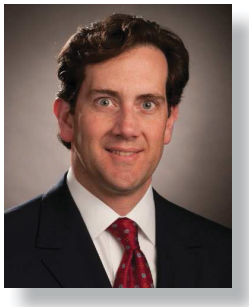
NLRB: Employee Use of "F-word" Not Considered Belligerent



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The Merriam-Webster Dictionary defines the term "belligerent" as "inclined to or exhibiting assertiveness, hostility, or combativeness." Most employers would consider an employee's use of obscene language to excoriate his or her boss as a "belligerent" act. However, according to a recent decision issued by the National Labor Relations Board, an employee's outburst—which included berating his employer and repeatedly using the "f-word" to describe him—does NOT constitute "belligerent" conduct for purposes of federal labor law. As a result, the Board ordered the employer to reinstate the employee and make the employee whole for any lost wages and benefits.

In Plaza Auto Center, Inc. (decided on May 28, 2014), the non-union employer operated a used car sales business in Yuma, Arizona, and hired Nick Aguirre as a salesperson. Mr. Aguirre's employment with Plaza Auto Center began in August of 2008 and ended with his abrupt termination on October 28, 2008. Although his tenure was brief, it was not tranquil.

Shortly after starting work, Mr. Aguirre began to inquire and complain about the employer's compensation system for sales employees. At the time, Plaza Auto Center paid commissions to its sales employees without any draw or guaranteed minimum. Mr. Aguirre also questioned the employer's calculation of his commissions and other policies related to breaks and meal periods. In response to his questions and complaints, the employer advised Mr. Aguirre that he was "free to leave" if he did not like the employer's policies.

Instead, Mr. Aguirre contacted the Arizona wage and hour compliance agency regarding the employer's commissions policy, and was advised that the sales employees were entitled to receive minimum wage as a draw against earned commissions. Mr. Aguirre shared this information with both his coworkers and the employer's Office Manager.

On October 28, 2008 (the same day that Mr. Aguirre spoke with the Office Manager), the employer's owner and two managers called Mr. Aguirre into a meeting. During the meeting, the owner informed Mr. Aguirre that he was "talking a lot of negative stuff" that would have a negative impact on the sales employees, and that Mr. Aguirre was asking too many questions. Mr. Aguirre responded that his questions were related to the minimum wage, commissions, and vehicle costs. After some discussion of the employer's policies, the owner told Mr. Aguirre that he should not complain about his pay, and that Mr. Aguirre did not need to work for the employer if he did not trust the owner.

Thereafter, Mr. Aguirre became angry, raised his voice and began berating the owner, referring to him as a "f******* mother f*********," "a f********* crook," and an "a**hole." In this tirade Mr. Aguirre also told the owner that he was stupid, no one liked him, and everyone talked about him behind his back. In addition, Mr. Aguirre stood up, pushed his chair aside and told the owner that he would regret it if he fired Mr. Aguirre. As you might imagine, in response the owner fired Mr. Aguirre.

Following his termination, Mr. Aguirre filed an Unfair Labor Practice Charge with the Labor Board. After conducting an evidentiary hearing, the administrative law judge found that the employer had violated the law several times by inviting Mr. Aguirre to resign in response to his protest of working conditions, which were protected activity under the National Labor Relations Act. However, based upon standards established in prior Labor Board cases, the judge found that Mr. Aguirre lost the Act's protection because his outburst was "belligerent" due to statements that repeatedly reviled the owner in "obscene and personally denigrating terms accompanied by menacing conduct and language." The decision of the administrative law judge was ultimately appealed to the Labor Board, which reversed.

As part of its analysis, the Board considered whether Mr. Aguirre's conduct was "menacing, physically aggressive, or belligerent." It was insufficient that the owner of the employer subjectively feared for his safety and the safety of other employees. Instead, evaluating Mr. Aguirre's conduct under an objective standard, the Board found that "[Mr.] Aguirre's conduct was not menacing, physically aggressive, or belligerent."

To support this finding, the Board found that Mr. Aguirre's "regret it" comment was ambiguous and did not explicitly refer to physical harm in any way. The Board further noted that Mr. Aguirre did not commit or attempt to commit any violent acts. Instead, the Board determined that Mr. Aguirre's ambiguous statement was a threat of legal consequences, and not a threat of physical harm.

The Board also found that Mr. Aguirre's conduct in rising from his chair and pushing it aside was not objectively "menacing, physically aggressive, or belligerent" because the meeting occurred in a small office and "it likely would have been difficult for [Mr.] Aguirre to stand up without pushing his chair aside." Although the employer's manager testified that he also rose from his chair because he thought Mr. Aguirre was about to hit the owner, the Board found that the conduct by Mr. Aguirre was not objectively "menacing, physically aggressive, or belligerent" because the manager did not attempt to restrain Mr. Aguirre. Further, the Board also noted that the employer did not file a complaint with the police, nor did it immediately remove Mr. Aguirre from its property after he was fired.

This case—which has been in litigation since 2008—serves as an important reminder to employers regarding the scope of protected employee activity under the National Labor Relations Act. Extreme caution is warranted when an employer is considering whether to discharge an employee that has complained about working conditions or policies. In this case, I suspect Mr. Aguirre was right—Plaza Auto Center probably regrets firing him. ✦