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Two Recent Cases May Indicate Expansion of the NLRB's Position Regarding Organizing Activity

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***Starbucks Corp.,* case number 02-CA-037548, at the National Labor Relations Board**

In June, the National Labor Relations Board (NLRB) ruled that Starbucks violated labor law by firing a worker, union supporter Joseph Agins, who used profanity in front of customers. In 2010, the NLRB found that Starbucks unlawfully terminated Agins' employment, but in 2012, the Second Circuit asked the NLRB to revisit its decision. The Board applied a different test but reached the same result, holding that Starbucks violated the law.

The original firing occurred after Agins and several other workers arrived at a Manhattan Starbucks and began protesting a ban on wearing union pins. Agins was confronted by, and in turn he cursed at, an assistant manager in front of several customers. In 2010, the Board adopted an administrative law judge's (ALJ's) finding that under the test laid out in the NLRB's 1979 *Atlantic Steel* decision, Agins' conduct was not so egregious that he lost National Labor Relations Act (NLRA) protection.

However, in a May 10, 2012, opinion, the Second Circuit found that the four-factor *Atlantic Steel* test does not apply when a worker uses obscene language in the presence of customers. The court reasoned, "We think the analysis of the ALJ and the board improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers."

On remand, the board reconsidered Agins' discharge and concluded that it was at odds with the NLRA. The NLRB used the "mixed motive" test set out in the 1980 *Wright Line* decision. The board determined that "the record establishes that the respondent's discharge decision was motivated in part by Agin's pro-union activities, which were clearly protected." That determination shifted the burden to Starbucks, which had to show that it would have discharged Agins absent his protected conduct.

The NLRB held that Starbucks did not meet that burden because the termination of Agins' employment was inconsistent with more lenient treatment of employees responsible for similar or worse misconduct. This case serves as an example of the ever-expanding protection that the NLRB is willing to extend to employees as they attempt to organize.

***Purple Communications Inc. and Communications Workers of America, AFL-CIO*; case numbers 21-CA-095151, 21-RC-091531 and 21-RC-091584; at the National Labor Relations Board**

In June, the NLRB's general counsel filed a brief arguing that employees' emails should be protected as concerted activity even when sent through a company's email system after working hours. The general counsel's office urged the Board to overturn its 2007 Register Guard ruling that employees have "no statutory right" to use an employer's electronic communication system for organizing purposes.

The brief was filed in the *Purple Communications* case, where the NLRB is reviewing an administrative law judge's ruling that applied Register Guard and found that Purple Communications Inc., which has an email policy that bans employees from engaging in activities that do not stem from a business affiliation, did not

violate labor law. In its brief, the general counsel's office argued that the Register Guard decision does not account for the realities of the modern workplace. Specifically, the general counsel's office asserted that "[t]he board should hold that employees who use their employer's electronic communications systems to perform their work have a statutory right to use those systems for Section 7 purposes during non-work time, absent a showing of special circumstances relating to the employer's need to maintain production and discipline."

Several amicus briefs have been filed, including one by a coalition of business organizations arguing that "[i]t is well established that employers have a basic property right to regulate and restrict employee use of employer-owned property for communications purposes. There is no justifiable basis for creating a new 'right' of employees to compel their employers to allow use of company email systems for Section 7 purposes."

The NLRB's decision may undercut that property right and make it even easier for employees to communicate regarding organizing activities.