Beyond Talking Smack — NLRB Draws the Line at Advocating Insubordination

Labor & Employment Law Update

By Beverly Alfon on November 14, 2014

Six months ago, the NLRB held (on remand from the Ninth Circuit) that an employer violated the National Labor Relations Act by firing an employee even though he called his supervisor a "[multiple expletives deleted]" and even threatened that if he was fired, the boss would "regret it." *Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014). That decision left many employers exasperated, and still does. Recently however, the board issued a decision that confirms that even this pro-labor board recognizes that some employee conduct falls outside the protections of the National Labor Relations Act (NLRA). *Richmond District Neighborhood Center*, Case 20-CA-091748 (Oct. 28, 2014).

In *Richmond District Neighborhood Center*, the board upheld an administrative law judge's ruling that Facebook dialogue between two employees of the center was not protected under the NLRA and the employer did not violate the act by considering that dialogue when it revoked their employment offers for the following school year. The employees' expressed their intent to have "field trips all of the time to wherever [ ] we want", "teach the kids how to graffiti up the walls…" and other similar statements expressing their intent to disregard their job duties and undermine the leadership at the center. The board agreed that the employees' statements, which included obscenities and statements regarding how they would "raise hell" at the center, went beyond discussion and complaints about work terms and conditions. The board further stated that the center was "not obligated to wait for the employees to follow through on the misconduct they advocated" before terminating their employment.

How do we reconcile these two decisions? In *Plaza Auto Center,* the employee's profanity and personal attacks were expressed in the context of a discussion regarding commission rates and break times. The NLRB reasoned that the discharge violated the employee's right to discuss terms and conditions of employment. In contrast, the employees in *Richmond District Neighborhood Center* went beyond expressing their discontent with their work terms and conditions through "pervasive advocacy of insubordination in the Facebook posts, compromised of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the act's protection."

Bottom line: There is no bright-line scope of protected activity versus unprotected activity under the NLRA. As demonstrated by the board's decisions, the analysis is very fact-specific. For both union and non-union employers, before issuing discipline to employees who engage in conduct that involves or is related to an expression of discontent about work terms and conditions, consult counsel to review the particular facts of the case before making a decision.