

What a Joke! NLRB Certifies Union Despite Election-Related Threats

Labor & Employment Law Update

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On April 29, 2014, a three-member panel of the NLRB certified a union as an exclusive bargaining representative despite election-related threats being made by pro-union employees. The case is *ManorCare of Kingston, PA, LLC & Laborers Int'l Union of N. Amer. Local 1310*, NLRB No. 04-RC-109516 (Apr. 29, 2014). Specifically, at least two pro-union employees threatened that they would “start punching people in the face,” damage people’s cars, and otherwise physically harm coworkers who voted against the union. These threats were then repeated to other employees.

Despite the Hearing Officer finding that the threats were made in a joking manner, he nonetheless recommended that the election be set aside because the threats were repeated to other employees who were not able to tell whether the threats were serious. Because the Hearing Officer determined that the repeated threats likely influenced employees in the way they cast their votes, he determined that the election, won by the union by a count of 34-32, should be set aside and a new election, free of such threats, conducted.

The union appealed the Hearing Officer’s direction of a new election to the NLRB. The NLRB agreed with the union and concluded that because the threats were made by employees who were not agents of the union, and were made in a joking manner, the threats could not be cause to overturn the election—even though the threats were repeated to other employees on the day of the election who may not have known they were made jokingly.

The NLRB held that merely repeating the joking and casual manner threats did not transform the original threats into objectionable conduct such that the election would be set aside. In dissent, member Johnson indicated that he would set the election aside in the circumstances because if only one vote was affected by the repeated threats, the outcome of the election would have been different. Member Johnson would find the statements objectionable based on their impact, regardless of the original intent of the speakers.

Joking is all fun and games, until someone gets hurt . . .

This decision reinforces the pro-union tilt of the current NLRB. There was no dispute that the statements were made and repeated. If just one employee was afraid of having his or her “face punched in” and car damaged and voted for the union as a result, then there could be no free election possible. The NLRB improperly substituted its judgment for that of the hearing officer – who had the ability to determine how pervasively disseminated the statements were and the impact on the employees who heard the repeated threats.

During election campaigns, employers should carefully note any reports or complaints of threatening conduct and language, including “jokes.” Promptly investigate the facts and carefully document the “effect” of such threats on the employees voluntarily voicing concerns about them. Because the NLRB is unlikely to overturn an election even affected by threats from pro-union employees (as from now on it can be anticipated that such threats, when made by pro-union employees, will be characterized as jokes) employers will need to quickly and effectively deal with such situations to diffuse the effect of such threats on employees eligible to vote.

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