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Labor and Employment Law

Almost Anything Goes in the Name of Protected Concerted Activity

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For those who follow the NLRB's expansive take on protected concerted activity, a recent case continues to push the boundaries. The Second Circuit affirmed a NLRB decision upholding an employee's right to curse out his supervisor on Facebook because the language was part of a statement concerning workplace concerns, and occurred just days before a union representation vote. NLRB v Pier Sixty, LLC., 855 F. 3d 115 (2d Cir, 2017).

The employee, Hernan Perez, worked for an event catering firm, Pier Sixty. The employees employed by Pier Sixty were in the process of organizing a union and were scheduled to vote on the representation issue. Two days before the vote, Perez was working an event and his supervisor told him and some other employees to stop chitchatting, spread out, and attend to the guests. These comments were made in a tone that Perez described as harsh, and perceived as part of an on-going show of disrespect toward employees generally.

In response, Perez took to Facebook and called his boss who made the comments a nasty motherfu**er who doesn't know how to talk to people. He went on to say f**k his mother and his entire f**king family. He's a loser, and vote yes for the union.

When management became aware of the comments, it fired Perez.

Mr. Perez then filed an unfair labor practice charge with the NLRB, claiming he was terminated in retaliation for engaging in protected concerted activity. He alleged it was protected because it dealt with workplace matters, including the upcoming election, and was concerted, because 10 of his Facebook friends were co-workers.

The issue boiled down to whether these comments, made in the name of protected, concerted activity, were so "opprobrious" that they lost protection under the Act.

In evaluating the use of obscenities in the workplace the NLRB historically followed a four-factor test enunciated in Atlantic Steel, 245 NLRB 814 (1979). The test considers (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

The Atlantic Steel test had already come under some scrutiny by the Second Circuit in 2012 for its failure to adequately consider employer interests when outbursts occur in a public place, and in the presence of customers. See NLRB v Starbucks, 679 3d 70 (2d Cir, 2012).

In addition, and around the same time, the NLRB was also trying to evaluate the proper test to apply to social media based comments, which are not made in the workplace, but concern workplace issues. Such Internet based comments are not made in the traditional and direct presence of customers; however, they are often viewed by customers, or potential customers, through social media interaction.

In trying to deal with the use of this evolving medium, the NLRB issued Guidance in 2011 and 2012 that outlined a 9 factor, totality of the circumstances test to address worker comments made on social media, and employer rules used to limit such statements. These factors include, but are not limited to: (1) any evidence of antiunion hostility; (2) whether the conduct was provoked; (3) whether the conduct was impulsive or deliberate; (4) the location of the conduct; (5) the subject matter of the conduct; (6) the nature of the content; (7) whether the employer considered similar content to be offensive; (8) whether the employer maintained a

specific rule prohibiting the content at issue; and (9) whether the discipline imposed was typical for similar violations or proportionate to the offense.

In deciding the instant case, the Second Circuit relied on the new 9-factor test, but again expressed concern that employer interests were not adequately addressed by it. In analyzing the facts and law, it found that although the message was dominated by vulgar attacks on the supervisor and his family, the subject matter included workplace concerns, including alleged management disrespect of employees and the upcoming union election. It also considered the context of the comments and found management had demonstrated hostility toward employees' union activities in the period immediately prior to the election and Perez's posting. As such, it stated that Perez's outburst was not an idiosyncratic reaction to a manger's request, but part of a tense debate over managerial mistreatment in the period before the election. It also found that management's toleration of profanity among its employees, and the use of the same offensive words by management officials in common discourse with employees, contributed to the finding that firing Perez for the use of the same language went too far. Further, no other employee was ever terminated for using similar language. Finally, it addressed the location of the statement, and found that an online forum is a key medium of communication among co-workers and a tool for organization in the modern era. While the comments were available for the world to see, the statement was not made in the immediate presence of customers, nor did they disrupt the catered event.

Based on its analysis, the Second Circuit concluded that Pier Sixty failed to prove that Perez's behavior was so egregious as to lose the protection of the Act. It did, however, expressly state that the case sits at the outer bounds of protected, union-related comments, and remined the

NLRB that any test for evaluating "opprobrious conduct" must be sufficiently sensitive to employers' legitimate disciplinary interests.

This decision should once again make it abundantly clear to employers that statements most managers would consider firing offenses will often be protected when they concern workplace matters, and are shared with co-workers. The NLRB has provided employees with a wide berth of protection, and it is unclear what, if any, comments would be coarse enough to warrant discipline, let alone discharge. Employers should consult with counsel prior to taking action in such cases, as the content and context of such speech must be carefully analyzed to insure that any discipline can be sustained.

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