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Employment Practices Liability

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Second Circuit Upholds NLRB Order Finding Derogatory Facebook Post Protected Under the National Labor Relations Act

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Executive Summary: On April 21, 2017, the United States Court of Appeals for the Second Circuit in *National Labor Relations Board v. Pier Sixty, LLC,* enforced an order of the National Labor Relations Board (NLRB) finding that an employee did not lose the protections of the National Labor Relations Act (Act) by posting a derogatory comment about his supervisor on Facebook while encouraging his co-workers to vote for the union in an upcoming election and in concluding that the employer violated the Act by discharging the employee. The Court of Appeals stated that the employer "failed to meet its burden of showing that Perez's [the employee's] behavior was so egregious as to lose the protection of the NLRA under the Board's 'totality-of-the-circumstances' test."

Background: The employer Pier Sixty is a New York based catering company. Union organizing activity began in early 2011, and included threats of discipline and discharge from management against employees involved in union activities. Two days before the October 27, 2011, election (which was won by the union), Pier Sixty employee Herman Perez was working as a server at an event. After Perez and two co-workers received instructions in a "harsh tone" from company supervisor Robert McSweeney, Perez became upset, viewing McSweeney's comments "as the latest instance of the management's continuing disrespect for employees." A few minutes later, Perez, during a work break, posted the following message on his Facebook page:

Bob is such a NASTY M_____ F_____

don't know how to talk to people!!!!!!

F___ his mother and his entire f_____ family!!!! What a LOSER!!!!

Vote YES for the UNION!!!!!!!

The individual referred to in the post was supervisor Robert McSweeney. Perez was aware that 10 co-workers who were among his Facebook friends would be able to view the post. Perez's Facebook post was also public, and he took the post down three days later. Pier Sixty management became aware of the post, conducted an investigation, and then terminated Perez. Perez filed an unfair labor practice charge with the NLRB challenging his termination.

Perez's charge was consolidated with a second charge filed by a co-worker, and a complaint was issued. The Administrative Law Judge (ALJ) who conducted the trial found that the employer violated the Act by terminating Perez in retaliation for his protected activity. The employer filed exceptions to the ALJ's decision with the NLRB. The Board, with one member dissenting, affirmed the ALJ's decision, which was appealed to the Second Circuit.

The Second Circuit's Decision: The Court of Appeals, after rejecting the employer's challenge to the authority of the Acting General Counsel to issue the original complaint, turned to consider the question of whether "Perez's Facebook post so 'opprobrious' as to lose the protection that the NLRA affords union-related speech." First, the Court of Appeals noted the deferential standard afforded to the NLRB's factual findings stating that such findings will be accepted "if they are supported by substantial evidence in light of the record as a whole" while also noting that the Board's legal conclusions are reviewed "de novo" but with "considerable deference." The Court then turned to discuss the rights afforded by the Act, specifically the right under Section 7 "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection" and Sections 8(a)(1) and (3) which prohibit employers from terminating employees for engaging in union related activity. However, the Court stated that employees can lose the protections of the Act where they engaged in protected activity in "an abusive manner." After discussing the former and current tests used by the Board to determine whether an employee's use of obscenities in the workplace should be protected under the Act, the Court found that the ALJ applied a nine-factor "totality of circumstances test" which had been previously criticized by the Second Circuit. However, because no objection was made to the ALJ's use of the nine-factor test, the Court declined to address the validity of the test.

Next, the Court of Appeals stated that the NLRB's decision was justified and proceeded to set forth its reasoning. First, the Court noted that Perez's Facebook post, while vulgar, included "workplace concerns—management's allegedly disrespectful treatment of employees, and the upcoming union election." The Court noted the climate in which the post was made, specifically the threatening conduct directed to employees by the employer shortly before the union representation election. Given the context in which the post was made, the Court found that "the Board could reasonably determine that Perez's outburst was not an idiosyncratic reaction to a manager's request but part of a tense debate over managerial mistreatment in the period before the representation election."

A second factor relied on by the Court was the employer's tolerance of "widespread profanity in the workplace" evidenced by its past failure to discharge or consistently discipline employees for use of profanity (the Board found five written warnings for use of profanity were issued in six years and no terminations). The Court also noted the ALJ's findings that supervisors, including McSweeney, "cursed at employees on a daily basis including screaming phrases such as "What the f___ are you doing?" "Motherf_____," and "Are you guys f_____ stupid?" Further, the Court stated that Perez had been employed for 13 years, but was fired for using profanity two days before a union election, when the employer had not previously discharged an employee for use of profanity in the workplace.

Finally, the Court of Appeals examined the "location" of Perez's comments. Here the Court noted that the comments were made on social media, not in the workplace, and did not "disrupt the catering event." The Court also relied on the fact that Perez took the post down three days later, after learning that his Facebook page was not private.

The Court of Appeals concluded by finding that the "Board did not err in ruling that Perez's Facebook post, although vulgar and inappropriate, was not so egregious as to exceed the NLRA's protection… [n]or was his Facebook post equivalent to a 'public outburst' in the presence of customers and thus can reasonably be distinguished from other cases of 'opprobrious conduct.'"

In a final note to its decision, the Court stated that "this case seems to us to sit at the outer-bounds of protected, union-related comments, and any test for evaluating 'opprobrious conduct' must be sufficiently sensitive to employers' legitimate disciplinary interests, as we have previously cautioned."

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Employers' Bottom Line: The Second Circuit's opinion in *Pier Sixty* has a number of lessons for employers, including the affirmation that employee comments made on social media about their employer may constitute protected activity. First, a backdrop of employer actions threatening disciplinary action or discharge made in the context of a union organizing campaign generally tend to taint subsequent employment actions made close in time to the protected activity. Second, an employer's decision to strictly enforce rules of conduct during a union organizing campaign, when employees had not previously received discipline for violation of the rules, casts doubt on the employer's motivation for an adverse employment action made during the campaign. Third, while it is possible for employees to lose the protections of the Act when engaging in protected activities, employers face a high bar on this issue, although the Court did characterize the conduct at issue as being "at the outer-bounds of protected, union-related comments."

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