UNFAIR LABOR PRACTICES

A tale of two agencies on uncivil speech

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Before this year, the National Labor Relations Board (NLRB) has shown a very high tolerance for employee speech that is offensive, profane, threatening, uncivil, and unprofessional as long as employees engage in the questionable speech during an activity that's otherwise protected and concerted. Indeed, the Board has often accepted harassing, discriminatory, and retaliatory speech by employees that could contribute to a hostile or discriminatory work environment and would otherwise justify serious disciplinary action. NLRB precedent on the issue has applied to all forms of employee speech, whether it occurs on the picket line, in print or on social media, during negotiations, in interactions between employees and their supervisors, and in oral exchanges between employees about their working conditions or relations with their employer.

Under the Trump administration, the NLRB terrain is changing. But as we explain below, readers can be assured that California almost certainly will not follow suit.

NLRB precedent on speech-related misconduct as protected activity

In *General Motors, LLC*, 368 NLRB No. 68 (2019), the NLRB majority observed that the Board's treatment of extremely profane, racially insensitive, and sexually offensive language "has been criticized as both morally unacceptable and inconsistent with other workplace laws by Federal judges." The Board was particularly critical of two relatively recent cases that overruled discipline taken against employees who (1) wrote profanity-laced Facebook posts attacking their supervisor *(Pier Sixty, LLC)* and (2) shouted racially offensive statements at employees crossing a picket line *(Cooper Tire)*. The cases involved the application of a four-factor test (location, nature, and subject of the outburst, and possible provocation) for determining whether offensive speech is protected. The test was established in the NLRB's groundbreaking 1979 decision in *Atlantic Steel*.

The facts in *Cooper Tire* and *Atlantic Steel* are illustrative of the problematic behavior at issue. In *Cooper Tire,*

the NLRB reversed an employer's discipline against a striking worker who told African-American replacement workers who crossed the picket line to "go back to Africa" while referencing fried chicken and watermelon. In *Atlantic Steel,* a union committee member sought to provide support for fellow employees who wanted overtime when they engaged in cross-training that the union thought was unnecessary. In a clearly protected discussion with a company manager, the employee spoke his mind by saying that he did not "give a f___ about [the] cross-training" and the company representative could "shove it up [his] f_____ ass."

The employee also played loud music containing profane and offensive racially charged lyrics each time the manager entered or exited the room. After the company disciplined him for his disrespectful conduct, the union filed unfair labor practice charges. An NLRB administrative law judge (ALJ) sustained the charges in part, finding the employee's statements to the manager were protected but his other conduct was not.

The NLRB showed particular restraint in its review of *General Motors*. Rather than simply overruling the previous cases, it took a pause, inviting the parties to the case as well as interested parties to file briefs "to aid the Board in reconsidering the standards for determining whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose the employee who utters them the protection of the [National Labor Relations Act (NLRA)]." The Board set November 12 and November 27, 2019, as the final dates for friend-of-the-court briefs and briefs by the parties.

California public-sector protections for untruthful and uncivil speech

California labor law is even more tolerant than the NLRB has been in the past with regard to employees' offensive speech during activity that is otherwise protected. Foremost, First Amendment protections apply to speech leveled against the government, but not against private-sector actors—a fundamental difference between private- and public-sector employment.

In part because of those First Amendment precepts, the Public Employment Relations Board (PERB) affords very broad protections to employee speech. PERB case law follows two paths. When employers wish to discipline employees for lying about matters involving employer-employee relations, employees' speech is generally protected even if it's defamatory or even erroneous unless it can be shown that the speech was made with malice *and* with knowledge of its falsity *(County of Riverside).*

Dishonesty aside, PERB claims to follow the *Atlantic Steel* case in assessing discipline against employees who have engaged in offensive written and verbal communications about employer-employee relations. In those situations, the Board treats speech as protected unless it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" that it causes "substantial disruption of or material interference with the employer's operations." In application, however, PERB is extraordinarily lenient toward offensive employee speech. PERB has emphasized that because labor disputes can engender "ill feelings and strong responses," the parties are afforded wide latitude to engage in "uninhibited, robust, and wide-open debate" in the course of those disputes *(City of Oakland).*

One of PERB's earliest decisions shows its evolution on this issue. In a 1978 case, *Pittsburg Unified School District,* PERB analyzed whether employees of a school district were disciplined for their role in preparing and distributing a leaflet venting their frustration over the slowness of the district's negotiations with the union. The leaflet, titled "If Only I Could Tell You," was intended to attack the credibility of a deputy superintendent. The various claims in the leaflet included questions such as: "What [union representative] . . . while traveling in far east county saw what deputy superintendent engaged in intercourse with more than one woman concurrently?"

The union's defense to those scurrilous accusations was that the leaflet was just a humorous "double entendre" about an incident in which the manager was speaking to several women—i.e., engaging in *social* intercourse. Unconvinced, PERB upheld the discipline, concluding:

> The leaflet's union origin provides no blanket immunity to the authors of its contents. Employees may be punished for improper activities. Precedent from the NLRB and the federal courts makes this clear. The [NLRA] has never been a shield to permit employees to engage in whatever kind of conduct they desire in total disregard of the rights of the employer.

PERB and NLRB case law has, of course, come a long way since then. But then again—for better or worse—the

NLRB appears to be reentering a time machine destined toward the past.

Bottom line

We can expect the NLRB's call for position statements in connection with the *General Motors* case to result in a major shift in NLRB case law governing offensive speech made in the course of protected activity. We can also expect that the PERB will not follow suit.

The NLRB's shift hasn't been limited to softening past prohibitions against employers disciplining employees for offensive speech uttered in the course of otherwise protected activity. In its 2017 decision in *The Boeing Company,* an NLRB majority composed of Trump appointees established a new balancing test that legitimizes a broad range of previously questionable "civility" rules as well as most rules against insubordination, noncooperation, disruptive behavior, and on-the-job conduct that adversely affects the employer's operations.

In contrast to the new NLRB's likely leanings, PERB has previously taken the position that employers "should respond to problematic speech with more speech, rather than via retaliatory discipline." Taken at face value, that is irrational. When speech is, for example, threatening or discriminatory, "more speech" is not the solution.

In practice, PERB has been less than evenhanded. For example, while it's rare for PERB to uphold discipline against an employee for his oral or written statements, the Board found in *Contra Cost Fire Protection District* that an employer's stated justification (i.e., speech) in negotiations about the need to maintain a separation between represented and unrepresented personnel is "inherently destructive" of employee rights, warranting an extraordinary back pay remedy. Turnabout, to PERB, is not fair play. In any event, there is no obvious reason to expect that PERB will change its basic approach to this issue, regardless of what the NLRB ultimately decides.

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