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Is the "Like" Button Becoming a Constitutionally Protected Activity?

October 16, 2013

On September 18, 2013, the Fourth Circuit Court of Appeals ruled that an employee's act of clicking the "Like" button on Facebook constitutes speech protected by the First Amendment. This ruling signals an extension of constitutional protections deeper into the realm of social media, and should be noted by employers seeking to understand the legal limits to their ability to regulate employees in this relatively uncharted arena.

The case, *Bland v. B.J. Roberts*, involved a former sheriff's deputy, Daniel Ray Carter Jr., who had "liked" the campaign Facebook page of a candidate who was a rival of Carter's boss, the incumbent sheriff, for the elected position of sheriff. Following the re-election of the incumbent sheriff, the deputy was not re-appointed. Carter filed suit, along with several other former employees, alleging that the sheriff's failure to re-appoint him after his re-election violated the First Amendment. The Fourth Circuit examined the meaning behind Carter clicking the "Like" button on the campaign page, and found that it was protected political speech.

In sum, "liking" a political candidate's campaign page communicates the user's approval of the candidate and supports the campaign by associating the user with it. In this way, it is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech. Just as Carter's placing an "Adams for Sheriff" sign in his front yard would have conveyed to those passing his home that he supported Adams's campaign, Carter's "liking" Adams's campaign page conveyed that message to those viewing his profile or campaign page.

In so holding, the Court likely foreshadows an impending ruling from the National Labor Relations Board (NLRB) that similar Facebook activity is protected activity under the National Labor Relations Act. One case currently pending before the Board is *Triple Play Sports Bar & Grille*. In that case, employer Triple Play terminated an employee who clicked the "Like" button on a Facebook comment wall that included expletives and complaints from current and former Triple Play employees and customers regarding taxes and Triple Play's payroll practices. The Administrative Law Judge ruled that the employee's use of the "Like" button within the context of the Facebook conversation constituted participation in the discussion sufficient to rise to the level of protected concerted activity.

In light of the NLRB's increasingly aggressive stance on the protection of employees' social media use, it is likely that the ALJ's decision will be upheld. Accordingly, employers should proceed with caution when taking disciplinary action in response to their employees' social media activity, and remain on the lookout for anticipated rulings from the NLRB in the near future.