Dealership Update

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Wash His Mouth Out With Soap!

By John Donovan (Atlanta)

The National Labor Relations Board under the Obama Administration has been in the news quite a bit lately. It has repeatedly been accused of ignoring past legal precedent in order to favor employees and unions over employers. While the agency has always been one of the most politicized in the federal government, it seems to have really outdone itself in a recent case involving a dealer. You be the judge.

How It Started

Nick Aguirre was hired as a used car salesman by Plaza Auto Center. On his first day on the job, he worked a tent sale and when he asked about bathroom facilities, he was told that there were none and that he could use the bathrooms at businesses across the street. Later, at a sales meeting, he asked his managers about taking breaks and eating during the tent sale and was told that "you're always on break buddy…you just wait for customers all day." His managers also told him that if he did not like the company's policies, he was free to leave.

A month later Aguirre spoke with his coworkers about their pay plan and the fact that they were paid only commissions with no minimum wage guarantee. A short time later, Aguirre sold a vehicle on the company's "flat list" and expected to receive a commission of $1,000 to $4,000. However, he was paid only $150. When he confronted his manager, the manager told him that the commission was low because he had given the vehicle away for almost nothing.

At another sales meeting, Aguirre and others complained about the company's practice of charging all sales people for the repair costs to any vehicle damaged on the lot. The owner responded that he did not like employee negativity and told them that he had a stack of applications from people who wanted to work there.

After about three months on the job, Aguirre told his manager that he wanted to know what certain cars cost because he was convinced that the company was stealing from him. The manager again invited him to go elsewhere if he did not trust them. At about the same time Aguirre learned from the state wage-hour agency that sales people were entitled to be paid at least the minimum wage even if they had no commissions for the week. He confronted the office manager with this information and she suggested he discuss it with the owner.

Learning of his complaints, Aguirre's managers called him into a meeting with them and the owner. The owner told him that he had heard that he was "talking a lot of negative stuff" that affected the sales force. He told Aguirre that he should follow the company's policies and procedures, that the company does not disclose the cost of vehicles to sales people and that Aguirre should not be complaining about his pay. The owner again reminded him that if he did not trust the company, he did not have to work there. At that point, Aguirre rose out of his chair and called the owner a "f***ing mother f***ing," a "f***ing crook," and an "a**hole." He also told the owner that he was stupid, that nobody liked him and that everyone talked about him behind his back. Not surprisingly, the owner fired him.

First Stop: The NLRB

Aguirre did not go to the EEOC as one might expect. Instead, he filed a charge with the National Labor Relations Board. Many employers believe – incorrectly – that an employee can only file a charge with the NLRB if they are somehow involved with a union. But that is not the case at all. The NLRA protects the right of *any* employee to engage in "protected, concerted activity." Simply put, "protected concerted activity" is any discussion of or complaints about wages, hours, or working conditions (activity), which are matters of common concern (concerted), provided it is done in a reasonable manner (protected).

The NLRB issued a complaint and the case went to trial before an Administrative Law Judge (ALJ). The NLRB's attorneys argued that telling an employee he could quit if he didn't like the way the company did business was a violation of the law. They also argued that Aguirre should be reinstated with back pay because he had complained about his wages and working conditions, that these were common concerns among his coworkers and that his comments to the owner were not so flagrant as to be unprotected.

The ALJ found that the managers' comments to Aguirre – that he could quit if he did not like the company's policies – did in fact violate the law:

> It is well settled that an employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that … engaging in … concerted activities and their continued employment are not compatible, and implicitly threatens discharge of the employees involved.

The ALJ also found that Aguirre's complaints about breaks, restroom facilities, and compensation constituted "concerted activity." But after witnessing firsthand all of the testimony concerning the incident, the ALJ characterized Aguirre's outburst as "repeated, extensive, and personally derogatory statements to a supervisor," and noted "Mr. Aguirre repeatedly reviled Mr. Plaza in obscene and personally denigrating terms accompanied by menacing conduct and language." As a result, the ALJ concluded that the conduct had lost its protection and that Aguirre was lawfully terminated.

The case was appealed to the National Labor Relations Board. In a 2-1 decision, the Board reversed the ALJ, ruling that Aguirre did *not* lose the protection of the Act, despite his having cursed out his boss. The Board relied on a 1979 NLRB case (*Atlantic Steel Co.*) where the Board set forth the test for determining if an employee's conduct or language crossed the line. The four-part test requires the Board to consider: 1) the place of the discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst; and 4) whether the outburst was in any way provoked by the employer's unlawful actions.

The Board noted that the law allows some latitude for impulsive conduct by employees in the course of protected concerted activity, but, at

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the same time, recognizes that employers have a legitimate need to maintain order. The Board found that the incident occurred in a manager's office and was not overheard by coworkers, that the discussion involved "concerted activity," and that the outburst was provoked to some extent by the employer's unfair labor practice (telling the employee he could quit if he did not like things). But the Board rejected the ALJ's finding that the outburst was so severe as to cause Aguirre to lose the protection of the NLRA.

In a rather unprecedented step, the Board rejected the ALJ's characterization of the outburst as "belligerent," "menacing," and "at least physically aggressive if not menacing," even though it was based on the ALJ personal evaluation of all the witnesses as they testified at the trial. Based on the same evidence, the Board stated:

> We conclude that Aguirre's outburst, while vehement and profane, was brief and unaccompanied by insubordination, physical contact, threatening gestures, or threat of physical harm. Therefore, we find that his conduct did not render him unfit for further service and thus did not exceed the bounds of statutory protection….

The Board ordered the employer to reinstate Aguirre with full back pay, dating back to his termination nearly two years before.

On To The Court Of Appeals

The employer appealed the NLRB's decision to the U.S. Court of Appeals for the 9th Circuit, considered by many to be the most "employee friendly" court in the country. After reviewing the entire record, the Court of Appeals enforced that part of the NLRB's decision that held that telling an employee that he was free to quit if he did not like his working conditions was a violation of the law. However, it disagreed with the Board's analysis of Aguirre's conduct.

The Court reasoned that the Board's analysis of the incident suggested that an employee's outburst does not factor into the loss of the Act's protection unless it is accompanied by physical conduct, or at least a threat that is physical in nature. The Court noted that this analysis was at odds with the Board's precedents which have recognized that an employee's offensive and personally denigrating remarks *alone* can result in the loss of protection of the Act.

The Court concluded that the NLRB had erred in its initial assessment that the nature of Aguirre's outburst weighed in favor of protection of the Act. It remanded the case to the NLRB to reconsider its decision, stating:

> [U]nder the Board's own precedents, obscene, degrading, and insubordinate comments may weigh in factor of lost protection even absent a threat of physical harm. In addition, the Board should give full effect to the ALJ's factual and credibility findings, including the finding that Aguirre's behavior was menacing or at least physically aggressive in that small room, unless "the clear preponderance of *all* relevant evidence convinces" the Board that they are incorrect.

One would think that when the employee-friendly 9th Circuit tells the NLRB that it has overstepped its bounds, the NLRB would back off. But that is unlikely to happen. In all likelihood, the case will languish in Washington, D.C., for months while the employer's back-wage liability grows even larger.

Then the Obama Board will revisit the case and reach the same conclusion – that no matter how badly an employee misbehaves at work, if the employee can somehow tie his behavior to a complaint about "wages, hours or working conditions," the NLRB will come to his rescue. Perhaps we need to ask the NLRB: if Aguirre's language and conduct did not strip him of the protection of the Act, what would it take?

The Take Away

You can expect the NLRB to continue to push its pro-employee, pro-union, anti-business agenda at least through the this year's election. So until the Administration changes, expect more of the same. When confronted by someone like Aguirre, remember that the deck is stacked against you. Don't take the bait and terminate him because the NLRB may well come knocking.

My recommendation: wash his mouth out with soap – but don't put him back to work!

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