NLRB UPDATE: Key NLRB Precedents Likely to Fall Under Liebman Board

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Earlier this year, we began our series *NLRB Update,* analyzing 10 critical decisions issued by the Bush-appointed National Labor Relations Board ("NLRB" or "Board") that likely will be overturned in the next few years if reconsidered by an Obama-appointed Board now chaired by Wilma Liebman. In most of the critical Bush-era Labor Board decisions that favored employers, then Board member Liebman dissented, challenging the reasoning and conclusions reached by the Board majority. Careful analysis of Liebman's dissenting opinions in these major decisions provides a legal roadmap – charting the likely course the Liebman Board will take if it is able to reconsider these issues. Consequently, we can expect significant changes in certain labor policy areas going forward. Part I of this series analyzed *IBM Corp.*, 341 NLRB 1288 (2004), concerning the representation rights of non-union employees. This analysis is available on the Ford & Harrison web site at: http://www.fordharrison.com/shownews.aspx?show=5074. In Part II, we analyzed *Guard Publishing Co. (Register Guard)*, 351 NLRB 1110 (2007), concerning the employer's right to restrict employee use of company e-mail to preclude union related communications. This analysis is available on the Ford & Harrison web site at: http://www.fordharrison.com/shownews.aspx?show=5094. In Part III below, we analyze *BE&K Construction Co.*, 351 NLRB 451 (2007), in which the Board held that an employer's unsuccessful but reasonably based lawsuit against a union does not constitute unlawful interference of Section 7 rights – even if the lawsuit has a retaliatory motive. **NLRB UPDATE PART III: NLRB PROTECTS EMPLOYER'S RIGHT TO LEGALLY CHALLENGE UNION TACTICS** *BE&K Construction Co.*, 351 NLRB 451 (2007). In September 2007, the NLRB issued a key decision protecting the right of employers to file lawsuits against labor organizations that engage in potentially unlawful conduct when trying to organize the employer. In *BE&K Construction Co.*, 351 NLRB 451 (2007), a 3-2 majority of the NLRB held the employer did not violate the National Labor Relations Act (NLRA or the Act) by filing and maintaining a reasonably based but ultimately unsuccessful lawsuit against the union, regardless of the employer's motive for initiating the lawsuit. The Board's decision in *BE&K* established a new standard for determining when an employer may take legal action challenging union campaign tactics without violating the NLRA. In *BE&K*, a non-union construction company won a contract to modernize a steel mill. Various labor unions who wanted union labor used at the steel mill engaged in a "corporate campaign" against BE&K. The unions attempted to delay the project by lobbying for the adoption of a new emissions standard, engaging in picketing and hand billing at the construction site, filing a state court action alleging violations of state health and safety laws, and filing numerous grievances against the employer's joint venture partner. In response, BE&K filed suit against the unions in federal

court asserting antitrust violations and seeking damages under the Labor Management Relations Act. The employer's legal actions were ultimately dismissed. The unions then filed unfair labor practice charges against BE&K – claiming the unsuccessful litigation violated Section 8(a)(1) of the NLRA because it unlawfully interfered with the employees' right to engage in protected organizing activities. If found liable under Section 8(a)(1), the Board could then order that BE&K pay the union's legal costs in defending the employer's lawsuit. The Board initially ruled in favor of the union. BE&K ultimately appealed the Board's decision to the United States Supreme Court. In 2002, the Supreme Court invalidated the Board's old standard that all reasonably based but otherwise unsuccessful lawsuits filed with a retaliatory purpose violated Section 8(a)(1) of the Act, and remanded the case back to the NLRB for reconsideration of the employer's case. Upon remand, the Board in *BE&K* held that merely filing an unsuccessful lawsuit against a labor union is **not** an unfair labor practice per se. *BE&K*, 351 NLRB at 451. In doing so, the majority expanded on the Supreme Court's reasoning in *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731 (1983), in which the Court had held that an *ongoing* reasonably based lawsuit cannot be enjoined as an unfair labor practice, even if it is was filed for a retaliatory purpose because that would burden the First Amendment right to petition the government for redress of grievances. Extending that rationale beyond *ongoing* litigation, the Board majority concluded that the First Amendment is "equally applicable to both *completed* and *ongoing* lawsuits." (Emphasis added). In that regard, an employer's right to access the courts is a critical component of its First Amendment right to petition the government for redress of grievances which should not be curtailed simply because the lawsuit is ultimately unsuccessful. According to the majority: We see no logical basis for finding that an ongoing, reasonably-based lawsuit is protected by the First Amendment right to petition, but that same lawsuit, once completed, loses that protection solely because the plaintiff failed to ultimately prevail. Nothing in the Constitution restricts the right to petition to winning litigants. In determining whether a lawsuit is reasonably based, the majority indicated the Board should apply the same test as articulated by the Supreme Court in the antitrust context: it would determine a lawsuit is "objectively baseless" if "no reasonable litigant could realistically expect success on the merits." **Liebman Dissent in *BE&K*:** Giving more weight to Section 7 rights than to Constitutional protections to seek redress in the courts, members Liebman and Walsh dissented – claiming the majority "goes too far in protecting First Amendment interests at the expense of the rights guaranteed by federal labor law." According to the dissent, the majority erred by "categorically rejecting" the possibility that some reasonably based but retaliatory and meritless lawsuits constitute unlawful violations of Section 8(a)(1). The dissent found that the Supreme Court's underlying decision in *BE&K* "left open the possibility that the Board could find unlawful some subset of unsuccessful but reasonably based suits targeting conduct protected by the [NLRA]." *BE&K*, 451 NLRB at 461. Nevertheless, the dissent failed to provide any objective criteria to determine what types of lawsuits it would consider unlawful. Rather, the dissent simply claimed the proper analysis should "balance First Amendment and Section 7 rights" – suggesting that "in at least some cases" the Board is permitted to find an unmeritorious retaliatory lawsuit to be unlawful even if reasonably based. Without objective criteria, however, employers have no way to know what types of actions may result in liability under Section 8(a)(1). **Significance for Employers**: With organized labor increasingly using aggressive and sophisticated "corporate campaign" tactics against employers, the current majority standard set forth in *BE&K* enables employers to look to the courts to defend against corporate campaign abuses. Under the current standard, even

if the employer's lawsuit is unsuccessful, the employer would not be in violation of 8(a)(1) – and not responsible for the costs of the union's legal defense – **unless** the union can sustain its substantial burden of proving the lawsuit was undertaken for a retaliatory motive and there is no reasonable basis for the employer to believe the action would be successful. If the Liebman Board reconsiders the issues raised in *BE&K*, the Board likely would adopt the "balancing test" set forth in the dissent – balancing the employer's First Amendment right to petition the courts against the Section 7 rights of employees and unions. Accordingly, in various undefined circumstances, the Liebman Board would find that "unmeritorious but reasonably based" lawsuits unlawfully interfere with Section 7 rights. Giving more weight to Section 7 rights than to the First Amendment protections guaranteed by the majority in *BE&K*, however, Liebman's "balancing" approach would have a definite chilling effect on employers seeking to exercise their Constitutional Rights. In fact, absent the First Amendment protection to petition the courts, employers considering filing a lawsuit challenging potentially unlawful union activity would do so at their peril – even when there is an objectively reasonable basis for the suit. Recognizing the untenable position of the dissent, the majority in *BE&K* stated: The dissent reiterates the view, twice rejected by the Supreme Court, that because retaliatory lawsuits undermine important goals of the Act, the Board is empowered to impose unfair labor practice liability on such suits even if reasonably based. The dissent thus elevates the rights guaranteed by Section 7 of the Act over the fundamental First Amendment right to petition the government. . . . The dissent finds lurking in the [Supreme Court's] refusal to decide whether there are any conceivable circumstances in which the Board could find unlawful a reasonably based, unsuccessful lawsuit filed with a retaliatory motive, a suggestion that the Board is free to engage in a balancing process in the general run of cases. The balancing process the dissent has in mind is a disguised method for the Board to preserve the general rule the Court condemned in *BE&K* with the added dimension of unpredictability and its attendant chilling effect on the First Amendment right to petition. *BE&K*, 351 NLRB at 457-58. For more information concerning the Ford & Harrison *NLRB Update* and the Board precedents likely to be overturned under the Liebman Board, contact the Ford & Harrison attorney with whom you usually work, or the author of this Alert, John Bowen, a partner in our Minneapolis office at jbowen@fordharrison.com or 612-486-1703. **Look for Part IV of NLRB Update next Monday**