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# Second Circuit Finds Employee's Obscene Facebook Post Is Protected Activity, Reminding Employers of Importance of Uniformly Enforcing Employee Conduct Policies

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In NLRB v. Pier Sixty, LLC, the Second Circuit held that an employee's expletive-laden Facebook post – which hurled vulgar attacks at his manager, his manager's mother and his family – did not result in the employee losing the protection of the National Labor Relations Act ("Act"). But even though the Second Circuit conferred protected status on this unquestionably obscene post, it did not create a protected right to level profane verbal assaults on management when discussing union business. Such conduct has been, and will continue to be, unprotected in most circumstances. Nevertheless, this case acts as an important reminder for employers: if they choose to allow vulgar conduct in the workplace when it does not pertain to union activity, they must also allow it when it does.

## A Pier Sixty Employee Posted an Obscene, Pro-Union Facebook Message in Response to Management's Alleged Disrespect

Pier Sixty operates a catering company in New York, New York. In 2011, its employees embarked on a tense organizing campaign during which management allegedly threatened employees with discipline for union activity, disparately enforced a no-talk rule and told employees "bargaining would start from scratch" if they voted to unionize. Two days before the election, Hernan Perez, a server employed by Pier Sixty, posted a vulgar Facebook message after his supervisor gave him instructions in a tone that Perez perceived to be disrespectful. That post read:

> Bob is such a NASTY [expletive] don't know how to talk to people!!! [Expletive] his mother and his entire [expletive] family!!!! What a LOSER!!! Vote YES for the UNION.

The Facebook post was accessible by Perez's Facebook friends, which included 10 coworkers, and by the public, although Perez insisted he did not know that at the time. Perez deleted the post three days later, but Pier Sixty management had already learned about it and, after conducting an

investigation, terminated Perez.

## Perez's Facebook Post Constituted Protected Activity Because Pier Sixty Routinely Tolerated Similarly Profane Outbursts from Employees

The Second Circuit ultimately concluded that Perez's Facebook post constituted protected activity because Pier Sixty routinely permitted vulgarities in the workplace. Notwithstanding the profane language, Perez's post "explicitly protested" management's mistreatment and "exhorted employees to 'Vote YES,'" while Pier Sixty's anti-union animus was uncontested. Given these circumstances, "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." Moreover, Pier Sixty consistently tolerated "widespread profanity in the workplace," and both management and employees used "daily obscenities" without consequence. In the six years preceding Perez's termination, there had only been five written warnings issued for such language and *no* terminations – until Perez. The Second Circuit noted that "it is striking that Perez – who had been a server at Pier Sixty for thirteen years – was fired for profanities two days before the Union election when no employee had ever before been sanctioned (much less fired) for profanity."

The Second Circuit also found the manner in which Perez communicated his ire to be significant. Social media is a "key medium of communication among coworkers and a tool for organization in modern era," and, despite publicly posting the message, Perez's outburst did not occur "in the immediate presence of customers nor did it disrupt the catering event." Thus, the Court found the post to be distinguishable from other "opprobrious conduct" cases it had considered.

Notably, although the Second Circuit deemed Perez's post to be protected under the Act, it also cautioned, "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."

## Court Questioned the Validity of the Board's "Totality of the Circumstances" Test

In 2012, the Second Circuit, in *NLRB v. Starbucks*, 679 F.3d 70 (2012), concluded that the test traditionally employed by the Board to assess whether obscenities uttered in the workplace constitute protected activity – the *Atlantic Steel* test – did not sufficiently accommodate employers' legitimate interest in preventing employees' public outbursts in the presence of customers and remanded the case to the Board to develop "more balanced standards for evaluating 'opprobrious' conduct in that context." The Office of the General Counsel subsequently issued Memorandum OM 12-59, which set forth a nine-factor "totality of the circumstances" test to assess the protected nature of employees' social media communications, which the Second Circuit characterized as "more employee-friendly." The Board employed this test in *Pier Sixty*, *LLC*, but the Second Circuit questioned the test's legitimacy, stating that "we are not convinced the amorphous 'totality of the circumstances' test adequately balances an employer's interests…" Ultimately, though, because Pier Sixty did not object to it the Second Circuit applied the test – without sanctioning its validity.

## Lessons Learned From Pier Sixty

This case serves as a reminder that employers must take the long view when deciding whether to

discipline employees for workplace conduct that is inappropriate but not particularly offensive to the employer. Here, Perez's posting would have likely fallen outside the bounds of protected activity had Pier Sixty disciplined employees for similar vulgarities in the workplace. However, because Pier Sixty routinely tolerated such conduct from management and employees alike, the Second Circuit could not find that Perez's conduct was "so egregious as to exceed the NLRA's protection."

This case also signals that the Second Circuit, and perhaps other courts, may be willing to abandon the Board's "totality of the circumstances" test in favor of a standard that better protects employer's legitimate interests in regulating employees' workplace conduct. Employers defending cases in which the Board employs this test should vigorously argue that this standard improperly intrudes upon their legitimate business interests.



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