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#$@&%*!: Second Circuit upholds NLRB's finding that an employee's vulgar Facebook rant toward his supervisor was protected under the NLRA

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Employee discipline often can seem like an uphill battle, especially when dealing with the protections afforded to employees under the National Labor Relations Act (the "NLRA"). Even in a non-union workplace, the NLRA protects employees who engage in "protected concerted activities," *i.e.*, actions for their mutual aid or protection relating to the terms and conditions of employment. Many employers are not familiar with the NLRA or its protections at all, and for those that are, the level to which these protections extend still may come as a surprise.

Approximately two years ago, we reported on a National Labor Relations Board (the "NLRB") decision[1] in which a three-member panel held that an employer violated the NLRA by terminating an employee for posting a profanity-laced Facebook statement about his supervisor.[2] Last week, the United States Court of Appeals for the Second Circuit (the "Second Circuit") affirmed this decision, effectively allowing an employee to call his supervisor a "NASTY MOTHER F***ER" on Facebook without any type of consequence. *National Labor Relations Board v. Pier Sixty, LLC*, 2017 U.S. App. LEXIS 6974 (2d Cir. Apr. 21, 2017).

Background

In the midst of a 2011 organizing campaign, Pier Sixty, LLC—a catering company in New York City—terminated an employee two days before a previously scheduled union election. The impetus for Pier Sixty's decision was the employee's vulgar and profane Facebook post regarding his supervisor. In response to a supervisor directing employees (in an allegedly harsh tone) to "stop chitchatting" and "[s]pread out, move, move," a long-term employee posted the following statement on Facebook:

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[1] *Pier Sixty LLC*, 362 N.L.R.B. No. 59 (March 31, 2015).

[2] See Nixon Peabody Alert: "NLRB protects vulgar workplace Facebook rant, reinstates fired employee," available here.

> Bob is such a NASTY MOTHER F**KER don't know how to talk to people!!!!!! F**k his mother and his entire f**king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

Utilizing a nine-factor "totality of the circumstances" test,[3] the NLRB determined that the employee's post constituted "protected concerted activity" and that Pier Sixty had violated the NLRA by terminating his employment. As a remedy, the NLRB required that Pier Sixty reinstate this employee to his previous position with full back pay and benefits and interest calculated daily.

Second Circuit analysis

Not surprisingly, Pier Sixty challenged this determination.[4] While it is well-established that the NLRA generally prohibits employers from terminating employees based upon protected concerted activities, this legal protection is not without limitations: an employee's conduct can be so abusive or "opprobrious" as to lose the protection of the NLRA. Accordingly, Pier Sixty argued that this employee's Facebook post—ostensibly a vulgar attack on his supervisor, as well as the supervisor's mother and family—should fall outside of the protections of the NLRA.

While not convinced that the NLRB's amorphous "totality of the circumstances test" adequately balances an employer's interests, the Second Circuit nonetheless issued a decision on April 21, 2017, *affirming* the NLRB's determination. The Second Circuit relied heavily on the deference afforded to the NLRB's factual findings and took particular note of the fact that Pier Sixty had consistently in the past tolerated the use of profanity among its employees and supervisors. In the past, Pier Sixty had not disciplined other employees for their use of "f**k" and "motherf**ker" in the workplace. Further, and perhaps even more importantly, the Second Circuit held that Pier Sixty engaged in unfair labor practices leading up to the election and it was *this* mistreatment that led to the employee's Facebook Post:

> . . . [E]ven though [the employee's] message was dominated by vulgar attacks on [his supervisor] and his family, the "subject matter" of the message included workplace concerns—management's allegedly disrespectful treatment of employees, and the upcoming union election. Pier Sixty had demonstrated its hostility toward employees' union activities in the period immediately prior to the representation election and proximate to [the employee's] post. Pier Sixty had threatened to rescind benefits and/or fire employees who voted for unionization. It also had enforced a "no talk" rule on groups of employees, including [the employee and his co-worker] who were prevented by [the supervisor] from discussing the [u]nion. [The employee's] Facebook post explicitly protested mistreatment by management and exhorted employees to "Vote YES for the Union." Thus, the [NLRB] could reasonably determine that [the employee's] outburst was not an idiosyncratic reaction to a

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[3] The "totality of the circumstances" test for evaluating an employee's use of social media may consider the following factors: (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 conduct at issue; and (9) whether the discipline imposed was typical for similar violations or proportionate to the offense.

[4] The NLRB also petitioned for enforcement of the underlying order.

manager's request but part of a tense debate over managerial mistreatment in the period before the representation election.

Ultimately, while noting that the employee's post sat at the "outer-bounds of protected, union-related comments," the Second Circuit agreed that the employee's conduct was *not* so opprobrious or egregious as to lose the protection of the NLRA. Accordingly, the Second Circuit granted the NLRB's petition for enforcement, and denied Pier Sixty's cross-petition for review.

Employer takeaways

Among the various lessons to be learned from this decision are the following:

- While not a panacea for all labor-related issues, the best way for an employer to avoid these types of issues is to ensure quality relationships with its employees. Indeed, allowing interactions between staff and management to devolve to the levels at issue in the *Pier Sixty* case is practically an invitation for an organizing campaign and/or labor-related headaches.
- Be consistent in application of discipline. If employers do not approve of vulgar and/or disparaging comments in the workplace, they should take appropriate steps to prohibit such conduct. Importantly, in this case Pier Sixty disciplined an employee for use of vulgarity and disparaging comments, despite the fact that it had never before disciplined employees—including supervisors—for similar conduct.
- The coverage of the NLRA continues to be construed much more broadly than employers generally expect. Employers should carefully consider the context surrounding instances of employee misconduct and should consult with legal counsel, as necessary, before taking disciplinary action. This is especially the case with respect to employer discipline arising from an employee's comments or statements on social media, an area in which the NLRB has taken great interest over the past few years.
- Employers should take this opportunity to review employee handbooks and policies. Certain previously "standard" policies have been found to violate employees' right to engage in protected concerted activity. In particular, employers should seek legal review of all non-harassment, social media, confidentiality, non-disparagement, workplace conduct, and similar policies if they have not been reviewed recently.

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