How much obscenity is too much for an employer to bear?

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While social media has dramatically changed how business is done in America, it comes with risks for employers. Bricker & Eckler has previously reported on employer risks associated with disciplining employees who may make disparaging or critical statements about companies or management on social media (see "Could this be you? Your employee handbook is on the NLRB's radar" and "The Top 10: Employment law year in review") and this subject has once again made its way into the courts.

In National Labor Relations Board v. Pier Sixty, LLC, the Second Circuit Court of Appeals considered the extent to which the National Labor Relations Act (NLRA) protects an employee's vulgarity-laden attacks on a supervisor on social media and the point at which such comments cross a line and lose that protection. The court upheld the order of the National Labor Relations Board, finding the employer had violated the employee's rights under the NLRA, noting that the board's six-day factual hearing warranted great deference.

Pier Sixty, a catering company in New York, became the target of a heated union organizing campaign and its employees eventually voted to unionize. Two days before the election, Perez, a server at a Pier Sixty venue, claimed he received directives from a supervisor in what the board described as a "harsh tone." (These instructions included "Turn your head that way [toward the guests] and stop chitchatting" and "Spread out, move, move." Shortly thereafter, Perez was on a break and used his phone to type an expletive-laden post about the supervisor, the supervisor's mother and entire family, and called for a "yes" vote for the union. Perez knew that at least ten co-workers were his Facebook friends. The post was publicly accessible. When management became aware of the post, an investigation took place and Perez was terminated.

Perez filed a charge with the board, claiming he was terminated in retaliation for engaging in protected concerted activities. The

Administrative Law Judge found Pier Sixty discharged Perez in retaliation for engaging in protected activity, and the board upheld the decision. On appeal to the court, the employer argued that Perez' use of obscenities was so opprobrious that it lost the protection that the NLRA affords union-related speech. Under the act, employees have the right to engage in concerted activities "for the purpose of collective bargaining or other mutual aid or protection." However, cases have held that where such activity is abusive, it can lose protection of the NLRA.

The case notes that determining what is abusive involves consideration of the place of the discussion, the subject matter, the nature of the employee's outburst and whether it was provoked by an employer's unfair labor practice. The board has also recently developed a nine-factor totality-of-the-circumstances test to be considered in social media cases. The board cited to conduct by management in the course of the election that appeared to support claims of disrespectful treatment of employees, including threats to rescind benefits or fire union supporters and a no-talk rule for groups of employees that included Perez. Thus, the board concluded that Perez's post was not the result of an idiosyncratic outburst but, rather, "part of a tense debate over managerial mistreatment."

The board also noted that Pier Sixty routinely tolerated profanity by staff, including the use of the same vulgarities contained in Perez's post. The employer had only issued five written warnings for such conduct in the six years prior, and it had never fired an employee for doing so.

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