

# Civility's Dead: Profanity, Insubordination, And Unprofessional Speech As Protected Activity

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## Today's Topics

- Basic Framework for the NLRA
- Protected Speech
- Social Media and Protected Speech
- Political Speech
- Hypotheticals and Case Examples
- Employer Best Practices

## The National Labor Relations Act:

- Regulates unionization
- Prohibits discrimination or retaliation
- Employees have rights under the NLRA whether or not unionized

## Under Section 7, Employees Can:

- Self-organize
- Form & join labor organizations
- Collectively bargain if represented
- Engage in other concerted activities

## Protected Speech

- Concerted activities
- Mutual aid
- Can include:
  - Discussing wages, benefits and other terms of employment
  - Protesting employer action related to terms of employment
  - Seeking out third-party assistance from union or otherwise

# Cases and Hypotheticals

## **American Federation for Children, Inc.**

- Employee contacted national level officials to report concerns.
- Employee alleged manager was “racist” and “anti-immigrant” to co-workers.
- Employer was found in violation for:
  - Telling employee not to contact national staff with concerns,
  - Characterizing comments made about a manager as “unprofessional” and “inappropriate,” and
  - Terminating the employee for engaging in protected concerted activity.

## Trader Joe's

- Employee raised concerns about lack of COVID-19 protocol.
- Employee had an outburst on the sales floor, leading to a complaint from a customer.
- The employee filed a charge and discussed it with co-workers.
- Employee was terminated shortly after.
- The NLRB found that the termination was motivated by the protected acts.

*Trader Joes & Jill Groeschel, 373 NLRB No. 73 (July 9, 2024).*

## Pain Relief Centers, Pa.

- Employees walked out during shift to protest alleged mistreatment.
- The NLRB found that the employees did NOT quit because they walked out.
- The employees were reinstated with backpay.
- The walkout was considered protected concerted activity.

## Home Depot

- An employee had “BLM” drawn on his uniform to represent “Black Lives Matter.”
- The refusal to remove the letters was considered concerted.
- The employee’s refusal was considered, “for mutual aid and protection,” because of prior alleged discrimination in the workplace.

*Home Depot Usa, Inc., 373 NLRB No. 25 (Feb. 21, 2024).*

## Pier Sixty

- Employees were attempting to unionize.
- An employee made a social media post calling his supervisor a “nasty motherf\*\*\*\*er.”
- The employee also posted, “f\*\*k his mother and his entire f\*\*\*ing family!”

## American Medical Response

- An employee made a Facebook post calling her supervisor a “d\*\*k” and a “scumbag” for denying her union representation.
- Co-workers interacted with the post in support.
- The employee was terminated in response.
- The complaint settled, but the NLRA protected the employee because:
  - employees can discuss working conditions while not at work, and
  - conduct was not so egregious as to lose protection under the NLRA.

## Alstate Maintenance, LLC

- **Background:** A skycap made a remark to his supervisor in front of other skycaps about not receiving tips for assisting with a soccer team’s equipment.
- **Issue:** The NLRB initially ruled that the skycap’s remark was not protected concerted activity.
- **Decision:** The Board later overruled this decision, applying a broader “totality of circumstances” test to determine that the comment was indeed protected concerted activity.

## General Motors - Background

- **Background:** union person at assembly plant involved in three separate incidents of offensive language.
  - During a discussion about overtime coverage, to a manager said: "You can't f\*\*\*ing tell me what to do."
  - In a meeting, mockingly invoked a caricature of a slave, using racially offensive language. He made comments such as, "I'm not your f\*\*\*ing slave," and "I'm not your f'ng [N-word]."
  - Played loud music with profane, racially charged, and sexually offensive lyrics during a work-related meeting.

## General Motors - Conclusion

- **Conclusion:** not automatically protected
  - Abusive conduct can be separated from the connected Section 7 activity (protected concerted activities).
  - An employer may lawfully discipline an employee for abusive conduct if it is unmotivated by Section 7 activity or if the employer would have issued the same discipline even in the absence of the protected activity.



## Triple Play Sports Bar and Grill

- **Background:** Employees posted and commented on Facebook about their employer's tax withholding errors.
- **Issue:** The employer terminated the employees for their online comments.
- **Decision:** The NLRB ruled that the Facebook discussion was protected concerted activity because it involved mutual workplace concerns.

## Joliff v NLRB

- **Incident:** Employees sent a letter to both their corporate office and one of their largest customers, Honda, complaining about their working conditions. They highlighted issues such as inadequate safety measures, poor management practices, and unfair treatment of workers.
- **Action Taken:** The employees were terminated by TNT Logistics for allegedly damaging the company's reputation by sending the letter to Honda.
- **Conclusion:** employees have the right to appeal to a third party about their working conditions, even if that third party is a major customer, unless the communication is maliciously false.

# Employer Best Practices

## Best Practices

- NLRA Compliant Policies
  - Social Media Policies
  - Professional Conduct Policies
  - Include disclaimers
- Supervisor Training
- Risk Assessment

# Questions?



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