

NLRB Determines that "Preemptive" Firing Violates Federal Labor Law

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By [Judd Lees](#)

The recent National Labor Relations Board decision of Parexel International addresses the definition of "protected activity" under federal labor law for which subsequent employer retaliation is unlawful. The case appears to stretch the boundaries quite a bit since the Board held in this decision that federal labor law protections apply to employees who think about engaging in a protected activity and does not require that they actually do so.

The case involved an investigation by the Company's Human Resource Consultant regarding employee rumors and dissatisfaction about alleged disparate pay. As part of the investigation, the HR consultant was advised by an employee that she had not yet discussed or complained to other employees about the issue, but was concerned about it. Several days later, the employee was fired.

The employee filed a charge under the National Labor Relations Act and, after the hearing, the Administrative Law Judge agreed that the termination was part of a "preemptive strike" to nip the rumors of disparate pay in the bud. However, the judge determined that since the charging party/employee had not yet engaged in concerted activity, the charge should be dismissed.

The National Labor Relations Board, on review, reversed, and ordered reinstatement of the discharged employee. According to the Board, the absence of "protected concerted activity" was not dispositive since a termination designed to nip such activity in the bud is violative of employee rights under the Act.

Just as the definition of protected conduct which could give rise to claims of retaliation has expanded in the areas of EEOC and wage and hour cases, we now see the expansion of this protection under NLRA. Thus, the employer inquiry prior to any bona fide termination, must include not only whether the employee has engaged in protected concerted activity, but whether the employee is thinking of engaging in that activity. No wonder Human Resource personnel lose their hair and develop facial tics at a young age.