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Appellate Court Reverses NLRB, Holding Tweet About "Salt Mines" Not an Unfair Labor Practice

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Last week, the Third Circuit reversed a National Labor Relations Board ("NLRB") decision finding that FDRLST Media, publisher of online news magazine *The Federalist*, unlawfully threatened its employees when its Executive Officer tweeted about sending employees "to the salt mine" if they tried to form a union. In *FDRLST Media, LLC v. NLRB*, the Third Circuit found that a reasonable employee would not view the tweet as threatening or otherwise interfering with employees exercising their rights under the National Labor Relations Act ("NLRA").

The Executive Officer posted the tweet in question from his personal Twitter account in response to news that staffers at a different media company had walked off the job during union contract negotiations: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." Both an ALJ and the NLRB found the tweet to be an objective threat against the employer's employees in violation of Section 8(a)(1) of the NLRA.

On appeal, the Third Circuit reversed, finding the tweet—which was obviously intended to be a joke—to be harmless. The court found these circumstances important context, since the tweet regarded matters—specifically, labor relations news—that *The Federalist* reports about on a regular basis. Additionally, the fact that there was no evidence of labor strife at *The Federalist* at the time of the tweet further indicated that employees likely would not read the tweet as an imminent threat. Under longstanding NLRB precedent, the determination of a statement's threatening nature is an objective test. Despite this, the court found that the lack of evidence that any *Federalist* employee actually felt threatened by the tweet also weighed against the NLRB's ruling.

The court also noted that the nature of Twitter makes it even less likely that a reasonable employee would be threatened by a tweet. By its structure (limiting tweets to 280 characters), Twitter inherently engenders jokey, exaggerated, or otherwise un-nuanced statements that are unlikely to be taken literally by a reasonable person. The court did, however, reject FDRLST Media's argument that the officer's personal Twitter account should not be attributed to FDRLST Media, noting that the officer not only is FDRLST Media's executive officer but also occasionally used his personal account for company business.

This is an unusual case with less than far-reaching implications. Still, it is an interesting analysis of the issues of standing, jurisdiction, and coercive statements under the NLRA. The Charging Party was not an employee of The Federalist and had no direct or indirect ties to the employer. Under the NLRA, anyone can bring an unfair labor practice charge and does not need to have "standing" like in virtually every other legal forum. The outcome undoubtedly would have been different if an employee had filed the charge. The case is instructive, however, because the court does an excellent job of articulating the factors used by the NLRB for determining whether a statement uttered by an employer is unlawful. The NLRB has not indicated whether it will appeal the Third Circuit's opinion.

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