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SECOND CIRCUIT REVIEW

Expert Analysis

Determining 'Opprobrious' Conduct Under the National Labor Relations Act

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This month, we discuss the Second Circuit's attempt to clarify what types of conduct strip an employee of protection under the National Labor Relations Act (NLRA) as employee speech spreads beyond the physical workplace to social media. On April 21, 2017, the U.S. Court of Appeals for the Second Circuit decided *NLRB v. Pier Sixty*, 855 F.3d 115 (2d Cir. 2017), affirming a determination by the National Labor Relations Board (the NLRB) that an employee who directed obscenities at an employer over social media did not lose NLRA protections associated with union-related activity. The court recognized that certain conduct could be so "opprobrious" that it loses the protection of the NLRA. Here, the court ruled that the conduct at issue, while "at the outer-bounds" of protected speech, did not cross the line as unduly opprobrious. In so ruling, the court focused on three key factors that informed its analysis, including the fact that the comments were made on social media.

'Starbucks'

Pier Sixty was the most recent in a series of decisions in which the Second Circuit grappled with how to determine whether speech is so "opprobrious" as to lose NLRA protection. Under §7 of the NLRA, an employee cannot be terminated due to his or her "union-related activity." An employee can lose that protection, however, for "profane and insubordinate comments" under a four-factor test[1] originally established in *Atlantic Steel*, 245 N.L.R.B. 814, 816 (1979). In *NLRB v. Starbucks*, 679 F.3d 70 (2d Cir. 2012), a decision authored by Judge Jon O. Newman and joined by Judge Ralph K. Winter, with Judge Robert A. Katzmann concurring, the Second Circuit overruled a decision of the NLRB and held that an employee's use of obscenity at his workplace, even while ostensibly part of a union protest and while the employee was off duty, nevertheless could

> The Second Circuit's decision in 'Pier Sixty' provides insight into how the court views employee comments posted on social media.

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constitute the type of "opprobrious" conduct that vitiates the protection of the NLRA. The employee at issue in that case was a barista who worked for Starbucks in 2005 during a hard-fought campaign to unionize Starbucks employees. He was also a vocal union supporter. One day, a number of off-duty Starbucks employees, including the barista in question, went to the Starbucks where they normally worked to protest Starbucks' policy restricting union paraphernalia. An off-duty manager confronted the barista, who, after a heated exchange, told him to "go f*ck yourself." Id. at 74. Shortly thereafter, the barista was fired for disrupting business. Subsequently, the NLRB found that Starbucks had committed unfair labor practices, including the barista's improper discharge.

On appeal, the Second Circuit remanded the case and ordered the NLRB to craft a new test for determining when "profane" comments lose the protections afforded by the NLRA. The court explained that the *Atlantic Steel* test had originally been created in the context of a factory floor or back office, where the issue was whether an outburst would impair employer discipline, not whether it would affect *customers*. Once the "place" of the discussion became a public venue, where the risk was no longer a lack of discipline but a loss of customers, the *Atlantic Steel* test was no longer applicable. The court refused, however, to create a new test, instead suggesting that the NLRB do so in the first instance.

Judge Katzmann wrote a separate concurrence, noting that while an employee's use of profanity in front of customers "constitutes serious misconduct" that could even be "dispositive in certain cases," there was no reason why the existing *Atlantic Steel* test could not address these concerns. Id. at 82 (Katzmann, J., concurring). He further observed that the test's other factors—the subject matter of the discussion, the nature of the outburst, and whether the outburst was provoked—are "highly relevant." Judge Katzmann agreed, however, that if there was to be a new test, the NLRB should determine it in the first instance.

'Pier Sixty'

The Second Circuit again confronted the question of when speech is so "opprobrious" that it loses the protection of the NLRA in *Pier Sixty*. This time, the court, in an opinion authored by Judge José A. Cabranes and joined by Judge Amalya L. Kearse and Judge Denny Chin, affirmed the NLRB's determination, finding that an employee's obscene comments directed at an employer over social media were not so "opprobrious" that they lost NLRA protection. The employee in question worked as a server in Pier Sixty and was involved in a contentious union-organizing campaign. Two days before the vote on whether to unionize, the server—after being criticized by his boss at work and while on break—posted a message on Facebook calling his boss a "NASTY MOTHER F*CKER" and adding "F*ck his mother and his entire f*cking family!!!!." *Pier Sixty*, 855 F.3d at 118. The same Facebook message also included the line "Vote YES for the UNION!!!!!!!" Id. The server knew that at least 10 co-workers could see the post, but claimed to have been unaware that it was publicly accessible. The post was taken down three days later, although it had already been seen by management. The server was fired shortly thereafter, ostensibly for the Facebook post. The server filed a claim with the NLRB, which determined that he had been improperly terminated in "retaliation for protected activity." Id. at 119.

On appeal, the Second Circuit held that while his conduct was "at the outer-bounds of protected,

union-related comments," the server did not lose NLRA protection. Id. at 118, 125. The court noted that the *Atlantic Steel* test had been the traditional method to determine whether obscenities used by an employee in the workplace qualified as sufficiently "opprobrious," but recently had been called into question due to the insufficient weight it gave to employers' interests. In response, the NLRB had created and applied a new nine-factor "totality of the circumstances" test[2] for evaluating cases where an employee used social media. Id. at 123. The court, while questioning whether this "amorphous" test adequately balanced employers' interests, did not address the test's validity because no party objected to it. Instead, the court held that there was sufficient support on the record to uphold the NLRB's conclusion, focusing on three factors: (1) the subject matter of the message included workplace concerns, including management's alleged disrespectful treatment of workers and the upcoming union election; (2) Pier Sixty had previously tolerated profanity among its workers; and (3) the location of the comments was an online forum that did not disrupt or affect customers. Id. at 124-25. With regard to the third factor, the court stressed that the server stated that he had believed the post was private and had taken it down once he learned it was publicly accessible. Further, the court highlighted that while a Facebook post can be visible to the entire world, that fact does not in and of itself constitute an outburst in the "immediate presence" of customers and it did not disrupt any business event. The combination of these three factors was sufficient to support the NLRB's conclusion that the employee's conduct was not so "egregious" that it lost NLRA protection. Id. at 125.

This ruling will provide significantly greater protection for comments, profane and otherwise, directed at employers on social media.

Conclusion

The Second Circuit's decision in *Pier Sixty* leaves for another day the precise contours for determining whether an employee's conduct is sufficiently opprobrious that it loses the protection afforded under the NLRA. The decision, however, does provide insight into how the court views employee comments posted on social media. At least in this case, even though the employee's post was visible to the world, that fact alone was insufficient to be considered in the "immediate presence" of customers. This ruling will provide significantly greater protection for comments, profane and otherwise, directed at employers on social media.

1. The four factors include (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.

2. These nine factors are: (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. *Pier Sixty*, 855 F.3d at 123 n. 38.

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