LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • BENEFITS

IS FOUL LANGUAGE/BEHAVIOR PROTECTED FREE SPEECH?

July 30, 2020

The National Labor Relations Board on July 21, 2020, issued a decision protecting an employer's rights to deal with profane attacks at work, profane attacks about the company or manager on social media and profane and racist comments when picketing. The case of *General Motors, LLC* involved a union committee person, Charles Robinson. Robinson had a heated exchange with the plant manager regarding overtime pay when employees were away on cross training. Robinson yelled at the plant manager, saying "I don't give a f**** about your cross training," "we're not going to do any f****n' cross-training if you're going to be acting that way," and the manager could "shove [the training] up [his] f****** a**." The employer graciously suspended Robinson for three days.

Two weeks later, Robinson attended a meeting with company managers regarding subcontracting issues. One of the managers asked Robinson to lower his voice – he was speaking too loudly. Robinson lowered his voice and mockingly said to everyone at the meeting about the manager: "Yes, Master, Your Master Anthony," "Yes, sir, Master Anthony," "Is that what you want me to do, Master Anthony?" Robinson then said to the manager that the manager wanted Robinson to be a "good Black man." The company suspended Robinson for two weeks.

Several months later at another meeting with the union shop committee and management representatives, Robinson kept repeating the same questions that management representatives had addressed. In response to one of the management representatives who asked Robinson to stop repeating his questions, Robinson said he would "mess [the manager] up." Then, during the meeting, Robinson began to play from his cell phone loud music with vulgar language and sexually explicit lyrics. Robinson did this for almost a half an hour. Robinson turned off the "music" when managers left the room, but when they returned, Robinson turned it back on. This resulted in a suspension of Robinson for thirty days.

Of course, from our perspective, the vulgar language used regarding overtime would alone have been a basis for termination. Robinson filed an unfair labor practice charge, alleging that his three suspensions were retaliatory for expressing his Section 7 rights – wages, hours and conditions of employment. An Administrative Law Judge ruled that Robinson's vulgar language directed toward the plant manager was not protected but his "Yes, Master" continuing comments were protected, as were his comment to "mess up" a manager and

playing the sexually explicit and racially charged music during a meeting when he had been asked not to. According to the Board in *General Motors,* prior Board decisions addressing this behavior

> have conflicted alarmingly with employers' obligations under federal, state, and local antidiscrimination laws. We believe that, by using [current] standards to penalize employers for declining to tolerate abusive and potentially illegal conduct in the workplace, the Board has strayed from its statutory mission.

Prior cases had one standard for workplace misconduct, another for social media comments, and yet another for picket-line misconduct. The Board stated that rather than three confusing standards applying to employee misconduct, Robinson's behavior should receive the same analysis as other disciplinary or discharge decisions in the context of employee Section 7 activity: The NLRB must prove that (1) the employee engaged in protected activity, (2) the employer knew of the activity and (3) the employer's actions against the employee were because of the employee's protected activity. Should the Board prove this, the employer must show that it would have taken the adverse action toward the employee regardless of the employee's Section 7 activity. The Board stated that:

> We read nothing in the Act as intending any protection for abusive conduct from nondiscriminatory discipline, and, accordingly, we will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful.

The Board added that "American workers engage in these [protected] activities every day without resorting to abuse, and nothing in the text of Section 7 suggests that abusive conduct is an inherent part of the activities that Section 7 protects." The Board stated the reality that employers try to follow, which is that

> [w]e live and work in a civilized society, or at least that is our claimed aspiration. The challenge in the modern workplace is to bring people of diverse beliefs, backgrounds, and cultures together to work alongside each other to accomplish shared, productive goals. Civility becomes the one common bond that can hold us together in these circumstances.

What does this mean for employers? Employers have the right to hold employees accountable when they engage in disrespectful behavior toward managers, other employees as well as disruptive behavior. This includes considering what employees post on social media. In a society today when civility to some appears to be a historical concept, employers may assert themselves. Be consistent and hold employees accountable for disrespectful, vulgar, disruptive, or other inappropriate behavior.