Labor & Employment Law/ Immigration Law

Social Media Posts as Protected Employee Activities

In April 2017 the Second Circuit held that an obscene work-related Facebook post made by an employee can be considered protected speech under the National Labor Relations Act.[1] Strange as it might seem, in *NLRB v. Pier Sixty, LLC* the court held that an employee can utilize vulgarities against employer on a social media platform so long as the employee includes language encouraging other employees to unionize.

By Cory H. Morris and Zachary Segal

Pier Sixty is one of many cases recognizing that water cooler speech may have moved to the Internet. As the Second Circuit considered it, employers should avoid using condescending or derogatory language towards employees in the workplace. Once employers set an example, an employee's use of such language may be found to be not so unprecedented or opprobrious to lose NLRA protection.[2]

Free Speech in Cyberspace

The predominant free speech forum seems to have become the Internet. In *Packingham v. North Carolina,* the Supreme Court held: "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[3] The Supreme Court recently held that "cyberspace…and social media in particular" are some of the "most important places (in a spatial sense) for the exchange of views." In striking down a law that prevents sexual offenders from accessing, inter alia, Facebook, the Supreme Court stated that "the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."[4]

In examining the language and holding in *Pier Sixty,* one should be mindful of the backdrop set by Justice Anthony Kennedy, stating that the internet contains the "principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."[5]

In contrasting the speech in *Packingham* and *Pier Sixty,* the speaker examined by the Supreme Court praised G-d and Jesus, while the *Pier Sixty* speaker was a bit more vocal in exploring realms of human thought and speaking in the public square. Realizing these vulgarities were accessible beyond his immediate facebook network, the speaker in *Pier Sixty* took down speech that can be compared to what is likely heard around the water cooler.

While "[h]uman experience teaches that not everything learned at the water cooler, so to speak, finds its way into institutional files or is readily acknowledged upon questioning,"[6] Facebook, and other internet social media, leaves a paper trial. Rather than "chilling water-cooler conversations,"[7] the social media forum seems to be embraced by all.

Still, while protecting speech in the workplace by an employee to an employer is not necessarily new,[8] albeit limitations remain.[9] For instance, speech that occurs not "as a citizen on a matter of public concern"[10] but rather as "pursuant to [one's] official duties"[11] does not entitle public employees to receive first amendment protections. In regards to the labor organization and the internet, the pro union, albeit vulgar, message provides employee protection.

Pier Sixty: Business Disruption as the Test

Previous NLRB decisions, and courts reviewing NLRB decisions, have held in favor of employees terminated or suspended directing vulgar language at an employer when the obscene remark was not made in the presence of other employees.[12] Conversely, when the vulgar or obscene comment is made in the presence of other employees, neither the NLRB nor courts have been as forgiving.[13] However, Hernan Perez changed that when he posted on Facebook a profanity-laced tirade against his boss by name, ending with "Vote YES for the UNION!!!!!!!"[14]

Perez worked at Pier Sixty, a catering company in New York City, for thirteen years. In early 2011, there was talk among Pier Sixty employees about unionizing. On October 25, 2011, Perez was working an event and his boss, in his usual condescending tone, told Perez and others "[t]urn your head that way [towards the guests] and stop chitchatting[.]"[15] About forty-five minutes later, Perez, on an authorized break, let the world know what how he felt about his employer through the popular social media platform, Facebook. Three days later Perez deleted the post. The day before, however, Pier Sixty employees had unionized. An internal investigation was commenced and, on November 9 Perez was terminated.

The day he was fired, Perez filed charges with the NLRB against Pier Sixty alleging he was fired "in retaliation for "protected concerted activities." On December 15, 2011, another Pier Sixty employee filed a similar claim with the NLRB so the NLRB consolidated the cases. The Administrative Law Judge ruled that Pier Sixty violated Sections 8(a)(1) and 8(a)(3) of the NLRA "by discharging Perez in retaliation for protected activity."

In reaching its decision that Perez's comments were protected under the NLRA, the Second Circuit explained, "although vulgar and inappropriate, [Perez's statement] was not so egregious as to exceed the NLRA's protection. Nor 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."[16]

Other cases of opprobrious conduct were measured by the *Atlantic Steel* test, which is used to determine if an employee crossed the line: (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 labour practice.[17]

In *NLRB v. Starbucks,* the court determined the *Atlantic Steel* test was not applicable because the employee, while off-duty, made an obscene comment to an employer in front of customers[18] rather than around the proverbial water cooler.[19] The court remanded it to the NLRB because it was a question of first impression. It thus follows that the determinative issue in cases applying the test, or determining whether obscene language towards an employer regarding union activity is protected, is where the comment was made.[20]

Conclusion: How Long Can This Speech Be Free?

Although the Second Circuit declined to determine whether obscene speech in front of customers has NLRA protection, it held obscene language "in front" of the world does. Where line from the water cooler and the world begins and ends is rapidly evolving.

Generally, when evaluating whether an employee's use of social media has NLRA protection, courts apply the "totality of the circumstances" test, which considers the following factors:

- any evidence of antiunion hostility
- whether the conduct was provoked
- whether the conduct was impulsive or deliberate
- the location of the conduct
- the subject matter of the conduct
- the nature of the content
- whether the employer considered similar content to be offensive
- whether the employer maintained a specific rule prohibiting the content at issue
- whether the discipline imposed was typical for similar violations or proportionate to the offense.21

But, Pier 60 did not challenge the Board's findings under the test, so the court did not address its validity.[22] The court did, however, discuss the location of Perez's comments, which provides the best insight into its holding:

> [T]he "location" of Perez's comments was an online forum that is a key medium of communication among coworkers and a tool for organization in the modern era. While a Facebook post may be visible to the whole world, including actual and potential customers, as Pier Sixty argues, Perez's outburst was not in the immediate presence of customers nor did it disrupt the catering event.[23]

While this holding has obvious implications for those practicing employment law, could it also be a signal that our nation's courts want to define Facebook, and other social media forums, due to the increased usage of them? Legal commentators note that "This ruling will provide significantly greater protection for comments, profane and otherwise, directed at employers on social media."[24] As the Supreme Court recently explained, "[s]ocial media allows users to gain access to information and communicate with one another about it on any subject that might come to mind."[25]

Social media's unlimited access to information and communication, according to the Supreme Court, provides everyone—including registered sex-offenders—with an outlet for "speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.[26] Of course organized labor should enjoy such an outlet but why not public employees? Such speech can no longer be limited to the water cooler as our society continues to becoming increasingly more active, if not dependent, on social media platforms.

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1. *National Labor Relations Board v. Pier Sixty, LLC,* 855 F.3d 115, 124 (2d Cir. 2017).
2. *Id.*
3. 582 U.S. ____, 137 S.Ct. 1730, 1735 (2017).
4. *Id.* at 1736.
5. *Id.* at 1737.
6. *Johnson v. Nyack Hosp.,* 169 F.R.D. 550, 556 (S.D.N.Y. 1996).
7. *Oliver Wyman, Inc. v. Eielson,* No. 15 CIV. 5305 (RJS), 2017 WL 4403312, at *6 (S.D.N.Y. Sept. 29, 2017).
8. *Atlantic Steel Co.,* 245 NLRB 814, 819 (1979) ("There is an exception to this rule for statements which are so opprobrious as to make the employee unfit for further service").
9. *See Lee-Walker v. New York City Dept. of Educ.,* No. 16-4164-cv (2d Cir. Oct. 17, 2017).
10. *Garcetti v. Ceballos,* 547 U.S. 410, 418 (2006).
11. *Weintraub v. Bd. of Educ.,* 593 F.3d 196, 203 (2d Cir. 2010).
12. Atlantic *Steel Co.,* 245 NLRB 814, 819 (1979) (Employee, not knowing his boss was present, was terminated for telling his union representative that his boss was a "lying s.o.b." was in violation of NLRA); *Alcoa, Inc.,* 352 N.L.R.B. 1222, 1226 (2008) (NLRB ruled for employee who was suspended for pointing at his supervisor, during a grievance meeting, saying, "If you tell this egotistical f—er to quit talking to people the way he does, this wouldn't happen"); *Stanford New York LLC,* 344 N.L.R.B. 558, 558-59 (2005 (NLRB ruled for employee who, while discussing joining the union with a union representative in a private room, called his supervisor a "f—ing son of a bitch").
13. *Verizon Wireless,* 349 N.L.R.B. 640, 642-43 (2007) (NLRA protection lost when employee continuously used vulgar language in the presence of other employees, even though the language was a result of frustration associated with union activity).
14. *Pier Sixty,* 855 F.3d at 119.
15. Id. at 118.
16. *Id.* at 125.
17. Atlantic *Steel Co.,* 245 NLRB 814, 819 (1979). *See also supra* nn. 4 & 5.
18. *Id.* at 80 ("Because we conclude that the Atlantic Steel test is inapplicable to an employee's use of obscenities in the presence of an employer's customers, we face one further issue in this case: whether an employee's outburst in which obscenities are used in the presence of customers loses otherwise available protection if the employee is off duty although on the employer's premises").
19. *Id.* at 80.
20. *NLRB v. Starbucks Corp.,* 679 F.3d 70, 79 (2d Cir. 2012) ("In the context of outbursts containing obscenities uttered in the workplace, the Board has regularly observed a distinction between outbursts under circumstances where there was little if any risk that other employees heard the obscenities and those where that risk was high").
21. *Pier Sixty,* 855 F.3d at 126 n.38.
22. *Id.* at 123-24.
23. *Id.* at 125.
24. Martin Flumenbaum, Brad S. Karp, Determining 'Opprobrious' Conduct Under the National Labor Relations Act, Expert Analysis, New York Law Journal Vol. 257 No. 103 (Wednesday May 31, 2017).
25. *Id.* at 1737.
26. *Id.*