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Profanity Protection: It's Now A 'Concerted Activity'

Law360, New York (June 20, 2014, 11:23 AM ET) -- Cursing at a supervisor will cause you to be fired. This seems like common sense. However, the National Labor Relations Board recently held in a 2-1 decision that an employee who shouted profanities at his boss did not lose the protection of the National Labor Relations Act, should not have been fired and that the employer was required to reinstate him with back pay. This article will discuss the NLRB's recent decision in Plaza Auto Center Inc and what it means for employers.

Plaza Auto Center: Case Background

Plaza Auto Center is located in Yuma, Arizona, and is nonunion. Nick Aguirre was a car salesman at Plaza for just under three months in 2008. During his brief period of employment, he spoke with other employees and managers about Plaza Auto Center's policies concerning breaks, restroom facilities and compensation.

In October 2008, Aguirre met with Tony Plaza, the company's owner. One of Aguirre's managers initiated the meeting, which occurred in a small manager's office. In the meeting Aguirre indicated he had questions about vehicle costs, commissions and the minimum wage. In response, Plaza told Aguirre his negativity was affecting other employees, that Aguirre had to follow policies and procedures, that sales employees normally did not know the dealer's cost of vehicles and that he should not complain about pay. Plaza also told Aguirre that he didn't need to work at Plaza Auto Center if he didn't trust them.

Aguirre then lost his temper, calling Plaza a "fucking mother fucker," a "fucking crook" and an "asshole." Aguirre also told Plaza he "was stupid, nobody liked him and everyone talked about him behind his back." During his angry outburst, Aguirre stood up in the office, pushed his chair aside and threatened that if Plaza fired him "he would regret it." Although Plaza did not intend to fire Aguirre going into this meeting, he did so after Aguirre's outburst.

NLRB's Decision

In Plaza Auto Center Inc., Case 28-CA-022256, May 28, 2014, on remand from Plaza Auto Center Inc. v. NLRB, 664 F.3d 286 (9th Cir. 2011), the NLRB concluded that Aguirre did not engage in menacing, physically aggressive or belligerent conduct and that Plaza violated the NLRA by discharging him.

In reaching its conclusion, the NLRB applied what it characterized as an objective standard to determine whether Aguirre's conduct was threatening. In the NLRB's view, Aguirre's statement that Plaza "would regret it" did not refer to physical harm, but was rather merely a threat that Aguirre would take legal action if Plaza fired him. Also, according to the NLRB, Aguirre pushing his chair aside when he stood up was understandable because the office in which the meeting took place was small and "it would have been difficult for Aguirre to stand up without pushing his chair aside." Further, Aguirre had not committed or threatened to commit any violent acts during his employment. Finally, Aguirre did not hit, touch or attempt to hit or touch Plaza. Notably, the NLRB disregarded — and did not credit — Plaza's testimony that he feared for his personal safety and the safety of his employees due to Aguirre's conduct.

Further, the NLRB applied the factors from Atlantic Steel Co. v. Chastain in determining whether Aguirre's conduct was unprotected by the NLRA:

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 the employer's unfair labor practice.

The NLRB found that even though the nature of Aguirre's outburst weighed against a finding that Aguirre had engaged in protected concerted conduct, the other three factors — the place of discussion, the subject of discussion and whether the outburst was provoked by employer's unfair labor practice — weighed in Aguirre's favor.

As to the place of discussion, the fact that Aguirre's outburst occurred in a manager's office, behind closed doors and away from other employees was significant because the NLRB found that it was not disruptive to the general workplace. As to the subject of the discussion, it was a discussion of Aguirre's concerted complaints about the terms and conditions of employment, mainly compensation policies relating to salespeople. The NLRB concluded that Plaza provoked Aguirre's outburst because Plaza invited Aguirre to quit if he did not like the policies and telling Aguirre not to complain.

The dissent argued that the majority failed to apply the law of the case as indicated by the Ninth Circuit in remanding the matter. The Ninth Circuit made clear that the administrative law judge's original factual finding in the case that Aguirre engaged in physically aggressive, menacing or belligerent behavior was a credibility finding and could only be rejected on the basis of the Standard Dry Wall Products clear preponderance-of-the-evidence test. The dissent asserted that the majority failed to satisfy this standard.

The dissent also disagreed with the majority's findings that the level of misbehavior and insubordination did not cause the employee to lose the protection of the NLRA, stressing that such a decision implied that profane and menacing outbursts are acceptable if coupled with protected concerted activity. Indeed, the majority disregarded prior NLRB precedent holding that "offensive and personally

denigrating remarks alone" can cause an employee to lose the protection of the NLRA. (See, e.g., Indian Hills Care Center, 321 NLRB 144, 151 (1996).)

The dissent also recognized that the majority's finding would put employers in a bind, noting: "It is entirely reasonable, and to a great extent legally necessary, for many employers to insist that employees engage each other with civility rather than personally directed 'f-bombs,' even on matters where opinions differ sharply and emotions flare." Further, such profanity and egregious conduct could be viewed as harassment, bullying or a precursor to workplace violence, which could subject employers to legal liability under other employment-related laws. In this regard, the dissent aptly pointed out: "The [NLRB] is not an 'uberagency' authorized to ignore those laws in its efforts to protect the legitimate exercise of Section 7 rights in both unrepresented and represented workforces."

Bottom Line

Plaza Auto Center demonstrates the NLRB is continuing its aggressive pursuit of employers — and especially nonunion employers — that allegedly interfere with, restrain or coerce employees for engaging in protected concerted activities. Indeed, employers should tread carefully when disciplining and discharging employees who might be acting to address collective employee concerns, even if those employees are engaged in intemperate behavior during the interaction. Rather, employers must remember that even if an employee engages in egregious conduct when engaging in protected concerted activity, he or she may still be protected under the NLRA if the other circumstances of the employee's alleged protected concerted conduct weigh in the employee's favor.

However, employers need not, and should not, disregard insubordination or profanity in the workplace because doing so may create legal risk in other areas, most notably Title VII. Each situation is highly fact-specific and employers should consider the words said and to whom, where the interaction occurred, who was present and what precipitated the interaction in determining whether to discipline or discharge the employee.

Further, an employer's response to an employee's protected concerted activity, even in the face of an employee engaging in inappropriate or insubordinate behavior, is critical. In its decision, the NLRB heavily emphasized what it called the employer's "serious, unlawful provocations" of the employee:

- The employer in Plaza told the employee on more than one occasion that "he could quit" if he did not like the employer's policies, which the NLRB characterized as an "implied threat of discharge" because it indicated that continued employment was not compatible with protected activity.

- In Plaza, the employer told the employee that he should not complain.

- The Plaza employer refused to deal with the substance of the employee's complaints.

Many of our mothers would have washed our mouths with soap and sent us to bed with no dinner had we cursed at authority figures. The current NLRB does not subscribe to this view, to which employers everywhere are thinking to themselves "oh, @&$!"

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