Cussing out Boss did not Void Protection Under NLRA

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The National Labor Relations Act (NLRA) provides employees with the right to engage in concerted activity regarding terms and conditions of employment. This right exists for union *and* non-union employees alike. In *Plaza Auto Center, Inc. and Nick Aguirre* (on remand from the Ninth Circuit Court of Appeals), the National Labor Relations Board (the Board) ruled that an employer unlawfully discharged its employee for engaging in protected concerted activity, despite the employee's profane outburst at his supervisor.

Nick Aguirre was hired as a car salesman at Plaza Auto Center in late August 2008. During his brief two months of employment, he spoke several times with co-workers and management about breaks, restrooms and compensation.

On October 28, he met with his sales manager about the calculation of sales commissions. The meeting turned ugly, Aguirre lost his temper, and started berating his manager. Aguirre launched into a profanity-laden rant and advised his manager, in closing, that if he was fired, the company would regret it. He was subsequently fired.

The Board, using the test articulated in its *Atlantic Steel* decision, balanced four factors to determine whether Aguirre's outburst during his protected activity cost Aguirre the protection of the NLRA. The four factors balanced were: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst;and (4) employer provocation of the outburst by unfair labor practices.

Ultimately,the Board found that while Aguirre uttered obscene and denigrating remarks during a face to face meeting, it was not pre-meditated and he was not physically threatening. And, while the employer had a legitimate interest in maintaining order and discipline, the outburst occurred in a manager's office out of view of other employees. The Board also found that the employer provoked Aguirre by stating that he did not need to work there if he did not like the company's policies.

Thus,the Board concluded that Aguirre's concerted activity was protected. Consequently, the employer was ordered to reinstate Aguirre with full seniority, back pay and other benefits, and to post a notice drafted by the Board acknowledging its violation and the remedies ordered by the Board and advising employees of their rights.

This case emphasizes just how careful employers need to be in terminating an employee. Here, cause to discharge clearly existed. However, because federal labor rights applied in this non-union setting, the discharge violated the NLRA. Thus, even when an employer believes the decision to terminate is clearly

proper, it is always wise to seek the advice of an attorney, like the author, who specializes in labor and employment law. Ms. Orr can be contacted at 313-983-4863 or corr@plunkettcooney.com.

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