



F-Word Facebook Firing Flipped By Federal Court

Insights

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In a ruling that could leave employers fuming and possibly cursing, a federal appellate court ruled that an employee who used a public Facebook page to curse out not just his boss, but also his boss's mother and entire family, should not have been fired from his job. Instead, the 2nd Circuit Court of Appeals decided late last week that the expletive-filled rant was protected by federal law because it was considered protected concerted activity (*NLRB v. Pier Sixty, LLC*).

The good news is that the April 21, 2017 decision does not give license for all employees to use expletives against management without any fear of repercussion; this ruling fell in favor of the worker because of the specific circumstances surrounding his social media swearing. But the bad news is that this case is a stark reminder that employers need to exercise caution when disciplining those who complain online about workplace conditions, even if they use four-letter words to do so.

You Won't #\$\$@%*! Believe What The Employee Said On Facebook

Pier Sixty operates a catering company in New York City. In late 2011, the company faced a union organizing drive that was, by all accounts, quite tense. The company managers even made threats to employees that they could be penalized or discharged for union activities, which management later acknowledged violated the National Labor Relations Act (NLRA). Some employees also felt that management engaged in a pattern of disrespectful behavior towards them.

One such employee, Hernan Perez, was upset at his supervisor, Bob McSweeney, for talking to him in a "harsh tone." Perez alleged that, just two days before the election, McSweeney directed him to "stop chitchatting" and "move, move" during a catering event in a way that seemed demeaning. Forty-five minutes later, during an authorized break from work, Perez used his smartphone to post the following message about McSweeney to his Facebook page:

Bob is such a NASTY MOTHERF___ER 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!!!!!!

The edits to make this language somewhat family friendly were made by this author, whereas Perez's post was not censored in any way. Perez's Facebook friends included 10 coworkers, and his page was publically accessible. The company was made aware of the offensive post and terminated Perez's employment. The Pier Sixty employees voted in favor of unionization, and Perez eventually filed an unfair labor practice charge with the National Labor Relations Board (NLRB). In 2013, the

Board issued a decision in Perez's favor and ruled he had been discharged in retaliation for engaging in protected activity. The employer appealed the decision to the 2nd Circuit Court of Appeals – which hears federal cases from New York, Connecticut, and Vermont – and that court issued its decision on April 21.

You Won't Believe How The Court Ruled

The court started with the premise that the NLRA prohibits employers from discharging an employee for concerted or union-related activity. Specifically, Section 7 guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. This right applies to unionized and non-unionized workers alike, whether in the midst of an organizing drive or on any typical workday.

The court then acknowledged that an employee may act in such an abusive manner that he loses the protection of the NLRA, even when engaging in ostensibly protected activity. The question for the court, then, was whether “Perez’s Facebook post was so opprobrious as to lose the protection that the NLRA affords union-related speech.”

This is not the first time a court has been called upon to determine whether a social media post crossed the line to become too profane to be protected. In fact, the NLRB issued a 2012 guidance to assist courts and agency members with how to distinguish such postings; the guidance document recommends a nine-factor test to examine the “totality of the circumstances” in such cases: (1) any evidence of anti-union 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.

The court pointed to three main factors that led it to conclude that the termination violated the NLRA:

- **Subject Matter Of Obscene Post Was About Workplace** – The court first said that the subject matter of the Facebook post “included workplace concerns: management’s allegedly disrespectful treatment of employees, and the upcoming union election.” It admitted that the message was dominated by vulgar attacks on the manager and his family, but pointed out this was not simply a situation where an employee was upset at his supervisor and reacted emotionally. Instead, the court concluded it “was part of a tense debate over managerial mistreatment in the period before the election.”
- **Employer Consistently Tolerated Foul Language** – The court then found that the employer permitted managers and employees alike to use profanity in the workplace on a regular basis with very few repercussions. In fact, despite evidence that vulgar language was used on a daily basis, even language similar to that found in the offending Facebook post, Pier Sixty could only show that five warnings were issued over a six-year period for offensive language. The court said

show that five warnings were issued over a six-year period for offensive language. The court said it was “striking” that Perez was fired two days before the union election for behavior that had largely been tolerated and for which no other employee had ever been terminated.

- **Online Statement Was Different Than In-Person Outburst** – Finally, the court said that the “location” of the comment was a factor that led it to rule in favor of Perez. Although an online statement may have been visible to anyone in the world, the court noted it was not in the immediate presence of customers, did not disrupt the catering event, and there was no evidence that the statement reached any customers or potential customers. The court said it was a “vulgar and inappropriate” statement, but not the equivalent of a public outburst in the presence of customers that can reasonably be characterized as too opprobrious as to garner NLRA protection.

What The #\$@&%*! Can Employers Take From This Case?

There is some good news in the court’s opinion. In the concluding section, the court notes that the employee’s conduct “sits at the outer-bounds of protected, union-related comments.” In other words, if possible, this case draws the definitive line that employees cannot cross if they wish to maintain the protections of the NLRA.

Moreover, this was a very fact-specific determination. Two of the main factors cited by the court include the timing of the termination – just two days before a union election, right in the midst of a particularly tense organizing campaign – and the inconsistency of the discipline applied. In most cases, employers will not be dealing with such a problem right in the throes of a union campaign. And in most cases (hopefully), employers would not tolerate a long history of four-letter words permeating the everyday work culture such that this kind of Facebook post would seem like run-of-the-mill banter.

The main lesson to be learned here, though, is that you need to tread carefully when disciplining workers for social media posts, especially if they contain content that could be characterized as complaints about the workplace. You should involve your labor counsel each and every time you consider discipline, and given the Labor Board’s heightened sensitivity towards workplace rules, you should have your labor counsel review your company policies to ensure they comply with the latest NLRB directives.

If you have any questions about this area of the law, or how this case may affect your business, please contact any member of our [Labor Relations Practice Group](#) or your Fisher Phillips attorney.

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