Now You, Too, Can Call Your Boss a Nasty Motherf****r

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April 26, 2017

Maybe we've all thought it at some point in our careers. But according to the Second Circuit Court of Appeals, you might actually be able to get away with saying it—that is, calling your boss a *nasty mother****r—if* you're saying it because you care about your coworkers, and *if* you all swear a lot at work anyway.

So has demonstrated Hernan Perez, a former server at New York catering company Pier Sixty, and now a foul-mouthed trailblazer for questionable employee rights. His plight, and verbatim reprints of his lurid, social media-based profanities, can be found in a decision just published by the Second Circuit Court of Appeals in *National Labor Relations Board v. Pier Sixty, LLC*, Nos. 15-1841-ag (L), 15-1962-ag (XAP) (April 21, 2017).

[Warning: explicit vulgarities will appear below. Not that your kids read this blog, anyway.]

In 2011, workers at Pier Sixty petitioned the National Labor Relations Board (NLRB) for an election to vote for union representation. One day at work, in the run-up to the election, a manager (we'll identify him here only as "Bob") told Perez and others "in a harsh tone" to spread out on the catering floor better to serve customers. Perez didn't like this. We know *for sure* that Perez didn't like this, because one day later he posted on his Facebook page:

Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

It is difficult to know where to start, and whether to feel sorry for Bob, Bob's mother, or Bob's entire, um, family.

Pier Sixty didn't feel sorry for Perez at all, however. Anyone reading the Facebook post would recognize Perez's public estimation of his boss as a career-limiting move. And Perez was fired. He then filed unfair labor practice charge with the NLRB, claiming that his termination was motivated by his having engaged in activity that was protected under the National Labor Relations Act—and the NLRB agreed.

Pier Sixty's trouble actually started in 1935, way before Perez was born, when Congress passed the National Labor Relations Act (NLRA). Under Section 7 of the NLRA, employees have a right to choose a union to represent them, and "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." The reason for this statutory protection is obvious: many employers don't like it when their employees unionize or complain about working conditions, and employees' Section 7 rights wouldn't mean much if employers could fire them for engaging in protected concerted activity.

The Second Circuit found that Perez's Facebook abomination, however offensive, was protected under Section 7. To see why, read what the Court itself had to say:

First, even though Perez's message was dominated by vulgar attacks on [Bob] and his family, the "subject matter" of the message included workplace concerns—management's allegedly disrespectful treatment of employees, and the upcoming union election. Pier Sixty had demonstrated its hostility toward employees' union activities in the period immediately prior to the representation election and proximate to Perez's post. Pier Sixty had threatened to rescind benefits and/or fire employees who voted for unionization. It also had enforced a "no talk" rule on groups of employees, including Perez and [another server], who were prevented by [Bob] from discussing the Union. Perez's Facebook post explicitly protested mistreatment by management and exhorted employees to "Vote YES for the UNION." Thus, the [NLRB] could reasonably determine that Perez's outburst was not an idiosyncratic reaction to a manager's request but part of a tense debate over managerial mistreatment in the period before the representation election.

For further context, the Second Circuit also pointed out that similar vulgarity was routinely tolerated at Pier Sixty. (Note: do *not* ask Perez for one too many *hors d'oeuvres* unless you're ready for an earful.)

It would be easy to criticize a crazy NLRB and a liberal Second Circuit for enshrining Perez's references to what Bob may or may not have done to his mother in the pantheon of protected labor rights. But as with so many things in labor and employment law, context is everything. The employer tolerated crude language at work, apparently made no secret that it didn't like that Perez liked the union, and fired Perez for speech that was more or less about the union (with Bob and his mother, and their family, as collateral victims in the driveby). This made it far easier for the Second Circuit to conclude that, profanity notwithstanding, Perez's speech was related to working conditions and the union election.

What might Pier Sixty have done to keep Bob's purported relations with his mom off Facebook? For starters, it might have trained Bob a little better on how to react during a union organizing campaign. Telling employees not to talk to each other, threatening to rescind benefits if employees organize, and preventing employees from discussing the union signals fear, which everybody can smell—including every employee who was about to vote in the Pier Sixty union election. (Employee reaction: "If my employer is so scared of the union, maybe the union is onto something"; or "You told me not to do something, and I'm human, so I'm going to do it.") Managers are much better off welcoming questions and asking employees to keep an open mind to information about unionization than attempting to gag them.

The bottom line for employers is this: when employees are talking about terms and conditions of employment, particularly where a question of union representation is out there, they can say more—and say more offensive things—than employers would often prefer to hear at work. Employers should tread carefully when taking punitive action against employees for things the employer doesn't like hearing (or reading).

An employer still has the right to insist on efficient, appropriate provision of services to customers, and insist that employees do their jobs well. If Perez had screamed his vulgarities to a room full of paying customers, this case might have ended differently; creating offense or chaos in a physical workplace with real customers in it isn't the same thing as a Facebook post that is much less direct.

But the facts in the Second Circuit case were what they were. Employers now live with the infamous Perez Rule, under which employees may have the option of telling the boss to go f**k him- or herself.

But only if they’re saying it on behalf of their coworkers. And only if they all swear at lot at work.