

## 'Hey Boss, F\*@& You!' Profanity-Laced Facebook Tirade Not Enough To Get The Axe

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A recent case out of the Second Circuit Court of Appeals demonstrates yet again the perils of firing an employee based on a seemingly inexcusable Facebook tirade. The matter involved an employee for a catering company who was upset that his supervisor admonished him and others in a “raised, harsh tone” about “chitchatting” with co-workers as guests arrived at a catered event. In response, the employee used his cell phone to make a public post on Facebook that said: “Bob is such a NASTY M----- F----- don't know how to talk to people!!!!!! F--- his mother and his entire f----- family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!!!” (Quote has been modified.) The employee knew that his Facebook friends, including 10 co-workers, would be able to see the post. His employer investigated and, not surprisingly, fired the employee, who immediately filed a charge with the National Labor Relations Board (NLRB) alleging that he had been terminated illegally and in retaliation for “protected concerted activities” under the National Labor Relations Act (NLRA). The NLRB agreed with the employee, finding that the employer otherwise tolerated profanity and that the employer’s anti-union sentiment bore heavily on the termination (the union vote was two days after the admonishment and subsequent Facebook post). The Second Circuit affirmed the NLRB’s decision, adding that the profane outburst was not in the immediate presence of customers and did not disrupt the catered event. Under these circumstances, the court found that the employee’s conduct did not lose the protection of the NLRA and that the employer had committed an unfair labor practice. While the court acknowledged that these facts sit at the “outer bounds” of protected conduct, it is a good bet that different judges or panels might view such a post (which not only curses the supervisor, but also invokes his mother and entire family) as crossing the line into unprotected conduct rendering the employee unfit for further service. Regardless, this case represents a great example of why employers need to take a step back when profane social media posts come to their attention. A knee-jerk reaction might not be the legal reaction, at least according to some courts and the NLRB.

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