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**Authors:**



Gary S. Starr  
(860) 251-5501  
gstarr@goodwin.com



Jarad M. Lucan  
(860) 251-5785  
jlucan@goodwin.com

## The Complaint Over Lunch With the Boss As Protected Activity

Is a non-union employee who speaks out about employment matters protected by the National Labor Relations Act? If so, under what circumstances? That question is critically important because if the employee is protected and is fired, the employer may have to reinstate him, pay back pay, and post a notice that the employer violated employee rights.

The answers are not so simple. Was the employee griping to management about work? Did he take any action to mobilize employees to support him? Was he seeking to induce group or collective action?

A recent Third Circuit appeals court addressed this situation. A computer engineer went to lunch with his boss and three co-workers to build team spirit, as the company was aware that it was understaffed and wanted to bolster morale. During lunch the computer engineer complained that there were too few engineers to do all the work and that the company should have hired more engineers rather than a \$400,000 per year executive, whom he named. Two employees at the lunch agreed.

The manager reported the conversation to the company CEO, who was particularly disturbed by the disclosure of the new executive's salary, which was confidential. There was an investigation into how the computer engineer knew the executive's salary. It was found that a project he was working on allowed him to view confidential information. The CEO then met with the computer engineer and asked how he obtained the confidential information. The computer engineer did not give a straight answer. He first said he found it on the Internet and denied that he had gone into the HR data base. He next said the executive's salary was water cooler scuttlebutt, and then claimed he had heard it from two employees. Shocked at hearing this explanation, the CEO spoke with one of these long-time employees, who denied providing any confidential information. The CEO concluded that the computer engineer had breached the company's confidentiality policy, had lied to him, and was not trustworthy. As the business required maintaining confidentiality of customer data, the CEO fired the computer engineer for lying and disclosing confidential information.

The fired employee fought his discharge at the National Labor Relations Board (NLRB). After a hearing, an administrative law judge (ALJ), concluded that the computer engineer's lunch comments were protected, that the Company's confidentiality policy was overly broad and unlawful, and that the firing was unlawful. The NLRB upheld that decision ordering reinstatement and back pay. An appeal followed.



The Court noted that the computer engineer had not discussed the work situation with others before the lunch nor did he seek support from others afterwards. The Court held, however that prior action, being selected as a spokesperson, or having plans to pursue the issue with others afterwards is not required for protected activity. What does matter is whether the conduct was taken with the intent to induce or effect group action in furtherance of group interests. As the computer engineer's complaints related to work, they were protected as two co-workers had agreed with his views.

While the NLRB ended its analysis there, the Court determined that the Company had the right to explain the reason for the termination. There needed to be a review whether the Company would have fired the computer engineer for a reason that did not involve protected activity, such as his evasiveness, dishonesty, and lack of trustworthiness.

The computer engineer's shifting explanations raised issues of honesty and trust and could be independent reasons for the firing. As neither the ALJ nor the NLRB had considered the alternative basis for the discharge and had not explored whether the reasons were a pretext for an unlawful firing, the Court sent the case back for a further examination of the employer's rationale. The Court told the NLRB to examine whether the company had established the importance of integrity and honesty in its business and whether employees had been disciplined in the past for similar activities.

**We recommend** before firing any employee to closely review the facts when an employee is raising concerns about work. Is he simply griping on his own account or serving as a spokesperson for others? Have others agreed with him? If so, he probably is engaged in "protected concerted activity." This can occur even if there is no union and no union organizing taking place. If the comments warrant discipline, conduct a review of what expectations have been violated; are those expectations in writing and narrowly drawn to be enforceable; and have others been disciplined in the past for similar activities. Undertaking this review in advance could save 5 years of litigation and legal fees. Further, a review of the policy relied on to support discipline is required as the NLRB has been scrutinizing policies to favor employee rights. This case is another reminder that terminations should occur only after analysis and reflection and policies need to be carefully drafted to satisfy the NLRB.

### **Questions or Assistance:**

If you have questions regarding protected activity, please contact Gary Starr at [gstarr@goodwin.com](mailto:gstarr@goodwin.com) or (860) 251-5501 or Jarad Lucan at (860) 251-5785 or [jlucan@goodwin.com](mailto:jlucan@goodwin.com).

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289 Greenwich Avenue  
Greenwich, CT 06830-6595  
203-869-5600

One Constitution Plaza  
Hartford, CT 06103-1919  
860-251-5000

265 Church Street - Suite 1207  
New Haven, CT 06510-7013  
203-836-2801

400 Park Avenue - Fifth Floor  
New York, NY 10022  
212-376-3010

300 Atlantic Street  
Stamford, CT 06901-3522  
203-324-8100

1875 K St., NW - Suite 600  
Washington, DC 20006-1251  
202-469-7750

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