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Killing the Boss in Effigy is Not Protected Activity Under NLRB

Written by Sarah R. Marmor

Many commentators have seen the NLRB’s various public pronouncements severely limiting employers’ ability to fire employees for often demeaning and intemperate social media criticisms of managers and their employers. The message has basically been that anything goes when you are attacking the company or your boss, under the incredibly broad (and growing) concept of protected concerted activities – i.e., where two or more workers engage in actions to improve working conditions or wages. Now comes word – albeit in a non-social media context – that there may be limits even at the NLRB on how nasty employees may be without fear of dismissal or other sanction.

According to a Law360 article today, the NLRB has dismissed nine complaints by terminated or suspended employees of American Apparel, Inc. who took place in a parking lot protest against the company as part of alleged union organizing activities – a protest that included attacking an effigy of American Apparel’s female CEO. “While numerous employees were present at the protest where the figure bearing a likeness to CEO Paula Schneider was beaten and stabbed with a long, sharp stick, the terminated workers were among the more active participants,” Law360 writes. “The protesters used the stick, which had colorful tissue attached to it, to ‘bash in’ the figure’s skull, beat it in its face and stab it in its stomach.”

It ought to be obvious that such conduct is beyond the pale, but given the public pronouncements and decisions of the NLRB in the past several years, one could have imagined this case going the other way. Companies and their managers are required to have extremely thick skin when it comes to public statements by their employees. This is one reason that we often counsel clients not to have managers “friend” employees who work for them. It is hard to “unsee” nasty comments, and if there is a record that the boss has seen them, that can be enough to substantiate a retaliation claim, at least at the pleadings stage. One lesson from the American Apparel cases, however, may be that when the criticisms get to the point of a safety issue, the NLRB will draw the line.

The dismissed complaints are American Apparel Inc., case numbers 21-CA-159063, 21-CA-159064, 21-CA-159065, 21-CA-159066, 21-CA-159071, 21-CA-159392, 21-CA-159393, 21-CA-159395 and 21-CA-159396, with the National Labor Relations Board.

[American Apparel Cleared Over Firings After Pinata Protest: Law360](#)