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Does Labor Law Protect Employees Engaged In Harassment?

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Employers across the U.S. have been moving swiftly to prevent and eradicate harassment in the workplace since the advent of the #metoo movement last year. While in many instances terminating employees engaged in “harassing” behavior can be an easy decision, the National Labor Relations Board (NLRB) has, in the past, forced employers to reinstate employees discharged for misconduct that potentially constituted unlawful harassment under federal employment laws, such as Title VII of the Civil Rights Act. This raises the question: Does labor law protect employees engaged in harassment? According to a new report by *Bloomberg BNA*, we may have a clearer answer to this question. NLRB General Counsel Peter Robb reportedly is meeting with leaders at the Equal Employment Opportunity Commission (EEOC) “to try to thread a needle between offensive speech that’s protected by federal labor law and comments that may be considered harassment under a separate workplace discrimination law.” The potential inconsistencies between the NLRB’s and EEOC’s positions on this issue have arisen in various instances over time, and they most recently were highlighted in a case last year when a federal court upheld an NLRB order that required a company to reinstate a worker who directed racial slurs at replacement workers during a strike. The board’s decision, in part, focused on the fact that the harassing conduct was related to “protected activity” (a strike) under the National Labor Relations Act (NLRA). That decision caused much consternation for employers around the country. Needless to say, it’s difficult to reconcile decisions like that with guidance from the EEOC that employers should generally prohibit the use of racial slurs in the workplace given they can constitute unlawful harassment and/or discrimination under Title VII. Accordingly, joint-guidance from both agencies more clearly identifying if/when harassing misconduct by an employee may be protected by labor law cannot come soon enough. Even without formal input from the EEOC and NLRB, there have been a couple positive developments for employers on this front from the labor board recently that may signal the agency will be taking a different view on issues like this. In December of last year, the board issued a ruling generally stating it will be upholding workplace “civility” rules despite the fact it had been striking down many such policies in recent years; and then in February of this year, the NLRB upheld the discharge of an employee who engaged in significant misconduct despite the fact he was engaged in “protected activity” at the time. While employers still face some uncertainty in this context in the absence of formal joint-guidance, these other recent developments at the NLRB are worth noting as companies navigate complex situations where both misconduct – including potential harassment – and potentially protected NLRA activity are involved.