Summer 2015

B&K LABOR UPDATE

Inside This Issue

With President Obama's December 2014 appointment of Member Lauren McFerran, the new, fully filled National Labor Relations Board ("Board" or "NLRB") spent the first half of 2015 actively issuing a wide range of decisions that significantly impact federal labor law. What follows below are summaries of some of the Board's most influential decisions from recent months, covering employer work rules, employee protected concerted activities using social media, the Board's jurisdiction over tribal owned casinos, and the legality of class action waivers. This summary also explores several federal court opinions examining issues such as the duty to bargain over changes to employer handbooks and a court's authority to enjoin the use of an inflatable rat deployed during a labor dispute.

BOARD UPHOLDS EMPLOYEES' RIGHT TO ENGAGE IN PROTECTED CONCERTED ACTIVITY IN THE WORKPLACE AND ONLINE

Employees have a right under Section 7 of the National Labor Relations Act ("NLRA" or "Act") to engage in actions for mutual aid or protection concerning their terms and conditions of employment ("protected concerted activity"). An employer that retaliates against or disciplines employees who engage in concerted protected activity commits an unfair labor practice under Sections 8(a)(3) and (1) of the Act. Additionally, an employer that maintains and enforces work rules that expressly restrict an employee's right to engage in protected concerted activity violates Sections 8(a)(5) and (1) of the Act. Even if a work rule does not expressly prohibit Section 7 activity, it will still be found unlawful if: (1) employees would reasonably construe the rule's language to prohibit Section 7 activity; (2) the rule was promulgated in response to union or other Section 7 activity; or (3) the rule was actually applied to restrict the exercise of Section 7 rights.[1]

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[1] *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd.*, 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

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1. Employee's Profane Facebook Posting Held Protected Concerted Activity

Recently, the Board has aggressively pursued charges that employers have unlawfully disciplined employees for discussing terms and conditions of employment through various social media platforms in violation of Sections 8(a)(3) and (1) of the Act. Applying well-established law, the Board reasoned that the "totality of the circumstances" must be considered to determine whether an employee's otherwise protected social media activity is so egregious as to lose protection under the Act.

In *Pier Sixty, LLC,*[2] the Board ruled that an employee's vulgar statement did not lose the protection of the Act because the employee was engaging in protected concerted activity. There, the employees engaged in an organizing campaign in response to what they perceived as hostile and degrading treatment by the employer. Following a workplace dispute with his supervisor, employee and known union supporter Hernan Perez posted the following message to his personal Facebook page: "[Supervisor] is such a NASTY MOTHER F****R don't know how to talk to people!!!!!! F*** his mother and his entire f*****g family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!."[3] After being informed of Perez's posting, the employer conducted an investigation and terminated Perez for violating Company policy, though the Company was unable to supply Perez with the policy under which he was being disciplined.[4] Perez filed an unfair labor practice charge with the Board, alleging that his termination violated Sections 8(a)(3) and (1) of the Act because he was discharged for engaging in protected speech.[5] The employer asserted that Perez's comment lost its otherwise protected status because of the obscene, profane, and vulgar message.[6]

The Board majority established that Perez's comment was concerted protected activity for which he could not be disciplined. The majority explained that the appropriate test for determining whether off-duty, offsite social media communications lose protection under the Act is the totality of the circumstances test.[7] In evaluating Perez's posting under the totality of the circumstances, the Board considered several factors, such as the nature, context, subject matter, and location of the posting, as well as whether profanity was tolerated in the workplace.[8]

Analyzing these factors, the Board determined that the employer demonstrated animus and hostility towards the union's organizing effort around the time the post was made.[9] Moreover, Perez's activity maintained protected status despite its profane character because "overwhelming evidence" established that the employer tolerated, and often itself used, extreme profanity in the workplace.[10] Considering the totality of the circumstances, the Board found that Perez's Facebook post was protected speech. Thus, his termination was unlawfully discriminatory under Sections 8(a)(3) and (1) of the Act.

2. Suggestion Of Profanity Not Enough For Union Insignia To Lose Protection

Employees generally have a protected right under Section 7 to wear union insignia, including union buttons, in the workplace.[11] This right, however, may be limited in two circumstances. First, an employee's right to don union insignia at work is not protected where the insignia is vulgar or offensive.[12] Second, an employee's right may be limited where an employer demonstrates special circumstances sufficient to outweigh the employee's Section 7 interests and legitimize the regulation of such insignia.[13] Special circumstances include "situations where display of union insignia might jeopardize

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[2] 362 NLRB No. 59 (2015).

[3] *Id.* at 2.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id*. (citing *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 3 (2014); *Richmond District Neighborhood Center*, 361 NLRB No. 74, slip op. at 2 (2014)).

[8] *Id*.

[9] *Id.* at 2-3.

[10] *Id.* at 3.

[11] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *P.S.K. Supermarkets*, 349 NLRB 34 (2007).

[12] *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972).

[13] *Komatsu America Corp.*, 342 NLRB 649 (2005).

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employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established . . . through appearance rules for its employees."[14]

The Board recently established in *Pacific Bell Telephone Company*[15] that the mere suggestion of profanity or poor taste on union insignia is not enough for the insignia to lose its protected status. In that case, the employer claimed that it could lawfully prevent employees from wearing union buttons on job sites because they were vulgar and special circumstances outweighed the employees' Section 7 rights.[16] The buttons in question read "WTF Where's the Fairness", "FTW Fight to Win", and "Cut the Crap! Not My Healthcare."[17] The Board ruled that while the buttons may have been in questionable taste, the suggestion of profanity or double entendre was not sufficient to render the buttons unprotected.[18] The Board also rejected the employer's "special circumstances" argument, holding the employer's appearance policy and customer exposure did not, standing alone, provide special circumstances justifying the restriction.[19]

3. Employer Social Media Policies Cannot Interfere with the Exercise of Employees' Section 7 Rights

In *Boch Honda*,[20] a divided Board reiterated that the prohibition on unlawfully overbroad work rules under Sections 8(a)(5) and (1) applies with equal force to employer social media policies. In that case, the employer's handbook included a social media policy requiring employees to identify themselves in any online comments posted about the company's business or policy issues.[21] The Union filed an unfair labor practice with the Board, alleging that the employer's maintenance of the social media policy violated Section 8(a)(1) of the Act which makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.[22]

The Board agreed with the Union, finding that the employer's social media policy was unlawfully overbroad.[23] The Board concluded that because employees could reasonably construe the self-identification rule to include comments about terms and conditions of employment, it would interfere with protected activity.[24]

Notably, with respect to the remedy, Members Pearce and Hirozawa acknowledged that an employer may repudiate violations of the Act, thereby eliminating the need for a remedial order.[25] But, despite the employer's correction of the unlawful social media policy prior to the Board's determination, the majority nevertheless determined that a remedial order was necessary because the employer made the changes without notifying employees about its unfair labor practices or providing additional assurances against future violations of the Act.[26]

4. Board Reaffirms That Class Action Waivers Restrict Section 7 Activity

In two recent decisions, the Board reaffirmed its position originally set forth in *D.R. Horton*[27] and *Murphy Oil USA*[28] that an employer violates Section 8(a)(1) of the Act by requiring that employees sign class action waivers prohibiting those employees from arbitrating or litigating a claim collectively in all forums. *Cellular Sales of Missouri, LLC*[29] and *Chesapeake Energy*

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[14] *Bell-Atlantic Pennsylvania*, 339 NLRB 1084 (2003), *enfd.* 99 Fed. Appx. 233 (D.C. Cir. 2004).

[15] 362 NLRB No. 105 (2015).

[16] *Id.* at 3.

[17] *Id.*

[18] *Id.* at 3-4.

[19] *Id.* at 5.

[20] 362 NLRB. No. 83 (2015).

[21] *Id.* at 2.

[22] *Id.*

[23] *Id.*

[24] *Id. See also Farah Manufacturing Co.*, 202 NLRB 666 (1973).

[25] *Boch Honda*, 362 NLRB No. 83 at 3; *See also Passavant Area Memorial Hospital*, 237 NLRB 138 (1978).

[26] *Boch Honda*, 362 NLRB No. 83 at 3.

[27] 357 NLRB No. 184 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir 2013).

[28] 361 NLRB No. 72 (2014).

[29] *Cellular Sales of Missouri, LLC*, 3

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Corp.[30] both involved employer arbitration policies requiring all employees to waive their rights to pursue as a class action any claims arising out of their employment.[31] Reasoning that these policies infringed on employees' Section 7 rights to engage in certain concerted activities, which include filing a lawsuit against an employer, a divided Board held in each case that the class action waivers at issue were unlawful under Section 8(a)(1).

BOARD'S JURISDICTION OVER TRIBAL CASINOS REMAINS CONTENTIOUS ISSUE

The Board has jurisdiction over businesses owned and operated by Indian tribes on tribal land unless: "(1) the law touched exclusive rights of self-government in purely intramural matters; (2) the application of the law would abrogate treaty rights; or (3) there was proof in the statutory language or legislative history that Congress did not intend the Act to apply to Indian tribes.[32] The Board has been active on this issue in recent years, holding in *Little River Band of Ottawa Indians Tribal Government*[33] and *Soaring Eagle Casino & Resort*[34] that jurisdiction was properly asserted over tribally owned and operated casinos on Indian lands.

1. **Board Declines Jurisdiction Over WinStar World Casino In Oklahoma**

On June 4, 2015, however, the Board refused to assert jurisdiction over the Chickasaw Nation, an Indian tribe, in its capacity as operator of the WinStar World Casino.[35] The Board reasoned that application of the NLRA would abrogate treaty rights specific to the nation contained in the 1830 Treaty of Dancing Rabbit Creek.[36]

2. **Sixth Circuit Finds Board's Jurisdiction Over Tribal Casinos Lawful**

The Board's 2014 decision to assert jurisdiction over a tribal casino in *Little River Band of Ottawa Indians Tribal Government* was recently enforced by a divided U.S. Court of Appeals for the Sixth Circuit. The court ruled that, with limited exceptions, nothing in federal Indian law forecloses application of the NLRA to tribal owned businesses.[37]

3. **Senate Committee Considers Legislation on Board's Jurisdiction Over Tribal Casinos**

In response to the Board's recent activity on this issue, the U.S. Senate Indian Affairs Committee cleared legislation (S. 248) that would shield Indian-owned businesses operating on tribal lands from federal labor law. The House Committee on Education and the Workforce held a hearing on June 16, 2015 in which a companion bill was considered, but no vote was taken at that time.

UNION CAN ACCESS WITNESS STATEMENTS FROM COMPANY INVESTIGATIONS

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration.[38] An employer must, upon request, provide a union with information that is relevant to the union's statutory duties and responsibilities in representing employees.

Overruling a long-standing precedent, the Board recently established in *American Baptist Homes of the West*[39] that employers may only deny union requests for witness statements taken during a company investigation when the employer can demonstrate a substantial interest in keeping

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[30] *Chesapeake Energy Corp.* 362 NLRB No. 80 (2015).

[31] *Id.*

[32] 341 NLRB 1055 (2004), *enfd.* 475 F.3d 1036 (D.C. Cir. 2007) (citing *Donovan v. Couer d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

[33] 361 NLRB No. 45 (2014).

[34] 361 NLRB No. 73 (2014).

[35] *Chickasaw Nation d/b/a Winstar World Casino*, 362 NLRB No. 109 (2015).

[36] *Id.*

[37] *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 2015 BL 181067, No. 14-2239 (6th Cir. June 9, 2015), *enforcing* 361 NLRB No. 45 (2014).

[38] *NLRB v. ACME Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

[39] 362 NLRB No. 139 (2015).

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them confidential. The Board had previously held that the Section 8(a)(5) duty to furnish relevant information does not include such witness statements.[40] The Board reasoned in *American Baptist Homes* that while the disclosure of witness statements may raise legitimate concerns of confidentiality or retaliation, there is no basis under federal labor law for concluding that all witness statements, no matter the circumstances, are beyond the reach of a requesting union.[41]

REINSTATEMENT MAY BE APPROPRIATE REMEDY FOR CERTAIN *WEINGARTEN* VIOLATIONS

An employee's *Weingarten* rights guarantee union representation during an investigatory interview where the employee reasonably believes that discipline or termination may result.[42] The Supreme Court ruled in *Weingarten* that after an employee has affirmatively invoked his right to be represented, the employer must choose from the following options: (1) grant the request and delay questioning until the union representative arrives and has an opportunity to consult with the employee privately; (2) deny the request and end the interview; or (3) offer the employee the choice between continuing the interview without a union representative or having the investigation proceed without an interview of the employee. An employer that denies a request for union representation and proceeds with the investigatory interview commits an unfair labor practice.

Ordinarily, violations of an employee's *Weingarten* rights are remedied by a cease and desist order against the employer, demanding that it stop its violations of the Act. Recently, however, the Board has reconsidered the appropriate remedy for *Weingarten* violations in situations where an employee is terminated or disciplined for statements made during an investigatory interview where a request for union representation is denied.

In *E.I. DuPont De Nemours & Co., Inc.*,[43] an employee was required to attend an investigatory interview about an accident at the plant in which he worked. His requests for union representation were summarily denied, and the employer used information ascertained during the interview in support of its decision to terminate the employee.

The Board ruled that the employee's *Weingarten* rights had been violated and, in an issue of first impression, the majority reasoned that because the misconduct that precipitated the discharge included statements made during the unlawful unlawful interview, the Board should also consider whether the employee was entitled to make whole relief beyond the traditional cease and desist order.

EMPLOYER REQUIRED TO BARGAIN OVER CHANGES TO HANDBOOK

Section 8(a)(5) of the Act provides that an employer has a legal duty to bargain in good faith with the exclusive representative over terms and conditions of employment. An employer violates this Section, thereby committing an unfair labor practice, when it unilaterally changes a term or condition of employment without bargaining with the union.

In *FirstEnergy Generation Corp. v. IBEW Local 272,*[44] the court upheld an arbitration award finding that the employer was obligated to bargain over changes in handbook provisions that were negotiated with the union. FirstEnergy Generation maintained a Safety Manual Handbook, provisions of which had been bargained with the union. The collective bargaining agreement provided that any claim or alleged violation of the Handbook was subject to the grievance procedure.[45] When the employer sought to unilaterally substitute the handbook with another version, the union demanded bargaining and filed a grievance which an arbitrator sustained in the Union's favor.[46] The employer filed a lawsuit to vacate the award, arguing that the arbitrator had exceeded his authority.[47] Granting the union's motion for summary judgment, the judge held that the arbitrator correctly ruled that changing the handbook would require bargaining.[48]

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[40] *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978).

[41] 362 NLRB No. 139.

[42] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[43] 362 NLRB. No. 98 (2015).

[44] Civil Action No. 14-560 (W.D. Pa. March 16, 2015).

[45] *Id.* at 2.

[46] *Id.*

[47] *Id.* at 2-3.

[48] *Id.* at 3.

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BOARD AND COURTS ISSUE NUMBER OF SIGNIFICANT PROCEDURAL RULINGS

1. D.C. Court Of Appeals Takes NLRB To Task For Failing To Enforce Its Own Order

When a union files an unfair labor practice charge with the NLRB, a successful result at the Board can include such remedies in a Board Order as reinstatement and back pay with interest, retroactive compliance with the contract and/or its benefit plans, and providing information requested for bargaining by the union.

These are but a few examples of a whole range of remedies the Board has available to it. Once the Board issues its order, and a wrongdoer refuses or fails to comply, the NLRB proceeds to obtain a circuit court order enforcing the Board's decision. At that point, we recommend that the union become a party to the court enforcement action. The reason is that the union can then present its position to the court without being undermined by an NLRB failure to advance that position, and additionally, as a party to the court proceeding, the union can influence any settlement reached between the NLRB and the wrongdoer before the court.

Otherwise, the NLRB has the ability to settle the case on whatever terms it thinks are appropriate. Sometimes this means that the NLRB yanks the rug out from under the Union after a hard fought victory, even after years of administrative litigation, by watering down the remedy after its own order has been issued. A recent example of this is *Dupuy v. NLRB*, ___ F.3d ___ (D.C. Cir. July 17, 2015, No. 14 - 1001). In this case, the Board issued its order after eleven years of administrative litigation and then obtained a federal court of appeals judgment, enforcing an employee's right to reinstatement and back pay with interest for his unlawful termination. Despite the order and judgment, the Region then entered into a settlement agreement with the former employer where the back pay would not include interest and also allowing the employer to reinstate the employee to a job having reduced pay, benefits and job security.

The employee refused to go along with the proposed settlement and petitioned the Board for review of this "compliance determination". The Board issued a decision in which it upheld the Region's watered-down resolution. The employee then petitioned the D.C. Circuit Court of Appeals for review of the Board's decision. The court was not impressed by the Board's approach.

In its decision criticizing the Board, the circuit court noted that it was long standing Board law that once the Board order is enforced by a Court of Appeals, as happened here, the Board no longer has any authority to modify the remedy contained in that order. The court in this case could not understand how the Board could ignore that law, and proceed to water-down its own remedy. And, the court refused to allow this to be done. The Court issued an order vacating the Board's water-downed decision and returned the case to the Board to straighten out its approach in this case.

This is an example of the reason why the Union needs separate representation in a Board case. Absent such representation, the Board can be free to do whatever it wants to dispose of the case by settling for less than what the Union and employees are entitled to.

2. NLRB Invites Briefs On Union Fees For Non-Members

Signaling that it may be interested in overturning existing law, the National Labor Relations Board announced in April 2015 that it is seeking amicus briefs on nonmember fees for grievance processing in a dispute between the United Steelworkers and a Florida-based subsidiary of the Georgia-Pacific LLC paper company.[49] Under existing Board precedent, it is an unfair labor practice for a union to require non-members who are employed in a bargaining unit to pay a fee as a condition of having their grievances processed through arbitration.[50]

Specifically, the Board invited briefing on two (2) questions. First, the Board sought input as to whether the Board should reconsider the existing rule making nonmember grievance processing fees unlawful.[51] Second, if nonmember grievance processing fees are found lawful, the Board sought input as to

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[49] *Buckeye Florida Corporation*, Case 12-CB-109654 (April 15, 2015) (inviting briefs).

[50] *Auto Workers Local 1303*, 192 NLRB 966 (1971); *See also Machinists Local Union No. 697*, 22 NLRB 832 (1976).

[51] *Buckeye Florida Corporation*, Case 12-CB-109654 (April 15, 20

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what factors should be considered to determine whether the amount of such fee is proper, and what actions a union may lawfully take to ensure payment.[52]

If the Board validates fair share arrangements, the impact would be most forcefully felt in the growing numbers of so-called "Right to Work" states where bargaining unit employees are not required to pay dues and fees as a condition of continued employment. Fair Share policies would ensure that labor unions receive adequate remuneration for the representational services they are required by law to provide toprovide to both members and nonmembers alike.

3. Employer Not Entitled to Know Identities of Union Witnesses Prior to ULP Hearing

In a recent Order, the Board reversed a ruling of the Administrative Law Judge in a pending unfair labor practice proceeding.[53] In January 2015, the judge ordered the Union to disclose to the employer the names of its witnesses who would be testifying against the employer regarding allegations that it violated Section 8(a)(1) of the Act.[54] Reversing, the Board ruled that a party is not entitled in advance of the hearing to a list of the General Counsel's witnesses or any pre-hearing statements they may have given.[55]

4. Court Upholds Union's Right To Use Inflatable Rat Demonstration

The U.S. District Court for the Eastern District of New York recently refused to prevent a union's use of an inflatable rat to protest the employer's use of a non-union contractor.[56] The employer petitioned the court for a preliminary injunction, seeking to prevent the union from positioning the rat at the employer's worksites. Given that the employer's petition arose from a labor dispute, the court's authority to issue the requested injunction was governed by the Norris-LaGuardia Act which, with very limited exceptions, strips the courts of jurisdiction to enjoin certain union activity in a labor dispute.[57] Because the union's protest of the contractor's use of non-union labor did not violate the contract, the court found that "[i]t is abundantly clear that [the union] has a constitutional right to use an inflatable rat to publicize a labor dispute . . . ."[58]

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[52] *Id.*

[53] *Pacific 9 Transportation*, Case 21-CA-116403 (NLRB June 11, 2015).

[54] *Id.*

[55] *Beta Steel Corp.*, 362 NLRB 1267 (1998); *Mid-West Paper Products Co.*, 223 NLRB 1367 (1976).

[56] *Microtech Contracting Corp. v. Mason Tenders Dist. Council of Greater N.Y.*, 201 LRRM 3278 (E.D.N.Y. October 27, 2014).

[57] *Id.* at 3280.

[58] *Id.*

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Blitman&King LLP | www.bklawyers.com

Syracuse
443 North Franklin Street
Suite 300
Syracuse, New York 13204
Telephone: 315-422-7111

Rochester
16 West Main Street
Suite 500
Rochester, New York 14614
Telephone: 585-232-5600

New York
60 East 42nd Street
Suite 4000
New York, New York
10165-0006
Telephone 212-710-3004

Albany
800 Troy-Schenectady
Rd.
2nd Floor
Latham, New York 12110
Telephone: 518-785-4387

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