The NLRB Continues Making Its Presence Known in Non-Union Employers' Backyards!

For those remaining non-union skeptics who wonder "why do you keep talking about the NLRB?" in these alerts, this latest decision may just make believers out of you that the NLRB is a force to be reckoned with - even if you are not unionized.

In*Human Services Projects, Inc.*, 358 NLRB No. 2 (2012), the NLRB upheld an Administrative Law Judge's finding that a (non-union) employee who told his supervisor to "make him" and gestured for the supervisor to come over and fight him when the supervisor told the employee to leave the employer's premises at the end of his termination meeting was engaged in protected "concerted activity" under the NLRA - even though the police ultimately had to be called and escort the employee off the employer's premises in handcuffs in order to make him leave!

If we had given you this scenario as part of an HR training course and asked "how many of you would say termination was warranted here?" we would imagine 99 if not 100% would have said "YES, DEFINITELY!"

So, why wasn't it here?

The NLRB found that the employee in question had engaged in protected "concerted activity" under the NLRA. Specifically, the employee and his co-workers' pay had been cut due to the struggling economy in 2009. In May of 2010, the employer called a meeting to inform all non-exempt employees that they might get the 2009 cut restored, but they would not receive any raises beyond that in 2010.

The employee at issue spoke up in this meeting and told the managers conducting it that this was "not good enough" and that because the employer's wage rates were so low they could not find other employees to hire. Other employees then joined in to comment on the employer's wage rates and general treatment of employees. A few days after this meeting, the employee wrote a letter to the employer's Board of Directors reiterating the complaints he had made during the meeting and asking for copies of the employer's financial statements and Board meeting minutes. He distributed copies of this letter to his co-workers.

A few days later the employee was told that management wanted to meet with him. He was not told that this meeting was mandatory or that he would be disciplined if he declined it. So decline it he did.

Two days later, he wrote another letter to the Board of Directors. Company management allegedly determined to discharge him the following day (but did not inform the employee of this decision until the day after). Before being let go the following day for "insubordination," the employee distributed his second letter to the Board of Directors to his co-workers.

When he asked for the details of his alleged insubordination during his termination meeting, the employer refused to give him any. He was told that his termination was "final" and to leave the premises immediately. That is when the incident described in the opening paragraph above occurred with his supervisor.

The NLRB determined that the employee's "blow up" was not severe enough to warrant denial of reinstatement, as they found that it was a spontaneous remark provoked and therefore "part of" the fact that the employee was being disciplined for engaging in the concerted activity described above (i.e., the meeting comments, Board of Directors' letters, etc.).

The Board has previously found that employees are permitted "some leeway for impulsive behavior when engaged in concerted activity."

Similar decisions have involved Board rationales that "even the most repulsive speech enjoys immunity, provided it falls short of deliberate or reckless untruth; federal law gives license to use intemperate, abusive or insulting language

without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point." *Dries & Krump Manufacturing,* 221 NLRB 309, 315 (1975);*Phoenix Transit System,* 337 NLRB 510, 514 (2002). "Protection is not denied to an employee regardless of the lack of merit or inaccuracy of the employee's statements, absent deliberate falsity or maliciousness, even where the employee's language is stinging and harsh." *Delta Health Center, Inc.*, 310 NLRB 26 (1991);*CKS Tool & Engineering, Inc. of Bad Axe,* 332 NLRB 1578, 1586 (2000).

For those of you whose personal sense of justice has been momentarily violated by the Board's finding in*Human Services Projects, Inc.*, that matter did have a "happy" albeit fortuitous ending for the employer. The same employee accosted the employer's bookkeeper at the post office when he proceeded to launch into a profanity-laced tirade five months after the incident with his supervisor. The NLRB found thatthis offensive rant wasnot sufficiently related to the initial incident with the employee's supervisor or the employee's other "concerted activity" and so upheld the employee's termination based on this second unrelated "flare-up."

For further information on the NLRB's ever-increasing impact on your workforce or any other labor law matter, please contactBill Trumpeter or any member of ourLabor Law Practice Group.

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