Employment Edge 113th Edition—Non-union Employer Pays $900,000 to Settle Labor Board Case

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The National Labor Relations Board (NLRB) announced last week that a non-unionized employer will pay $900,000 in back pay to two fired employees for violations of the National Labor Relations Act (NLRA). The announced settlement is a stark reminder for both non-union and union employers about the importance of compliance with the federal labor law—even though that law is often casually regarded as governing only unionized workplaces.

Back Pay Settlement with Non-Union Employer. The NLRB explains that a non-unionized employer, the Texas Dental Association, has distributed $900,000 in back pay awards to two former employees, one of whom was a supervisor. The back pay settlement resolves unfair labor practice charges brought against the employer by the terminated employees, who the NLRB ruled were fired in retaliation for circulating a petition complaining of poor management and unfair treatment by their employer. According to the NLRB's press release, the employer has also agreed to post a notice informing employees that they cannot be fired for acting together for their mutual benefit and protection.

The charges, in which no union was involved, grew out of a meeting of employees in 2006 that resulted in a petition to delegates of the Association, which represents more than 7,000 dentists in Texas. The petition, signed by 11 employees using aliases, requested an outside investigation of management and working conditions at the Association's headquarters.

The delegates declined to authorize the requested investigation. Instead, management initiated a different investigation, to learn who had been involved in preparing and distributing the petition. In the course of this investigation, a forensic study was made of office computers, and one employee who had helped to write the petition was fired after a fragment of it was found on his computer. The second employee, a supervisor who refused to divulge the names of employees involved in the petition, was also fired.

This case went to trial at the NLRB. The NLRB judge ruled that the employer committed unfair labor practices because termination of the two employees was in retaliation for, and interfered with, the employees' rights to engage together in "concerted activity" that is protected by the labor law. Specifically, the judge found that the first employee was unlawfully fired for engaging in protected activity, and that the supervisor was fired for refusing to engage in unlawful activity by divulging the employees' identities. The

case was at the Fifth Circuit Court of Appeals when it was settled through mediation.

NLRA Protects Union and Non-Union Employees. The NLRA is the federal labor law that applies in most private workplaces. The NLRA protects employees' rights to engage in—and to refrain from engaging in—a very broad range of "concerted activities." In essence, concerted activity occurs anytime employees come together to talk about or work together to affect the terms and conditions of their jobs. The concept of protected concerted activity, like all other fundamental rights of employees in the federal labor law, comes from Section 7 of the NLRA. Employees' rights relating to collective and union activities are often referred to as "Section 7 rights."

The bedrock principle of Section 7 is that employees have the right to freely choose whether or not to engage in collective activity—whether there is a union involved or not.

Employees Are Protected When They Work Together to Improve Working Conditions.

Employees' Section 7 rights include the rights to:

- Discuss terms and conditions of employment or union organizing with co-workers or a union
- Take action with one or more co-workers to improve working conditions, by among other things, raising work-related complaints
- Form, join or assist labor organizations (unions)
- Engage in "other concerted activities" for the purpose of collective bargaining or other "mutual aid or protection." This includes the activity of any employee advocating in any way for another employee, or on behalf of any group of one or more employees
- Refrain from engaging in self-organizing and concerted or union activity

Sometimes Supervisors Are Protected, Too. Even though supervisors are not generally protected by the NLRA, a supervisor's discharge violates Section 8(a)(1) under certain limited circumstances, including when it is based on the supervisor's testimony in an NLRB hearing or refusal to commit an unfair labor practice. In such circumstances, the NLRB justifies its prohibition against discharging the supervisor as being necessary to vindicate employee rights, arguing that such prohibition does not unduly trench upon an employer's legitimate interests in selecting and trusting its management team. Thus, for example, the NLRB has held that an employer may not terminate a supervisor for insufficiently advancing the employer's plan to unlawfully prevent unionization.

Labor Law Compliance Can Be Critical. The NLRA has potentially critical implications for many employment policies and practices, without regard to whether an employer is unionized. Besides the fact that violations can be expensive, as they were here, committing unfair labor practices can also have a very negative effect on an employer's ability to resist unionization during organizing activity. So as this case aptly

demonstrates, wise employers will ensure that their managers, human resources professionals, and internal counsel all share a strong awareness of labor law issues that may arise in the workplace. The attorneys of Gray Plant Mooty's Labor Law practice group are available to assist with labor law training and compliance, as well as litigation and dispute resolution. If you have questions about the NLRA or how it applies in your workplace, please email or call Mark Mathison.

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