Yelp "Knows Just The Place" To Complain, Except for Its Employees

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Yelp's recent advertising campaign tells would-be users in search of businesses and services, “We know just the place.” Yelp provides an online forum where users can utilize star-ratings and comments to share their experiences with fellow consumers. Recently, the site has evolved into a venue for consumers to mercilessly complain about their subjectively mediocre experiences. The complaints can sometimes escalate to the point where fellow consumers won’t darken a business’s doorstep based upon its Yelp reviews.

While some may perceive the Yelp forum as an overindulgence of highly sensitive customers, business owners take poor reviews on Yelp seriously. For example, a small town restaurateur claimed that a two-star Yelp review ruined his business. Another restaurant owner encouraged his customers to give him poor reviews in an attempt to short circuit the stronghold Yelp had over the fate of his business.

Yelp’s success can be credited to consumers’ increasing reliance – even dependence – upon online reviews to guide them in a multitude of endeavors, ranging from whether a particular plumber is trustworthy to whether a particular restaurant is suitable to host their anniversary party. But now Yelp faces an ironic paradox – what should it do when an employee gives the company a one-star rating?
In mid-February, a 25-year old Yelp customer service agent penned a scathing letter to the company’s CEO that she published online. She chastised the CEO claiming that she receives inadequate compensation and benefits and has to suffer stressful working hours. She then compared her compensation against her expenses for her phone bill, rent, and grocery bill, and calculated that she constructively makes a little over $8.00 an hour. Much like other reviews on Yelp, the employee did not provide solutions to her complaints, but merely provided her CEO, and the world, a dismal perspective on her experience at the company. While Yelp “thought [the letter] was an important example of freedom of speech,” it fired the employee two hours after the letter was published for violating the company’s “terms of conduct.”

This scenario presents a unique question: aside from the irony that Yelp fired an employee for writing a negative review, was the employee protected from such an adverse employment decision because she posted her negative commentary online? The answer is unclear.

In March 2015, the NLRB Office of General Counsel released a report on the legality of employer rules and policy statements under the NLRA. The report compared hypothetical rules that violate federal labor law to those that hypothetically do not violate the law. The Office of General Counsel stated that it has growing concerns that some employers’ rules and actions are interfering with employees’ rights under the NLRA.

Section 7 of the NLRA guarantees employees “the right...to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Under this definition, employees may be protected from adverse employment decisions for discussing their terms and conditions of employment, including in an online venue, where they express criticism of their supervisor, management, the company, or other working conditions.

The analysis of whether such speech is protected under the NLRA does not necessarily hinge on whether the public criticism is offensive; instead, the analysis focuses on whether the employee’s complaint is meant to be a complaint on behalf of the individual employee alone or is a collective complaint on behalf of other employees. If acting alone, the employee likely receives no protection. But if the employee is the voice of a collective group, she may have protection for even the nastiest online rant. Moreover, if the complaint is intended to encourage fellow employees to join in a collective complaint, then the online post could be considered protected speech under Section 7.

Employers should be cognizant that employees who are not represented by a union also have rights under the NLRA. The NLRB expressly states that the NLRA protects all employees’ rights to engage in “concerted activity” – where two or more employees take action regarding the terms and conditions of their employment. Critically, the NLRB points out that a single, unrepresented employee may also engage in concerted activity where she 1) acts on the authority of other employees, 2) brings group complaints to the employer’s attention, 3) tries to induce group actions, or 4) seeks to prepare for group action. Adverse employment actions following these activities could likely trigger violations of the NLRA. Further, depending on the circumstances, if an employer engages in a social media battle with the employee, retaliation liability under the NLRA or other related employment
laws may be triggered.

In the Yelp scenario, the employee stated, “Every single one of my coworkers is struggling.” She even provided examples of fellow employees struggling to make ends meet. Whether her expressions were intended to be a collective complaint has yet to be decided. However, days after the letter was published, another Yelp employee, an associate account executive, published a similarly toned letter. On March 1, Yelp took to Twitter stating that it had to “part ways with [the associate account executive] due to repeated absences (10 of her 59 workdays with Yelp) despite many exceptions to accommodate her needs.” Twitter users and others were quick to pick sides in the battle between Yelp and the two employees, but legal action has not yet been initiated.

The takeaway from these events, and any potential fallout, is that employers generally should avoid acting too quickly upon the discovery of a public complaint against a supervisor, company, or co-workers without completing the proper analysis of whether the complaint constitutes protected speech under the NLRA. Before responding to any complaints on social media, employers should carefully consider the circumstances and avoid pointing to specifics, such as repeated absences, in order to curb possible retaliation claims.

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