For Every Employer Action, There Is a NLRB Reaction: Board Expands Scope of Protected Concerted Activity Again

Labor & Employment Law Update

By Beverly Alfon on August 12, 2015

In a recent decision, *Central States Southeast and Southwest Areas, Health & Welfare and Pension Funds*, 362 NLRB No. 155 (Aug. 4, 2015), the National Labor Relations Board (NLRB) held that an employee's posting of a written warning at his cubicle was protected, concerted activity. The employee, Frederick Allen Moss, received the written warning from his supervisor for refusing to stop using his electronic tablet during a work meeting. In response, Moss laminated a copy of it and posted it next to his computer so that it was visible to anyone who entered his cubicle or stood at the entrance of his cubicle.

During a grievance meeting between management and Moss' union, the supervisor complained that Moss was being disrespectful and insubordinate. The director of Moss' department (the supervisor's boss) told Moss that if he did not remove the posting, he would suspend Moss for three days. Moss took down the posting after the union advised him to do so. However, the director's threat landed the employer before the NLRB.

The administrative law judge who heard the case found the employer's threat to be an "overreaction" – but not any violation of the National Labor Relations Act. He found no evidence that Moss sought the support of other employees in the grievance process or that his posting advanced his cause in the grievance process. He found no evidence that Moss was seeking the support of other employees because they wanted to be able to use their electronic devices freely while at work or to protest unfair discipline in general. He found no common cause to bring Moss' conduct under the protection of protected, concerted activity. Nonetheless, the Board in Washington D.C. reversed the ALJ and found violations of the Act.

The Board reasoned that the posting was protected because it was related to other means of communicating with other employees about discipline. Without reasoning, however, the Board dismissed the uncontested fact that Moss and the employees continued to openly discuss the written warning before and after the

posting. The Board rejected the employer's argument that it had a legitimate business justification to "remov[e] open displays of insubordination because such displays are disruptive and undermine management's authority," concluding that the employer had no factual basis for deeming the posting to be insubordinate.

Notably, the Board also found that the direction for Moss to remove the posting amounted to an unlawful work "rule" because it was communicated in the presence union stewards who could reasonably interpret that direction as a rule against any discussion of discipline through the physical posting of the discipline.

Bottom line: Whether or not you have a unionized workforce, this decision serves as a reminder that when an employee responds to discipline – comparative choices for any employer reaction should be carefully evaluated in light of the real potential for substantial and expensive litigation before the NLRB. Also, if you have not done so already, train your managers and supervisors regarding the NLRB's increased scrutiny of employer work rules.

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