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NCLA Clinches 1st Amend. Victory in NLRB Lawsuit over Ben Domenech Satirical Tweet, No Veiled Threat, Says Court

FDRLST Media, LLC v. National Labor Relations Board

Washington, DC (May 20, 2022) – The U.S. Court of Appeals for the Third Circuit sided with the New Civil Liberties Alliance today in its [ruling](#) to vacate the National Labor Relations Board’s (NLRB) flawed decision to charge FDRLST Media, LLC with committing an “unfair labor practice.” The Court said, “[t]he record contains no sign—indeed, no inkling—of any circumstance at FDRLST Media that leads us to conclude that a reasonable employee would interpret Domenech’s tweet as a veiled threat.”

NCLA, a nonpartisan, nonprofit civil rights group, filed an [appeal](#) in *FDRLST Media, LLC v. National Labor Relations Board* in June 2020, challenging NLRB’s [ruling](#) that it was an unfair labor practice for petitioner Ben Domenech to have posted a [satirical tweet](#) from his personal account. NLRB’s order for Mr. Domenech to delete his personal tweet is unlawful because the tweet is (1) not an unfair labor practice, and (2) protected by the First Amendment.

The Court held that FDRLST did not violate the National Labor Relations Act (NLRA). Judge Thomas Hardiman wrote the majority opinion, concluding that NLRB’s “finding is not supported by substantial evidence,” and that the Board’s “failure to consider the tweet’s context dooms its finding of a veritable threat.”

The First Amendment protects Mr. Domenech’s satirical speech. As Judge Hardiman emphasized, “[T]o give effect to Congress’s intent and avoid conflict with the First Amendment, we must construe the Act narrowly when applied to pure speech, recognizing that only statements that constitute a true threat to an employee’s exercise of her labor rights are prohibited.” NLRB’s analysis of the context of Mr. Domenech’s tweet ultimately fell short. As the Court explained:

Employees’ subjective impressions are especially helpful where, as here, the employer claims his statement was made in jest. **Humor is subjective.** What is funny to a fisherman may be lost on a farmer. A quip about New England winters is unlikely to get a laugh in Alaska. The propensity for jokes to fall flat for want of context or audience understanding has given rise to idioms like “I guess you had to be there[.]” ... Excluding context and viewing a statement in isolation, as the Board did here, could cause one to conclude that “break a leg” is always a threat. But when expressed to an actor, singer, dancer, or athlete, that phrase can reasonably be interpreted to mean only ‘good luck.’

NCLA released the following statements:

“NCLA is thrilled with this outcome. We knew all along that this tweet did not violate the National Labor Relations Act. Ben’s case highlights the problems with agency in-house adjudications because they require enforcement targets to run the gauntlet of a deeply biased process. It took getting this case before an Article III court, with independent judges, for free speech principles to prevail.”

— **Kara Rollins, Litigation Counsel, NCLA**

“My thanks to the Third Circuit for this decision, which honors and defends free speech and the right to tell a joke even if a humorless Twitter troll doesn’t get it. The decision and concurrence also raise key questions about the scope of the NLRA, questions I hope the courts will resolve, before other Americans in our social media age are subjected to taxpayer-funded ideological harassment for daring to laugh at people who don’t like to be mocked.”

— **Ben Domenech, employee of FDRLST Media, Petitioner in *FDRLST Media, LLC v. NLRB***

“NCLA commends the Third Circuit for ruling that NLRB’s authority to supervise expression on social media violates the First Amendment when used to penalize a harmless joke. However, we continue to believe that the NLRA does not empower random people to activate NLRB’s enforcement machinery in the first place to punish speech they dislike. We also believe federal agencies like NLRB do not have the power to haul enforcement targets to foreign jurisdictions to adjudicate their alleged transgressions. NCLA will continue fighting to vindicate those principles in the future.”

— **Mark Chenoweth, President and General Counsel, NCLA**

For more information visit the case page [here](#) and watch the case video [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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