Labor Letter

July 2011

Fisher & Phillips LLP
ATTORNEYS AT LAW
Solutions at Work®
www.laborlawyers.com

The Labor Board Is Giving Employees More Rights To Complain

By D. Albert Brannen And Brian Herman (Atlanta)

Section 7 of the National Labor Relations Act (NLRA) grants employees the right to "engage in…*concerted* activities for the purpose of collective bargaining or other mutual aid or protection." (emphasis added). This broad statutory language leaves room for subjective interpretation, and, over the years, the courts and the National Labor Relations Board (NLRB) have refined the standard for what conduct is considered "concerted."

As explained by the current Chair of the Labor Board, Wilma Liebman, despite years of precedent dictating whether employee activity is truly "concerted," the public should expect "policy oscillations" resulting from changes in the political makeup of the Board. In several recent cases, the Obama Labor Board has shown a willingness to expand the definition of concerted activity to protect employees and labor unions. Employers (both organized and non-union) should take notice of the dramatic shift in the Labor Board's policies. Act now to avoid being caught in these changing tides.

Two Recent Cases Have Expanded the Concept of Concerted Activity

In the 1980s, the Supreme Court confirmed that a single employee acting alone could be engaged in concerted activity and thus could be protected under certain circumstances. Soon afterward, the Labor Board articulated the standard for determining when a single employee was engaged in concerted activity to be those times when the individual was seeking "to incite, induce or prepare for group action" or to bring group complaints to the employer's attention.

Two cases decided by the Obama Labor Board this year demonstrate how the Obama Labor Board is expanding the concept of concerted activity. *Parexel International, LLC*, decided in January 2011, involved an employee who complained to a coworker about her belief that certain employees were paid higher wages and given preferential treatment. The employee told her supervisor of her complaint, who in turn reported it to Human Resources. Later, the Human Resources Director asked the employee about the nature of her complaints. During that conversation, the Human Resources Director asked if the employee had mentioned her complaints to any other employees, and the employee said she had not. Six days later, the employer terminated the complaining employee.

An Administrative Law Judge (ALJ) ruled that the employer did not violate the law by discharging the complaining employee. His decision (that the complaint was from a single employee, acting alone, and therefore not "concerted") was based on existing precedents. But in a 2-1 decision on review, Chairman Liebman and controversial Member Craig Becker

ruled that the employer violated the NLRA. They reasoned that the discharge of the employee for expressing her individual complaint was "a pre-emptive strike to prevent her from engaging in activity protected by the [NLRA]." The Board continued, stating that "[i]f an employer acts to prevent concerted activity – to 'nip it in the bud' – that action interferes with and restrains the exercise of Section 7 rights and is unlawful."

The Board decided a similar case, *Wyndham Resort Development Corp.*, in March. In that case, the employer maintained a "resort casual" dress code under which male employees could wear untucked Tommy Bahama shirts. An employee returned from vacation and heard a rumor about a new dress code that required employees to tuck in their shirttails. Prior to an employee meeting, the employee confronted his supervisor and complained about the new dress code policy. He also complained that the company usually put policy changes in writing and he had not seen a memo on the new policy. The employee said he "might not want to tuck in my shirt" and "I did not sign up for this crap." The supervisor then took the employee into his office, with another employee witness, to scold him and "invited" him to quit. A few days later the employer simply issued the complaining employee a written warning.

An ALJ ruled that the employee's protest of the dress code was not concerted because he acted independently of other employees, in his own self-interest and without a common goal. However, in another party-line split decision, Chairman Liebman and Member Becker rejected the ALJ's decision and held that the individual employee's actions were concerted and thus protected, because they occurred *in front of other employees* – even though he had not solicited his peers' input on the policy before voicing his complaints.

Continued on page 4

Hitting The Reset Button At Work

By Tillman Coffey (Atlanta)

If you have ever attended an employment law seminar or a management training class, you have no doubt heard the speaker extol the virtues of consistency when dealing with employees. Consistency provides your employees with clear direction and minimizes uncertainty. Once your employees know what you expect, they are more likely to meet those expectations without the need for discipline.

Consistency is also the key to prevailing in the unemployment compensation arena and reducing your company's exposure to discrimination claims. In both contexts, the issue of whether the disciplined or discharged employee engaged in inappropriate conduct, or failed to meet the performance expectation, often is not in dispute. Instead, the basis for many claims is that the company allegedly failed to treat the claimant the same as it did another "similarly-situated" employee who engaged in comparable conduct. In other words, the employee complains that the company acted inconsistently and the reason for the inconsistent actions is the employee's protected status.

The Problem

Allegations of discriminatory or inconsistent treatment may also arise after an employer takes disciplinary action against an employee who has recently made a complaint of inappropriate conduct (*e.g.,* discrimination, harassment, safety, *etc.*), filed a workers' compensation claim, or requested or taken leave protected under federal or state law. The circumstances and timing of the disciplinary action may give rise to a claim of retaliation, especially when the employer relies upon a seldom- or never-enforced rule or performance standard as the basis of the discipline *after* the employee engaged in a form of protected activity.

Again, the issue ultimately may not be whether the employee broke the rule, but instead whether the employer's enforcement of the rule was consistent with its normal or past practice. With the growing number of retaliation claims being made (retaliation was the number one charge filed with the EEOC in 2010), employers should be cautious when taking disciplinary action under these circumstances.

How Did We Get Here?

One reason for enforcement failure is that most supervisors prefer to avoid confrontation with their employees. The common thought is that they have to work with and rely on these employees day in and day out and believe it is hard enough to get work done when they do not have an adversarial relationship with their employees.

Still other supervisors fail to act because they do not know what to do. They are afraid that if they do the wrong thing, the Company, and maybe the supervisor, will be sued. Faced with this perceived dilemma, many supervisors take the path of least resistance, do nothing, and hope the problem goes away on its own. The supervisor feels safer doing nothing about the underperforming employee and simply lives with the problem.

When the problem does not correct itself – and it rarely does – and the supervisor has no choice but to act, the timing may be bad, or the discipline may be inconsistent with established "precedent." In a recent case, an employee alleged race discrimination and retaliation following his termination. The facts showed that the former employee had an eight-year history of documented performance problems and numerous "final" warnings. The company had finally had enough and terminated the employee, but did so a few months after employees complained about race discrimination. The company eventually prevailed, but its failure to act earlier subjected it to the costs and disruption of litigation.

A supervisor's inaction creates several potential problems in the workplace that go beyond the "problem" employee. Good employees may lose respect for supervisors because they fail to enforce the rules and standards, and good employees may move on. Most employees adhere to the rules, and think it's only fair that other employees be required to do so as well. Employees like structure. How often do supervisors hear from the co-workers of the former employee: "it's about time you did something" or "we were wondering when enough would be enough?"

Failure to enforce the rules and standards also may actually lower the standards for everyone, not just the problem employee. In most cases, the lowest conduct or performance standard accepted by management by not enforcing the rules becomes the *de facto* standard for everyone in the group. For example, if the standard is to produce ten units a day and an employee is allowed to produce only seven without penalty, then seven may be the new standard for everyone. If 7:30 is the "official" or posted starting time, and an employee is regularly allowed to start at 7:45, is the new start time 7:45? The same concern applies to conduct issues. Once the supervisor establishes a tolerance level for employee conduct, that tolerated level may be the new code of conduct, not the one set forth in the handbook.

Employers and supervisors may be left thinking that they are damned if they do and damned if they don't. Fortunately, it does not have to be that way: there is a way out. You can escape the history of your inaction, or that of your predecessors, by "resetting expectations." If expectations are reset correctly, you may be able to shed the past, get everyone on the same page going forward, and take necessary corrective action without creating unnecessary exposure for the company.

Getting From Here To There – And Back Again

The resetting expectations process requires that the company give everyone a clean or almost clean slate on the specific issue at hand. Here's how it can work: the first step is to identify where you are, where you want to be, and what it will take to get there. Next, communicate with your employees the new (or renewed) expectations of them. You can, and

Continued on page 3

Hitting The Reset Button At Work

Continued from page 2

probably should, admit that you or the company allowed the standards to slip and that you and the company accept full responsibility for the past.

Management should then: 1) tell the employees what its expectations are going forward; 2) provide a date when employees are expected to begin meeting these standards; and 3) explain the possible consequences for their failure to do so. The timeline should be reasonable under the circumstances and the message should include an offer of assistance to achieve the goal. The more reasonable your demand, the increased likelihood of success. Put these expectations in writing and request that the employees acknowledge by signing that they understand and agree. A copy of the signed form should then be placed in each employee's personnel file.

Once employees are put on notice of your expectations and possible consequences of failure, each supervisor must follow up and ensure that the employees are meeting the standards. For those who don't, take appropriate action – and do so on a *consistent* basis. Termination for failing to meet the reset expectations must be an unfortunate reality if efforts to regain control are to be effective.

Get Back On Track

It's never too late to reset expectations. If you do, the next time you contact your human resources department or your employment lawyer for approval to take disciplinary action and are met with the usual list of questions designed to determine whether your actions are consistent, you should be in good shape.

For more information contact the author at tcoffey@laborlawyers.com or 404.231.1400.

Fisher & Phillips Files Comment On NLRB Proposed Rulemaking

Taking a stand for employers, Fisher & Phillips LLP filed an official Comment with the National Labor Relations Board (NLRB) about proposed rulemaking that could be burdensome for employers. The NLRB has proposed a rule requiring employers to notify employees of their rights under the National Labor Relations Act. Employers whose workplaces fall under the National Labor Relations Act (NLRA) would be required to post the employee rights notice.

While at first blush this might seem benign, the impact on employers would be significant. The Board estimates the cost to employers to post the notice would be $375 million in the first year. The Fisher & Phillips comment challenges that number as being too low.

Jim Walters, a partner in the Atlanta office, wrote the Comment. The Comment includes: "We believe the Board's basic premise for the proposed rule is flawed; that the aggregate costs of the proposed rule are vastly underestimated; and that the proposed penalties for violation of the rule are overreaching, unnecessary and in all likelihood impermissible." The Comment notes that the NLRB probably does not have the legal authority to take this action; the NLRA does not have a general notice-posting requirement.

Jim also points out that the wording of the proposed poster is heavily skewed toward union-related rights, and that there is a huge potential impact. By the NLRB's own estimate, six million different employers, varying from small retailers to multi-location corporations, would be required to permanently post a notice of many rights under the NLRA. A large multi-location employer would be required to place notices at every workplace.

Additionally, there has been no general posting requirement in the 75 years the NLRA has been the principal labor law, so why would it suddenly be necessary?

For more information, or to view the Comment in its entirety, visit our website at www.laborlawyers.com.

Visit Our Webinar Library

Our free webinars continue to be extremely popular. We are constantly striving to bring our clients the most current and timely topics that impact employers today. We know that busy employers cannot always adjust their schedule to attend live webinars. Fisher & Phillips is happy to provide archived recordings of our firm webinars available on our website for viewing at any time. Please visit our Webinar Library for an up-to-date list of the webinars available for viewing. It's available on our website at www.laborlawyers.com. Click on "news and events," and then "webinar library."

The Labor Board Is Giving Employees More Rights To Complain

Continued from page 1

Watch Your Step

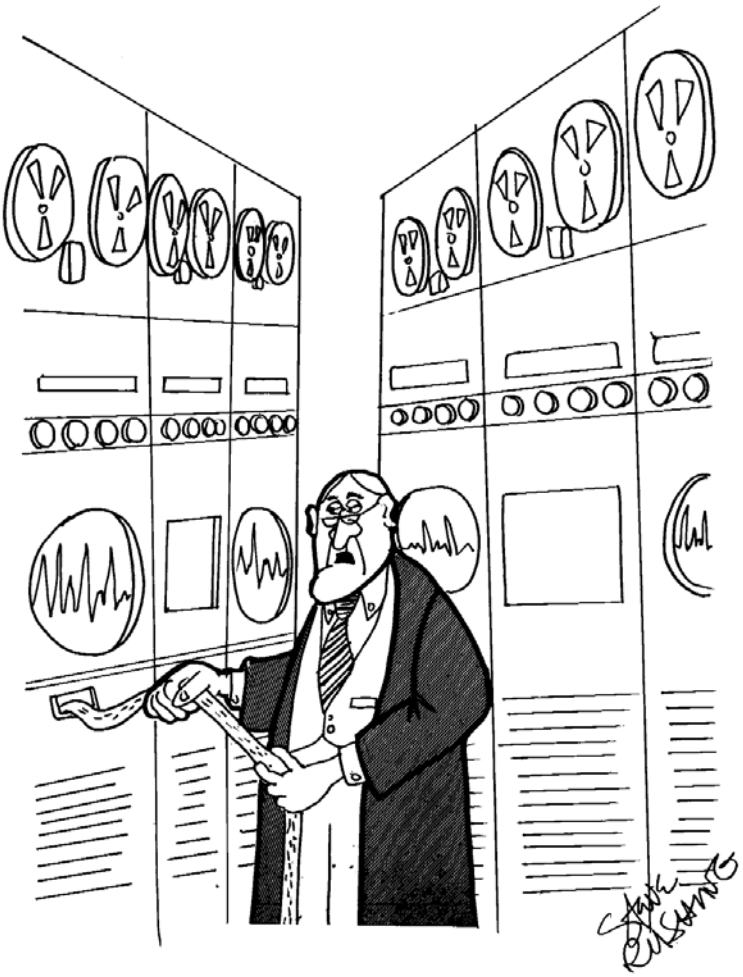
The shifting Labor Board policies announced in these two recent cases underscore the need for employers to take time to review *all* of their work rules to make sure they could withstand the scrutiny of the current lineup. Work or behavioral rules that may have been lawful under the policies of the Bush 43 Labor Board may be deemed unlawful by the current Labor Board.

Chairman Liebman has suggested that employers should add language to their employee handbooks that makes it clear that the employer's work rules and policies are limited and not intended to violate employee rights under Section 7 of the NLRA. We agree that such language may be appropriate, at least in the context of rules addressing topics such as solicitation or distribution, off-duty access to employer property, disclosure of confidential information, contact with government agencies, and non-disparagement of the employer.

You should also establish precise grievance or problem-solving procedures. Educate your employees about the proper channels and methods of raising complaints. When employees raise complaints, consider whether the act of raising the complaint is subject to the protections of Section 7 of the NLRA. Consider adding the phrase "any protected concerted or union activity" or some similar variation to your standard nondiscrimination or Equal Employment Opportunity (EEO) policies.

Under the previous NLRB, employers clearly had more latitude to discipline or discharge individual employees who complained. But with these policy changes and the dramatic rise in claims of retaliation under various other laws, employers should be especially cautious when disciplining or discharging complainers or whistleblowers.

For more information contact the authors at dabrannen@laborlawyers.com, bherman@laborlawyers.com, or 404.231.1400.



"IT SAYS NOT GUILTY BY REASON OF A LEGAL TECHNICALITY."

Office Locations

Atlanta
phone 404.231.1400

Charlotte
phone 704.334.4565

Chicago
phone 312.346.8061

Cleveland
phone 440.838.8800

Columbia
phone 803.255.0000

Dallas
phone 214.220.9100

Denver
phone 303.218.3650

Fort Lauderdale
phone 954.525.4800

Houston
phone 713.292.0150

Irvine
phone 949.851.2424

Kansas City
phone 816.842.8770

Las Vegas
phone 702.252.3131

Los Angeles
phone 213.330.4500

Louisville
phone 502.561.3990

New England
phone 207.774.6001

New Jersey
phone 908.516.1050

New Orleans
phone 504.522.3303

Orlando
phone 407.541.0888

Philadelphia
phone 610.230.2150

Phoenix
phone 602.281.3400

Portland
phone 503.242.4262

San Diego
phone 858.597.9600

San Francisco
phone 415.490.9000

Tampa
phone 813.769.7500

Washington, DC
phone 202.429.3707

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters

We're interested in your opinion. If you have any suggestions about how we can improve the *Labor Letter* or any of our other publications, let us know by contacting your Fisher & Phillips attorney or email the editor at mmitchell@laborlawyers.com.

How to ensure continued receipt of this newsletter
If you would like to continue to receive our newsletters and other important information such as Legal Alerts and seminar information via email, then please take a moment right now to make sure your spam filters are set to allow transmissions from the following addresses: communications@laborlawyers.com or seminars@laborlawyers.com. If you currently receive communications from us by regular mail, and would like to begin receiving them by email, please send a request to communications@laborlawyers.com.