

Second Circuit Holds Pro-Union Sentiment Outweighs Impropriety of Profanity-Laden Rant Against Supervisor, His Mother, and “His Entire ****ing Family”

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by Jillian Kornblatt

Use of profanity by employees, whether in the workplace, outside the workplace, or on social media, presents difficult legal issues for the employer, as highlighted by a recent Second Circuit Court of Appeals decision overturning the firing of an employee who engaged in a highly profane Facebook rant against a supervisor. Although an employer has a justifiable interest in keeping profanity out of the workplace, its interest does not overshadow an employee’s Section 7 protected rights to engage in concerted activity under the National Labor Relations Act (“NLRA”).

In yet another NLRA-social media decision (see [here](#) and [here](#)), the court considered whether the vulgar and offensive language – directed at a supervisor – in an employee’s statement advocating for unionization is protected activity under the NLRA. See *NLRB v. Pier Sixty*, 855 F.3d 115 (2d Cir. 2017). The court held that language was protected and overturned the company’s termination of the employee in question.

Two days before a union election, an employee posted the following statement on Facebook:

Bob is such a NASTY MOTHER F***ER don’t know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

The post was visible to the public for three days before the employee took it down. Company management saw the post before it was removed and terminated the employee. An unfair labor practice charge followed shortly afterward, alleging a violation of section 8(a)(1) of the NLRA.

Section 7 of the NLRA guarantees employees the right to “self-organization, to form, join, or assist labor organizations . . . and **to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.**” 29 U.S.C. § 157 (emphasis added). Section 8(a)(1), in turn, protects these rights by prohibiting employers from interfering with, restraining, or coercing employees in the exercise of

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these rights. 29 U.S.C. § 158(a)(1). Ordinarily, an employer is prohibited from discharging employees for participating in union-election activity, and the employee's Facebook post did explicitly call for a pro-union vote in the upcoming election. But the protections of the NLRA are not absolute. The National Labor Relations Board ("NLRB" or "Board") has long held that an employee engaged in "ostensibly protected activity may act in such an abusive manner that he loses the protection" of the NLRA. See *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984).

Here, the NLRB had ruled in favor of the employee. The Second Circuit upheld the Board, agreeing that the statement came close to, but did not cross, the line. The Board and the court applied a "totality-of-the-circumstances" test. Although the court gave considerable deference to the Administrative Law Judge's factual findings (which were upheld by the Board), employers can find some comfort in the court's note that the post seems "to sit at the outer-bounds of protected, union-related comments."

The court provided several reasons for its decision:

- First, although the post can be characterized as "dominated by vulgar attacks" on the supervisor, the message addresses the workplace concern of how management treats employees, qualifying the post as "concerted activity for the purpose of collective bargaining."
- Second, profanity among employees had been consistently tolerated by the employer, so it could reasonably be inferred that the employee was not fired for mere profanity, but for the protected, union-related content of the comment.
- Third, the employer had engaged in other unlawful, anti-union conduct as the election approached, including threatening pro-union employees with the loss of their jobs or benefits, and by implementing a "no talk" rule prohibiting discussion of union issues.
- Fourth, the court gave some weight to the fact that this post was made on Facebook—"a key medium of communication among coworkers and a tool for organization in the modern era," and that the employee apparently (although erroneously) believed the post would not be publicly available. The court found that the Facebook posting was different from an outburst in the presence of customers.

Accordingly, there are a few takeaways for employers to keep in mind.

- Implement a Clear, Written Policy. To effectively discipline employees for using offensive or vulgar language at the workplace, employers should have a clear written policy against profanity that informs employees of the rules regarding the use of profane or vulgar language in their interactions with colleagues and customers. The policy should specify the consequences for violations.
- Enforce the Policy Consistently and Uniformly. Employers should be consistent in enforcing any policy against profanity in the workplace. Past failures to enforce or to impose appropriate sanctions may tie the employer's hands in future situations where a sanctionable activity may arguably be clothed with NLRA-protection. (Consistency would necessarily include, for example, applying the policy to profanity by supervisors and managers as well as by line employees. The employer's tolerance of profanity by supervisors was cited by the court as proof of inconsistent enforcement.) Consistent and uniform enforcement of the policy is key.
- Be Careful Not to Limit Protected Activities. The enforcement of a policy against profanity or other inappropriate conduct must be balanced against an employee's right to engage in protected activities under the NLRA. The employer's other anti-

union conduct in the *Pier Sixty* case was a factor in the decision. The *Pier Sixty* court has made clear that not all offensive language loses NLRA-protection. This decision confirms courts' willingness to broadly construe the coverage of the NLRA, especially when considering employee activities on social media. Employers should carefully consider the context of potential profanity policy violations before taking disciplinary actions.

When faced with the question of whether to fire an employee who uses vulgar and offensive language in a Facebook post directed at a supervisor and her family, you should first determine whether the subject matter of the Facebook comment touches on any workplace concerns. If not, there may not be NLRA-protected conduct. But if the subject matter—notwithstanding the vulgarity—is arguably related to working terms and conditions, you should take extra caution to make sure that any discipline will not run afoul of the NLRA. Consider the company's practice with regard to policing profanity at work. If the company has tolerated profanity use among its employees in the past, you may not be in a good position to sanction an employee for a statement that, although offensive, may be protected under the NLRA.