees would reasonably interpret the rule to preclude them from discussing their complaints with their coworkers and others.

The U.S. Court of Appeals for the D.C. Circuit disagreed and reversed the NLRB, with respect to that policy ruling. The Court stated:

> The handbook urges employees to voice their complaints to their supervisors or to Human Resources, but the language is neither mandatory nor preclusive of alternatives… Moreover, the handbook does not prescribe penalties for complaints to fellow employees. A reasonable employee would not read the provision, with its exhortatory language and lack of penalties, to prohibit complaints protected by § 7.

FACEBOOK "LIKE" MAY BE PROTECTED

According to a recent case, the National Labor Relations Act may protect an employee who "likes" a disparaging comment about his or her Employer on Facebook. A former employee of a sports bar posted the following on Facebook:

> 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!!!!

Two current employees clicked the "like" button, and one commented, "I owe too. Such an asshole." The Employer argued that the employees should have lost the protection of the Act because their statements contained obscenities viewed by customers.

The U.S. Court of Appeals for the 2nd Circuit, upholding the NLRB, disagreed:

> Almost all Facebook posts by employees have at least some potential to be viewed by customers. Although customers happened to see the Facebook discussion at issue in this case, the discussion was not directed toward customers and did not reflect the employer's brand. The Board's decision that the Facebook activity at issue here did not lose the protection of the Act simply because it contained obscenities viewed by customers accords with the reality of modern-day social media use.

Because the case involves current employees complaining about tax withholding, it was viewed as protected activity.

Editor's Note: This type of case will have to be judged on a case-by-case basis. Not all employee comments on Facebook will be protected. At some point, employees cross the line of disloyalty when they publically disparage the Employer's product or the Management team.

NLRB "QUICKIE ELECTION" RULE UPDATE

Previously, this writer reported that the U.S. District Court in Washington, D.C. upheld the NLRB's "quickie election" Rule on July 29, 2015. That lawsuit was filed by the U.S. Chamber of Commerce. The U.S. Chamber of Commerce has decided not to appeal that Decision.

In a second case, filed by the Associated Builders and Contractors of Texas, the U.S. District Court for the Western District of Texas previously upheld the NLRB's Rule on June 1, 2015. The Associated Builders and Contractors have appealed that case to the U.S. Court of Appeals for the Fifth Circuit. The parties have filed Briefs and are awaiting Oral Argument before the Court.