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Profane tirade enjoys protection

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The owner and two managers of a Yuma used car lot, Plaza Auto Center (PAC), sat in a very small office with salesman Nick Aguirre, who had worked at PAC for only two months. The owner began the meeting by telling Aguirre that he was "talking a lot of negative stuff" and asking too many questions. Aguirre responded that he had questions about vehicle costs, commissions, and minimum wage. The owner responded that Aguirre had to follow company policies, salespeople don't know vehicle costs, and he shouldn't be complaining about pay. During the discussion, the owner twice told Aguirre that he didn't have to work there if he wasn't satisfied with the pay or policies.

Aguirre lost his temper and began berating the owner, using the "f" word, calling him names, and saying he was stupid, nobody liked him, and everyone talked about him behind his back. During his outburst, Aguirre stood up in the small office, pushed his chair aside, and told the owner that he would regret it if he fired him. The owner fired Aguirre on the spot. The incident became a case before the National Labor Relations Board (NLRB) pitting employee rights against employer discretion to punish insubordination.

Elusive line

Aguirre brought an unfair labor practices charge against PAC after his firing, claiming the company wrongfully discharged him for exercising his rights under Section 7 of the National Labor Relations Act (NLRA). Section 7, which applies in nonunionized workplaces such as PAC in the same way it applies to unionized workplaces, protects an employee's right to engage in "protected concerted activity" by discussing the terms and conditions of employment with his coworkers.

Section 7 rights are not absolute, however. Conduct that crosses the line as menacing, physically aggressive, or belligerent loses its protection. The procedural twists and turns in Aguirre's case show just how hard it is to draw that elusive line between protected Section 7 conduct and unprotected misconduct that can support a discharge even when the employee is upset about pay or working conditions and has shared his gripes with his coworkers.

The case was decided first by an administrative law judge (ALJ), who upheld PAC's decision to fire Aguirre for the verbal abuse and profanity he directed at the owner. Aguirre challenged that decision before a panel of the NLRB, which reversed the ALJ, finding that PAC violated Aguirre's Section 7 rights by firing him. PAC then appealed to the U.S. Court of Appeals for the 9th Circuit, whose rulings apply to Arizona employers.

The 9th Circuit found a mistake in how the NLRB applied a four-factor test that governs the analysis of whether the discharge decision was a violation of the employee's Section 7 rights (see "Inappropriate conduct may cost employees NLRA protection" on pg. 1 of our February 2012 issue). The four factors to be considered in the analysis are (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the outburst, and (4) the employer's provocation of the outburst through unfair labor practices.

The NLRB found that all four factors weighed in Aguirre's favor. The 9th Circuit reversed on the "nature of the outburst" factor and sent the case back to the NLRB for a second balancing analysis of the four factors. On May 28, 2014, the Board issued a new ruling, with the three-member panel voting 2-1 that PAC loses again.

Current last word

In a fine display of hair-splitting, the two NLRB members in the majority, Chairman Mark G. Pearce and Kent Y. Hirozawa, determined that Aguirre's outburst solely involved obscene and denigrating remarks that constituted insubordination but did not cross the line to menacing, physically aggressive, or belligerent behavior. Because the nature of the outburst factor didn't cross that line, the strength of the other three factors still warranted shielding Aguirre's conduct because it involved complaints about pay and working conditions.

The NLRB panel majority faulted PAC for provoking the outburst. "Telling an employee who is engaged in protected concerted activity that he may quit if he does not like the employer's policies is an implied threat of discharge, because it suggests that continuing to engage in such protected activity is incompatible with continued employment," the majority stated.

NLRB member Harry I. Johnson III filed a dissent that began with this strong sentence: "Today my colleagues find a clearly justified employee discharge to be unlawful." Johnson chastised the majority for allowing employees like Aguirre to curse, denigrate, and defy their managers with impunity during the course of otherwise-protected conduct. Employees can do so, according to Johnson, "provided that they do so in front of a relatively small audience, can point to some provocation, and do not make overt physical threats. In my view, few, if any, employers would countenance such behavior in the absence of protected activity."

The case has been going on since 2008, but if PAC still has an appetite for the fight, Johnson's dissent certainly gives the company ammunition to take the case back to the 9th Circuit.

Stay away from the line

The ultimate outcome of Aguirre's case matters less than the lesson it provides for how employers should respond to employee complaints about pay or working conditions. Aguirre was right, after all, when he complained that PAC has to pay at least minimum wage to its sales force. The Arizona Minimum Wage Act requires even salespeople paid on straight commission to receive a minimum wage draw against those commissions, and if the commissions are less than the draw, the salesperson gets to keep the draw.

More important, employers need to be receptive to employee concerns about pay and working conditions. If the law is on your side, don't hesitate to explain in a cool and calm manner why your policies are lawful and consistent with your business needs. Before firing an employee because of a nonviolent workplace outburst that relates in any way to pay or working conditions, consider seeking legal advice on whether the outburst should be considered protected concerted activity under the NLRA.

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