

Reproduced with permission from Daily Labor Report, 45 DLR AA-2, 3/9/17. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Unfair Labor Practices

Lawyers Expect Reset on Concerted Activity; Trump Labor Board Will Take Narrower View

A new Republican majority will steer the National Labor Relations Board away from the more expansive view of employee rights it employed under the tenure of President Barack Obama, management lawyers recently told Bloomberg BNA.

Employers are particularly eager to see the NLRB moderate its stance on the scope of protected concerted activity under federal labor law, the lawyers said.

The board has endorsed a “very broad and expansive” interpretation of employees’ rights to complain and protest about employment issues, Mark J. Neuberger, a management-side employment lawyer in Foley & Lardner LLP’s Miami office, told Bloomberg BNA. In the last three years, the board extended protection to individual employee acts that were never before considered to be concerted in nature, Neuberger said.

One dissenting voice in many of those decisions was Republican Philip A. Miscimarra, now the agency’s acting chairman. That suggests change could be on the horizon.

The NLRB’s expansion of employee rights is likely coming to an end as President Donald Trump prepares to appoint members who will give the board its first Republican majority in nine years, Neuberger and other lawyers said.

But the NLRB’s broad interpretation of employee rights has its supporters, too. Bryan T. Arnault, a partner at Blitman & King LLP in Syracuse, N.Y., told Bloomberg BNA that the board’s recent approach was “entirely appropriate” under the federal labor law.

The board should continue to guard the right of employees to join together for their own protection, Arnault said. He represents employees and unions in cases under the National Labor Relations Act.

For Neuberger, however, the Obama board went too far. Board officials at times appeared to tout the rights of nonunion employees under the NLRA “because they were afraid of going out of business” if union activity and related litigation continues to drop in the U.S., Neuberger said.

NLRA Protects ‘Concerted’ Activity. Federal law gives employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Concerted activity is “when two or more employees take action for their mutual aid or pro-

tection regarding terms and conditions of employment,” according to the NLRB.

The NLRB and courts have long held that employees who approach an employer with a group complaint about employment issues are engaged in concerted activity and are protected against employer retaliation.

An individual employee deputized by co-workers to deliver a group complaint to an employer also is considered to be engaged in concerted activity.

But tougher questions arise in applying the NLRA’s protections to the acts of a single employee who isn’t expressly speaking on behalf of a group.

Fresh & Easy Take on Protected Activity: Protection of Employment Laws. In the 2014 decision of *Fresh & Easy Neighborhood Market, Inc.*, the board held that an Arizona grocery clerk had engaged in concerted activity when she asked co-workers to help her document an act of sexual harassment—the posting of degrading material next to her name on a company whiteboard—that was seemingly directed at her alone.

By appealing for support on a workplace issue, the employee invoked the protection of federal and state laws against sexual harassment, and her appeal to co-workers was “acting for the purpose of mutual aid or protection,” the board held in a 3-2 decision split along party lines.

Republicans Miscimarra and Harry I. Johnson dissented. In his dissent, Miscimarra warned that the board’s theory threatened to involve the NLRB in individual employment disputes “every day throughout the country.”

Discussing Issue of Common Concern. Less than a year later, a majority of the board in *Sabo, Inc.* held that La-Donna George, a vending machine driver, engaged in concerted activity under the NLRA when she told a co-worker she had seen a help-wanted ad that Sabo might have placed.

The employees speculated Sabo was planning to replace one of its current employees, but they didn’t discuss what to do about it. Sabo later fired George for “gossiping” about the job ad, and the board found the discharge was unlawful.

The employees’ discussion involved a subject of vital and obvious concern to employees, and it therefore was “inherently concerted” under the act, the majority said.

Miscimarra again dissented. He warned that the majority’s theory was seemingly “limitless” and could apply to “mere griping” about wages, work schedules, or job security.

Extension of Earlier Concerted Activity. In July 2016, a 2-1 majority of the board held in *Omni Commercial Lighting, Inc.* that an employee who honestly—but incorrectly—believed he was covered by a collective bargaining agreement engaged in concerted activity when he sought higher pay under the agreement.

Thirty-two years before, the U.S. Supreme Court concluded that an individual asserting a right grounded in a bargaining agreement is protected by Section 7 of the NLRA. The same rule should apply to an employee who honestly, but mistakenly, believed his contract rights had been violated, the majority of the board in *Omni* said.

In his dissent, Miscimarra said Supreme Court precedent doesn't protect an employee who "does not invoke or rely on" rights actually contained in a collective bargaining agreement, so it couldn't protect an employee who was mistaken about the existence of such a right.

Miscimarra Marking Path for New Board? All three of the cases are now "ripe for reversal by a Trump board," Daniel Altchek, counsel at Miles and Stockbridge PC in Baltimore, told Bloomberg BNA.

From Miscimarra's dissenting opinions, Altchek said, "we obviously know where he stands."

These long and passionate dissents from the now-acting chairman will persuade the new board majority to pull back from the Obama board's expansion of employee rights. And such a course correction would be appropriate, Altchek said.

Arnault conceded that the recent dissents by Republicans on the Obama board may signal that a Trump-majority board will require more rigorous proof of a concerted purpose for employee activity. But he said such a change would be "contrary to the fundamental purpose" of the NLRA.

Lawyers See Change Needed and Coming. *Fresh & Easy* is a significant ruling that should be high on the new board's agenda for reversal, Altchek said.

Extending NLRA protection to an employee complaining about sexual harassment "turns the NLRA into a super-protection statute for all other labor and employment laws," Altchek said. The management community sees the case as "a real radical departure" from the purposes of the NLRA.

In *Omni*, Altchek said the board took a longstanding rule and extended it to an employee complaint that didn't even relate to a collective bargaining agreement.

And with *Sabo*, the board took an offhand conversation between two employees about a job ad and "shoehorned it" into protected concerted activity, Altchek said. If left untouched, *Sabo* would create "a new floor for what constitutes protected concerted activity."

The board will retreat from *Fresh & Easy*, *Sabo* and *Omni*, Neuberger predicted, but he offered a cautionary note.

While some have criticized the NLRB for "policy oscillation" on labor law issues, he said, Democratic and Republican board members have sometimes been hesitant about overruling recent board precedents.

The NLRB moves more slowly than other agencies. Trump appointees will make a major change at the NLRB, Neuberger said, but the impact of their appointments may not be evident for some time.

BY LAWRENCE E. DUBÉ

To contact the reporter on this story: Lawrence E. Dubé in Washington at ldube@bna.com

To contact the editors responsible for this story: Peggy Aulino at maulino@bna.com; Terence Hyland at thyland@bna.com; Christopher Opfer at copfer@bna.com