

NLRB: Secret Recording of Workplace Meeting Is Held to Be Protected Activity

By Gregory A. Hendershott and Modessa Jacobs

March 29-2011

The National Labor Relations Board (NLRB) has ruled that an employer committed an unfair labor practice when it fired a worker for secretly recording a meeting with management. While the facts of the case were unusual, the current NLRB, which increasingly has been scrutinizing and invalidating employer workplace policies, may well apply the rule more broadly.

Here, the NLRB based its decision in part on the fact that the employer did not have a policy prohibiting secret recordings. Thus, concerned employers should make sure they have such a policy. But even with it, employers must use caution when disciplining employees for conduct that could be characterized as being for the benefit of other employees, that is, so-called “concerted activity,” which is protected by the National Labor Relations Act.

The case at issue, *Stephens Media LLC d/b/a Hawaii Tribune-Herald*,¹ involved a union employee who secretly recorded a meeting with his manager, after the manager allegedly refused to allow him to bring a co-worker to the meeting as a witness. The employee thought the refusal might violate his *Weingarten* rights.² The employer did not have a policy prohibiting the possession of recording devices or recording others without their notification and consent, and there was no Hawaii state law prohibiting such conduct.

Because the employee agreed with a group of his co-workers that the meeting should be recorded to document potential labor violations, the NLRB determined that the employee’s actions were “protected concerted activity” and overturned the employer’s decision to fire the employee for making the secret recording. Also, the Board required the employer to rescind a policy it implemented *after* this incident prohibiting secret recordings. The Board said the new rule was “overly broad.”

Of course, employees can lose their protection under the Act if their actions are “sufficiently egregious.” But, in *Stephens Media*, the NLRB ruled, based on the facts of the case, that since the employee reasonably believed the meeting could result in discipline, the employee’s actions were not egregious. In making this ruling, the NLRB highlighted that no employer policy or state law prohibited the employee’s conduct.

The Board did not comment as to whether their analysis might change if a case arises in a state such as Washington,³ California,⁴ Oregon,⁵ or Alaska⁶ that prohibits the secret audio recording of private conversations without the consent of one or more parties. Nevertheless, employers in these states should not rely on those statutes alone to discharge or discipline an employee for secretly recording conversations in the workplace, since federal labor law pre-empts conflicting state laws. The employer needs to determine whether the employee was engaged in “protected concerted activity” when making the recording.

Action items for employers:

- Have a well-disseminated policy prohibiting unauthorized recordings/photographs of any kind in the workplace;
- Enforce the policy uniformly. This can be difficult because, for example, ordinary mobile phones can be used as cameras or recording devices;
- Know your applicable state law. It is helpful if state law prohibits recording without consent, but the NLRB may still rule the recording to be protected by federal law;
- Do not apply an after-the-fact new rule to discipline an employee; and
- Before disciplining or discharging an employee for making a secret recording, or for any other reason, evaluate whether the employee’s conduct could be considered for “group” benefit and therefore protected concerted activity.

FOOTNOTES

¹ 356 NLRB No. 63.

² Under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), employees are entitled to bring a witness to investigatory meetings with management if the employee reasonably believes the meeting could result in discipline.

³ RCW 9.73.030 (prohibiting a person from intercepting or recording a private conversation without first obtaining the consent of all participants in the communication).

⁴ Cal. Penal Code § 632. (prohibiting a person from eavesdropping or recording a confidential communication without the consent of all parties).

⁵ ORS § 165.540(c) (prohibiting a person from obtaining or attempting to obtain the whole or any part of a conversation ... if not all participants of the conversation are specifically informed that their conversation is being obtained).

⁶ Alaska Stat. § 42.20.310 (prohibiting a person from using an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation).

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.