

# NLRB: Employee's Profanity and Threatening Comments Insufficient to Forfeit Protections of the Act

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In the past, we frequently have discussed protected activity and how an employee's [profane outburst](#) or [deliberate conduct](#) may render otherwise protected activity, "unprotected." However, as this recently issued decision reinforces, the Board is usually quite tolerant of impulsive behavior and outbursts in response to legitimate grievances over the terms and conditions of employment.

## **Plant Worker Refuses to Sign Dues-Checkoff Form**

In [Alle Processing Corp.](#) 369 NLRB No. 52 (2020), the employer, a manufacturer and packager of kosher food products for hospitals, entered into a bargaining relationship with a local union. The parties' CBA contained a union-security clause requiring that all bargaining unit employees become members of the union and that the union could request the employer to fire employees who failed to pay dues and initiation fees. The contract also contained a checkoff clause authorizing the employer to deduct dues from employee paychecks and remit the money directly to the union. Dues deductions are voluntary and the each employee must voluntarily execute a checkoff authorization form.

On multiple occasions, union representatives came to talk with employees to get them to sign dues deduction authorization forms. Though their efforts succeeded with nearly all employees, a few refused to sign. As a result, the plant's manager held individual meetings with the reluctant individuals, and soon only a lone holdout remained. In an attempt to convince the employee, the employer held two additional meetings in the manager's office.

Though the employee calmly declined to sign during the first meeting, events escalated in the second. After the employee was eventually convinced to sign the form, a provocative comment from management caused him to raise his middle finger at the plant manager, who immediately threatened him with termination. The employee responded, "I can get to you whenever I want...whenever I want I can find you...this is how I work, I'm a streets guy." The employee then grabbed a small carousel containing coffee accessories, motioning as if to throw it, but was stopped and left the meeting. He was terminated and left the plant without further incident.

### **Refusing to Sign Dues-Checkoff Form is Protected Activity**

Citing numerous Board precedents, the administrative law judge found that it is well settled that "the Act guarantees to each employee the right to determine for himself, free from coercion, whether he shall sign a checkoff authorization or not." Thus, the employee's repeated refusals to sign the dues-checkoff authorization, both prior to and during the meetings with employer representatives, constituted protected activity.

### **Employee's Outburst Did Not Forfeit the NLRA's Protections**

The administrative law judge applied the following four factor set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) to determine whether the employee's conduct forfeited the protections of the Act: 1) the place of the discussion; 2) the discussion's subject matter; 3) the nature of the outburst on the part of the employee; and 4) whether the outburst was provoked by the employer's unfair labor practices. On review, the Board affirmed the ALJ's conclusion that all four factors favored a determination that the employee's conduct retained the protection of the Act.

#### The Place of the Act

The meeting where the outburst took place occurred within the plant manager's office as opposed to a work area. Only managers or supervisors were present, and there is no evidence that any employees saw or heard anything that occurred within. In fact, they worked in an entirely separate building. In other words, the employee's acts of defiance did not occur in front of other employees which would be more difficult for the employer to tolerate.

#### The Subject Matter of the Discussion

The employer admitted that the subject matter of the meeting was to discuss the employee's refusal to sign the dues-checkoff form. The employee long had been an opponent of the union, refused to sign the form on prior occasions, and therefore, his conduct occurred during his "attempted assertion of a fundamental right under the Act."

### The Nature of the Outburst

The Board upheld the ALJ's credibility determinations regarding competing accounts of the employee's conduct, noting that credibility determinations could not be overruled unless "the clear preponderance of all the relevant evidence convinces us that they are incorrect." While the Board did not "condone" the employee's use of an obscene gesture and profanity, it emphasized that the employer had no policy against profanity, and previously tolerated profanity by employees, even if directed at supervisors. The Board further found that the employee's statement that he was a "streets guy" was too vague to constitute a threat. Therefore, the nature of the employee's conduct did not militate against a finding that it remained protected under the Act.

### Whether the Outburst was Provoked

The Board affirmed the ALJ's finding that the employee's conduct occurred in response to coercive conduct by the employer. Numerous precedents hold that attempts to coerce employees to execute dues-checkoff authorizations or leading employees to believe such dues are mandatory clearly violate Section (8)(a)(1) of the Act.

### **Takeaways**

Taken in isolation, the employee's outburst of profanity and perceived threats of physical harm may appear too egregious to remain protected under the Act. However, this case cautions that such actions must be considered in the context of the regular practices at the employee's workplace. Particularly where the outburst occurs away from the eyes of uninvolved employees and in response to clearly unlawful action, the Board may find such conduct retains protection under the Act.

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- **Mark Theodore**

Partner

- **Scott S. Tan**

Associate