PLUNKETT COONEY

Appeals Court Rules employee complaint to customer is a protected activity under federal labor Law

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You might think an employer has the right to discipline an employee for "bad mouthing" the company to its customers. Employers in Ohio, Michigan, Kentucky and Tennessee may need to think again.

If the negative comments have to do with working conditions, discipline might violate the National Labor Relations Act. And, this applies equally to a non-union workplace.

In *Jolliff v National Labor Relations Board* (NLRB), Ohio employees of TNT Logistics of North America, Inc. approached the United Auto Workers about organizing a union at TNT. They were advised to ready the workers in favor of a union, but to wait until the organizing drive at Honda became active – Honda was one of TNT's largest customers.

A few months later, the employees grew tired of waiting and decided to send a letter to TNT's corporate office and to Honda complaining about the working conditions for drivers and dock workers at TNT. Their complaints included poor management resulting in a loss of business, a lack of empathy for workers, employees being forced to work when they are sick, not permitting employees to attend funerals of family members, drivers being told to "fix" their log books and make extra runs, granting favored routes to cronies, and a lack of heat on the shipping docks.

TNT determined that three employees were responsible for the letter and terminated their employment, stating in part, "sending a threatening letter of this nature to our customer puts TNT's reputation in a bad light and additionally could lead to a loss of business or failure to get new business and we can not tolerate that by any employee."

Following their discharge, the employees filed an unfair labor practice, claiming they had been discharged for engaging in "protected concerted activity" when they voiced concerns about working conditions to TNT's largest customer.

The NLRB found that the letter was not protected because it contained "maliciously false or disparaging statements" about drivers being ordered to make extra runs and "fix" their log books. The NLRB found that, while TNT had changed the route times, there was sufficient evidence to show that the employees knew (or should have known) that the company had not asked drivers to make fraudulent entries in their log books.

The employees appealed, and the Sixth Circuit Court of Appeals reversed the NLRB's ruling.

While first noting that it must uphold the NLRB's findings of fact when there is substantial evidence to support it, the Sixth Circuit found such evidence lacking. It reasoned that employees have the right to appeal to a third party about working conditions, *even when that third party is the employer's largest customer*, unless the communication is maliciously false.

In this case, the court found that there was insufficient evidence to show that the employees knew the statements were false or acted in reckless disregard as to whether they were false or not. Therefore, the statements about working conditions to TNT's largest customer were a protected activity.

Employers need to recognize that employees have the right to engage in protected concerted activity and not just those who are members of a union. Thus, an employee has the right to be openly critical (on behalf of himself and co-workers) of his employer and working conditions even to customers, unless the employee makes statements that he knew or should have known were false and did so maliciously. Disciplining an employee under such circumstances could violate federal labor laws.

For a complete copy of *Jolliff v National Labor Relations Board*, click here.