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Even Profane Emails of Employees May Be Federally Protected

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Employee emails referencing an employer's unfair labor practices may be protected under the federal National Labor Relations Act, even if such speech may seem inappropriate. An NLRB (Board) ruling on this issue was affirmed by a summary order from the United States Court of Appeals for the Second Circuit.

Before making any termination considerations, employers should ascertain whether the substance of an employee's critical comments could be considered a protected activity under the NLRA.

Mexican Radio Corporation v. National Labor Relations Board

Mexican Radio Corp. was operating a restaurant in New York City and hired a new general manager in August of 2015. Almost immediately, employees expressed concerns about the manager's disrespectful and demeaning treatment of employees. Four waitresses lodged complaints about the general manager and the restaurant's allegedly unsanitary conditions with Mexican Radio's director of operations and the restaurant's owners. When the restaurant failed to improve conditions, the four employees contacted the New York City Department of Health & Mental Hygiene, angering management.

In October 2015, a bartender/server sent a group email to the restaurant's owners, managers and a select group of employees announcing her resignation and complaining about the general manager's treatment, unsanitary working conditions and management's failure to respond to the employees' complaints. The email contained obscenities and encouraged employees to stand up for their rights. It included criticisms of the owners' business practices and made allegations of tax fraud, among other grievances.

The four waitresses then individually used "reply all" to respond to the departing employee's email, expressing thanks for standing up for the employees and agreeing with the departing employee's sentiments. Over the next few days, the four waitresses were each fired for insubordination.

Following a trial, a federal administrative law judge (ALJ) determined that the four waitresses had engaged in protected concerted activity and that their reply-all emails were not so "opprobrious" (*i.e.*, expressing scorn or criticism) as to merit forfeiture of NLRA protections. (Certain conduct can be so "opprobrious" that it loses its protection under the NLRA.) The ALJ also concluded that the terminations were motivated by the four employees expressing support for the departing employee's email. The NLRB adopted the ALJ's determination and Mexican Radio thereafter appealed to the Second Circuit.

Affirmation From Federal Appeals Court

In a recent order affirming the NLRB, the Second Circuit applied the Board's *Atlantic Steel* test to determine whether the waitresses' emails were protected by the NLRA. Four factors must be weighed when evaluating whether an employee loses the NLRA's protections under the *Atlantic Steel* test: (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 provoked by the employer's unfair labor practices.

The Second Circuit agreed with the Board that all four factors weighed in favor of providing NLRA protection to the employees. The court first determined that, while the email replies were made in front of other employees (which would traditionally undercut NLRA protection), the "place of the discussion" was not in the workplace and was limited to certain individuals.

Second, the appeals court noted that the "subject matter of the discussion" does not turn on the timing or tone of the discussion, as Mexican Radio argued, and concluded that the departing employee's email restated the employee concerns about unsanitary conditions and the general manager's treatment of employees. Thus, the substance of the email weighed in favor of NLRA protection.

Third, the court rejected Mexican Radio's argument that the language in the departing employee's email should be attributed to the four email replies, noting that the Board appropriately focused on the language of the replies themselves, which did not add negative comments, feelings of animosity or profane language—the third factor, therefore, also weighed in favor of protection.

Finally, the court determined that the emails were provoked in part by a comment from the general manager about how employees who did not like how the restaurant operated could "look for another job." This amounted to an implicit threat to fire the employees, which is an unfair labor practice. Thus, the fourth factor also weighed in favor of NLRA protection.

Takeaway for Employers

In light of the *Mexican Radio* decision, employers should think twice before taking any adverse employment action when employees make comments about the workplace over email or on social media, even if such comments contain negative sentiments or profane language. Even though making comments on these platforms may reach a broad audience, a careful analysis must be performed to determine whether the content of the comments and where they were made are enough to strip them of protection under the NLRA. Employers should consult with legal counsel to mitigate risks in situations that involve employee criticisms of the workplace.

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