

First Circuit Reverses NLRB: Rude Employee Is Not Immune from Termination Solely Because He Was Engaged in Protected Activity

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In [Good Samaritan Medical Center v. National Labor Relations Board](#), the United States Court of Appeals for the First Circuit reversed the decision of the National Labor Relations Board (“NLRB”) requiring a hospital in Massachusetts to rehire an employee it had terminated for violating the hospital’s general civility policy when he challenged a union representative during her presentation about union membership. In reaching this decision, the First Circuit closely scrutinized the record and concluded that the NLRB overlooked substantial evidence revealing that the hospital terminated the employee, not because he voiced opposition to union membership, but due to the rude and intimidating manner in which he did so. The First Circuit recognized that the hospital was entitled to enforce its civility policy (which requires employees to treat coworkers with respect, patience and courtesy, and to refrain from abusive and disruptive behavior), and that the violating employee was not immune from termination solely because the discussion in which plaintiff was engaged when he misbehaved pertained to union membership. This decision should provide some comfort for all employers who have hesitated to terminate an employee because the employee’s otherwise terminable misconduct is connected, even tangentially, to activity protected by the National Labor Relations Act (“NLRA”).

Section 7 of the National Labor Relations Act (“NLRA”) grants employees the right to form and join unions and the right to refrain from joining a union. See 29 U.S.C. §157. Section 8(a)(1) of the NLRA prohibits an employer from interfering with, restraining, or coercing employees in their exercise of these rights. See 29 U.S.C. § 158(a)(1). Employers are expressly prohibited from discriminating “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” See 29 U.S.C. §158(a)(3). Plaintiff Camille Legley (“Legley”) claimed that the hospital violated this provision of the NLRA when it terminated him after he challenged certain statements made by Darlene Lavigne (“Lavigne”), a long-term employee of the hospital, about union membership during his new hire orientation. Specifically, when Legley understood Lavigne to say that he had to join the union, he objected by interrupting her and speaking to her in a rude and aggressive manner. While the description of what transpired at the meeting varied from witness to witness, the record revealed that the conversation escalated with both Legley and Lavigne becoming irritated. After the meeting, Lavigne contacted the hospital’s human resources representative and complained that Legley “really gave [her] a hard time.” Lavigne also called her union delegate and complained that Legley was very rude during the orientation and

repeatedly interrupted her. Lavigne cried during this telephone call when reporting what had transpired. Recognizing that Lavigne was extremely upset by how Legley spoke to her, the union delegate contacted the hospital's facilities manager and reported "how disruptive Legley was at the meeting and how upset he got at Lavigne." Based on what was reported to them, the hospital's manager and human resources manager, citing the hospital's general civility policy, decided to terminate Legley for his disrespectful behavior during the orientation.

Following a hearing, an Administrative Law Judge ("ALJ") concluded that both the hospital and the union violated Section 8 of the NLRA by terminating Legley's employment. In reaching his conclusion, the ALJ applied the holding in *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979), which focuses on whether an employee engaged in conduct normally protected by the NLRA loses the benefit of that protection because his conduct is "opprobrious" or offensive. The ALJ concluded that Legley did not act in an overly aggressive manner or make any threatening or profane statements. Instead, the ALJ concluded that "at most, both Legley and Lavigne raised their voices when he said he didn't have to become a union member and she said that he did." The ALJ found that nothing that Legley said or did at the orientation compelled a conclusion that he lost the protection of the NLRA as a result of any misconduct on his part. Concluding that Langley's statements about union membership and the tone in which he made them could not be "disentangled," the ALJ concluded that the hospital's decision to terminate violated the NLRA. The NLRB affirmed this decision and ordered the hospital to reinstate Langley and awarded Langley back pay damages.

The First Circuit reversed this decision. Recognizing that Legley engaged in activity protected by the NLRA by asserting his right not to join a union, the First Circuit opined that "the question is whether Legley was discharged because of his protected activity or for some other, lawful, reason." Criticizing the NLRB for ignoring "substantial evidence" that the hospital fired Legley because of his bad behavior, not due to his skepticism towards the union, the Court engaged in a thorough review of the testimony elicited during the hearing before the ALJ in an effort to determine what actually motivated the hospital's decision. The First Circuit found that the ALJ's application of the holding in *Atlantic Steel* and focus on whether Legley's misconduct was bad enough to warrant the loss of NLRA protection was a mistake. Instead, the First Circuit reasoned that the ALJ should have applied the analysis set forth in *Wright Line*, 251 N.L.R.B. 1083 (1981), which focuses on whether an employee was terminated because of the protected conduct or because of his unprotected behavior. Analyzing the testimony provided by the witnesses involved in the decision to terminate, the First Circuit found that "their only concern was Legley's difficult interaction" with Lavigne at the orientation, not with the fact that he voiced skepticism about joining the union. Accordingly, the First Circuit reversed the NLRB's decision and upheld the hospital's decision to terminate Legley.

The First Circuit's decision in *Good Samaritan Medical Center v. National Labor Relations Board* should provide some comfort to employers confronted with difficult personnel decisions involving employee misconduct that is closely connected with conduct that is protected by the NLRA. Following this decision, employers should find comfort in the fact that both the NLRB and the Courts should longer summarily conclude that a termination decision violates the NLRA simply because an employee's misconduct is tied to protected activity. Instead, this decision reflects the need for the NLRB and the Courts to closely scrutinize the facts underlying a termination decision to ascertain the actual motivation for the decision. So long as the facts reveal that the employer reasonably believed the employee engaged in misconduct and the decision to terminate for such misconduct is consistent with the employer's policies and practice, the employer's business decision should be upheld.

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