THE
NATIONAL LAW REVIEW

Say What? Second Circuit Establishes New Outer-Bounds Limit to Protected Employee Speech

STARK & STARK
ATTORNEYS AT LAW
Article By
Benjamin E. Widener
Stark & Stark
New Jersey Law Blog

- Labor & Employment
- Litigation / Trial Practice

- 2nd Circuit (incl. bankruptcy)

Tuesday, May 9, 2017

To say that Facebook and social media have complicated the relationship between employer and employee and, specifically, what an employee can say or do with respect to his/her work, is an understatement. Social media has added a new dimension to analyzing the intersection between employee speech and protected activity under the National Labor Relations Act (the "NLRA"), and the level of protected activity has reached a new low.

A new line has been drawn in the sand, and the "outer-bounds of protected, union-related" activity has been reestablished by the United States Court of Appeals for the Second Circuit. In *National Labor Relations Board v. Pier Sixty, LLC,* the Second Circuit was tasked with the challenge of determining to what extent the NLRA protects an employee's comments on social media and the point at which an employee's conduct is so "opprobrious" (*i.e.* abusive, pejorative, obscene, libelous) as to lose the NLRA's protection.

In laymen's terms, the question is: How badly can an employee behave and still keep his job if the employee's behavior is at least loosely tethered to union-related activity? The answer, as explained below, is very badly.

Pier Sixty operates a catering company in New York City. In 2011, many of its service employees sought to unionize. Two days before the election, an employee, in

response to what he perceived to be harsh criticism and continued mistreatment by a supervisor, took to Facebook with the use of his iPhone during an authorized work break. He posted: *"Bob is such a NASTY M–R F–R 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 employee knew that his Facebook friends included coworkers, and that those coworkers would be able to see the post. As expected, news of the Facebook rant made its way back to Pier Sixty which, following an investigation, fired the employee.

The Second Circuit upheld the termination event and protected the employer, right? Not so fast.

Wait – you can drop the f-bomb on your boss (and his family) and keep your job? I repeat: Not so fast. It's a little more nuanced than that.

First, some ground rules. The NLRA generally prohibits employers from discharging an employee based on that employee's concerted or union-related activity. Section 7 provides, in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ."

In turn, Section 8(a) reads: "It shall be an unfair labor practice for an employer-- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In other words, employers cannot fire employees who engage in speech protected by the NLRA.

The caveat, of course, is that, at some point, the employee's conduct is so "opprobrious" that it forfeits NLRA protection.

Thus, in *NLRA v. Pier Sixty*, the Second Circuit was required to resolve whether an employee's Facebook post insulting his boss's mother and encouraging other employees to vote for the union should receive protection under Sections 8(a)(1) and 8(a)(3) of NLRA. Applying the nine-factor "totality of circumstances" test for evaluating an employee's use of social media, the Second Circuit determined that Pier Sixty failed to show the employee's behavior was so egregious as to lose the protection of the NLRA.

In making its decision, the Second Circuit rested heavily on the deference afforded to the factual determinations of the National Labor Relations Board following a six-day trial, as well as the specific culture at Pier Sixty (where profanity was somewhat tolerated). The Second Circuit qualified its decision by reiterating that the case sits at the outermost-bounds of protected, union-related activity, and that the test for evaluating "opprobrious conduct" must be "sufficiently sensitive to employers' legitimate disciplinary interests."

So, it's okay to call your boss names in a public forum and you won't lose your job, right? No, obviously not. Again, it's more nuanced and fact-specific than that. In *NLRA v. Pier Sixty*, the Pier Sixty work environment, the employee's use of

Facebook as a medium to vent (but also to communicate with fellow co-workers and at least loosely engage in concerted activity), and the employee's inclusion of "Vote YES for the UNION!!!!!!!" in his post on the eve of the union election, all factored into the court's decision.

The point is this. What likely seemed to be a clear cut decision for Pier Sixty – to fire its employee for clear misconduct – obviously was not clear cut... not at all. The *Pier Sixty* case reminds us that these cases, which are incredibly fact-sensitive, can be tricky and often require careful consideration (if not a phone call to an employment attorney), before any critical decisions are made. Furthermore, the Second Circuit's ruling serves as a reminder that employers should revisit their social media, cell phone, and disciplinary policies, all of which can come into play under these types of situations.