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Boeing Takes Flight: Application of the NLRB's New Standard for Workplace Rules

By Peter J. Moser and Kaila D. Clark

In December 2017, the National Labor Relations Board ("Board") issued its landmark decision in *Boeing,*[1] creating a new and more balanced standard for the review of employer work rules.[2] *Boeing* was a welcome reprieve for handbook drafters, as preceding years had seen the Board heavily scrutinizing employer work rules and finding many common handbook policies unlawful under Section 7 of the National Labor Relations Act ("NLRA" or "Act").[3] In the wake of *Boeing,* there have been additional clarifying agency pronouncements, advice memoranda, and decisions by the

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[1] *Boeing Co.*, 2017 NLRB LEXIS 634 (N.L.R.B. December 14, 2017).

[2] This article adopts the definition of work rule applied in *Boeing* and its progeny. *See e.g., Pfizer, Inc.*, 2019 NLRB LEXIS 199, *47-48 (N.L.R.B. March 21, 2019) ("As used in *Boeing*, the terms 'work rule,' 'employment policy' and 'employee handbook provision' all appear to describe messages communicated by an employer which typically meet these criteria: (1) The message informs employees about what conduct is required or prohibited or sets work standards and (2) a failure to comply with the message can subject an employee to discharge or other disciplinary action. The latter requirement does not have to be spelled out in the particular message if, under all the circumstances, employees reasonably would believe that a failure to obey the instruction could result in such consequences. The factors would militate against a conclusion that employees reasonably would believe that they could be disciplined for failure to obey the instruction.").

[3] *See, e.g., William Beaumont Hosp.*, 2016 NLRB LEXIS 282 (N.L.R.B. April 13, 2016) (invalidating rule prohibiting conduct that "impedes harmonious interactions and relationships"); *Whole Foods Mkt., Inc.*, 2015 NLRB LEXIS 949 (N.L.R.B. December 24, 2015) (invalidating no-recording rule aimed at fostering employee free expression); *Triple Play Sports Bar & Grille*, 2014 NLRB LEXIS 656 (N.L.R.B. August 22, 2014) (invalidating rule stating that social media use "may be violating the law and is subject to disciplinary action" if the employee engages in "inappropriate discussions about the company"); *Fresh & Easy Neighborhood Mkt.*, 2014 NLRB LEXIS 597 (N.L.R.B. July 31, 2014) (invalidating rule requiring employees to "[k]eep customer and employee information secure"); *Hills & Dales Gen. Hosp.*, 2014 NLRB LEXIS 236 (N.L.R.B. April 1, 2014) (finding a requirement that employees "represent [the employer] in the community in a positive and professional manner" unlawful); *2 Sisters Food Group, Inc.*, 357 N.L.R.B. 1816 (N.L.R.B. December 29, 2011) (rule unlawful that subjected employees to discipline for the "inability or unwillingness to work harmoniously with other employees.").

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ATTENTION READERS

Any reader interested in sharing information of interest to the labor and employment bar, including notices of upcoming seminars or newsworthy events, should direct this information to:

Laurie E. Leader
Clinical Professor
Chicago-Kent College of Law
565 W. Adams – Ste. 600
Chicago, IL 60661
E-mail: lleader@kentlaw.iit.edu

or

Mary Anne Lenihan
Legal Editor
Bender's Labor & Employment Bulletin
LexisNexis Matthew Bender
230 Park Avenue, 7th Floor
New York, NY 10169
E-mail: maryanne.lenihan@lexisnexis.com

If you are interested in writing for the BULLETIN, please contact Laurie E. Leader via e-mail at lleader@kentlaw.iit.edu or Mary Anne Lenihan via e-mail at maryanne.lenihan@lexisnexis.com.

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Board and administrative law judges. This article summarizes the key *post-Boeing* developments, identifying practical takeaways for handbook drafters.

Background

The Pre-Boeing Standard

Section 7 of the NLRA gives employees the right to unionize, to bargain collectively through chosen representatives, to engage in "concerted activities" for "mutual aid or protection", and to refrain from any such activities.[4] An employer work rule that interferes with Section 7 rights may be found unlawful.

In 2004, the Board articulated a standard for reviewing work rules in its *Lutheran Heritage* decision.[5] A majority of the Board in *Lutheran Heritage* held that a work rule which does not expressly prohibit Section 7 activity can nonetheless be found unlawful if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[6]

In the years following *Lutheran Heritage,* most of the Board cases involving work rules were decided under the first prong, i.e., determining whether an employee would reasonably construe the language to prohibit Section 7 activity.[7] The Board found many common handbook policies and work rules to be unlawful, much to the frustration and confusion of employers.[8]

What Did Boeing Change?

In *Boeing Co.*,[9] the Board under a new Republican administration overruled the first prong of the *Lutheran Heritage* test, leaving the remaining two prongs intact, and announced a new test to replace it.[10] The employee-focused "reasonably construe" standard was replaced with a balancing test to be applied whenever a workplace rule has the potential to interfere with the exercise of Section 7 rights.[11] In such case, the Board announced that it will evaluate both "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule."[12]

The Board also identified three distinct categories of work rules resulting from its new standard:[13]

> *Category 1* - rules that the Board designates as lawful to maintain, because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. (example: workplace civility rules).
>
> *Category 2* - rules that warrant individualized scrutiny in each case whether the rule would prohibit or

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[4] 29 U.S.C. § 157. Section 8 of the Act (29 U.S.C. § 158(a)(1)) makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of these Section 7 rights.

[5] *Martin Luther Mem'l Home, Inc. d/b/a Lutheran Heritage Village-Livonia,* 343 NLRB 646 (N.L.R.B. November 19, 2004).

[6] *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (N.L.R.B. November 19, 2004).

[7] See *Boeing Co.*, 2017 NLRB LEXIS 634, at *3 (N.L.R.B. December 14, 2017).

[8] The majority in *Boeing* noted that "Over the past decade and one-half, the Board has invalidated a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain". *Boeing Co.*, 2017 NLRB LEXIS 634, *11 (N.L.R.B. December 14, 2017). The majority also stated the *Lutheran Heritage* test "has been exceptionally difficult to apply, which has created . . . immense uncertainty and litigation for employees, unions and employers." *Boeing Co.*, 2017 NLRB LEXIS 634, *8 (N.L.R.B. December 14, 2017).

[9] *Boeing Co.*, 2017 NLRB LEXIS 634 (N.L.R.B. December 14, 2017).

[10] *Boeing Co.*, 2017 NLRB LEXIS 634, at **6-12 (N.L.R.B. December 14, 2017) (delineating a multitude of problems when evaluating the maintenance of work rules, policies and employee handbook provisions under the "reasonably construe" prong of the *Lutheran Heritage* test).

[11] *Boeing Co.*, 2017 NLRB LEXIS 634, at *12 (N.L.R.B. December 14, 2017).

[12] *Boeing Co.*, 2017 NLRB LEXIS 634, at *12 (N.L.R.B. December 14, 2017).

[13] *Boeing Co.*, 2017 NLRB LEXIS 634, at **13-14 (N.L.R.B. December 14, 2017).

interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

Category 3 - rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule (example: a rule prohibiting employees from discussing wages or benefits with one another).

Post-*Boeing*

Since the *Boeing* decision in late 2017, additional guidance and clarification have come from a General Counsel's Memorandum[14], Advice Memoranda[15], and a number of informative case decisions.

General Counsel's Memorandum (GC 18-04)

On June 6, 2018, the General Counsel's office issued a memorandum addressing the new *Boeing* standard.[16] This memo ostensibly provides guidance to the NLRB Regional Offices ("Regions"), but also provides insight for employers into how the General Counsel will exercise its authority when deciding whether to prosecute charges involving work rules.[17]

GC 18-04 expressly states that Regions must not interpret ambiguities in rules against the drafter, and that "generalized provisions should not be interpreted as banning all activity that could conceivably be included."[18] In addition, the General Counsel sorted common types of workplace rules into each of the three categories outlined in *Boeing*.

Category 1:

- Civility rules;
- No-photography and no-recording rules;
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
- Disruptive behavior rules;
- Rules protecting confidential, proprietary, and customer information or documents;
- Rules against defamation or misrepresentation;
- Rules against using employer logos or intellectual property;
- Rules requiring authorization to speak for the company; and
- Rules banning disloyalty, nepotism, or self-enrichment.[19]

Category 2:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union;
- Confidentiality rules broadly encompassing "employer business" or "employee information" (as opposed to confidentiality rules regarding customer or proprietary information, or confidentiality rules directed at employee wages, terms of employment, or working conditions);
- Rules regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of employees);
- Rules regulating use of the employer's name (as opposed to rules regulating use of the employer's logo/trademark);
- Rules restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media *on the employer's behalf*);

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[14] General Counsel memoranda are issued to NLRB regional offices by the General Counsel to provide policy guidance.

[15] An advice memorandum is provided by the General Counsel to an NLRB regional office at the region's request in connection with a pending charge. The memorandum may later be released to the general public after the case is closed.

[16] *See generally,* Peter B. Robb, N.L.R.B Office of the General Counsel, Memorandum GC 18-04, *Guidance on Handbook Rules Post-Boeing*, June 6, 2018, *available at* https://www.nlrb.gov/news-publications/nlrb-memoranda/general-counsel-memos.

[17] The General Counsel's memo is instructive but not binding on the Board, an administrative law judge, or the courts. *See e.g., Pfizer, Inc*., 2019 NLRB LEXIS 199, at *7 (N.L.R.B. March 21, 2019) ("The Respondent's brief, as might be expected, argues that the confidentiality clause is lawful. Somewhat less expectedly, the General Counsel now agrees with the Respondent that under the Boeing standard the confidentiality clause is lawful, at least on its face. However, contrary to both the General Counsel and the Respondent, I conclude that the clause chills the exercise of Section 7 rights and violates Section 8(a)(1) of the Act.").

[18] *See* Peter B. Robb, N.L.R.B Office of the General Counsel, Memorandum GC 18-04 at 1.

[19] *See* Peter B. Robb, N.L.R.B Office of the General Counsel, Memorandum GC 18-04 at 2-15.

- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work, or rules specifically banning participation in outside organizations); and
- Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements).[20]

Category 3:

- Confidentiality rules specifically regarding wages, benefits, or working conditions; and
- Rules against joining outside organizations or voting on matters concerning the employer.[21]

Advice Memoranda

On March 14, 2019, the General Counsel's Office released an advice memorandum that was originally issued in July 2018 to NLRB Region 21 concerning *ADT, LLC* (Case 21-CA-209339). This memorandum discussed the application of *Boeing* to four handbook rules.

Dress Code – The employer's rule was found lawful, and could not reasonably be understood as prohibiting union insignia, even though the rule prohibited the wearing of "[a]ny items of apparel with inappropriate commercial advertising or insignia"; in context, the policy could not be interpreted as prohibiting union insignia as the disputed language was an isolated line in a two-page policy which otherwise clearly conveyed a focus on the need for a professional, business-like appearance.

Personal Cell Phone Usage – The employer's rule was found unlawful where it stated that due to the risk of distraction personal cell phones may be used only for "work-related or critical, quality of life activities", defining "quality of life activities" as including "communicating with service or health professionals who cannot be reached during a break or after business hours." The rule further stated that "[o]ther cellular functions, such as text messaging and digital photography, are not to be used during working hours." The rule was unlawful because employees have a Section 7 right to communicate with each other through non-employer monitored channels during lunch or break periods.

Confidentiality – The employer's rule was lawful because it was based on legitimate business need and would not reasonably be interpreted to prohibit Section 7 activity. The rule merely urged employees to "exercise caution" in the handling of confidential information, which was defined to include proprietary information as well as "[p]ersonally identifiable customer and employee information, including name, address, social security, credit card and bank account numbers, and similarly personally identifiable information".

Media Relations – The employer's rule was found lawful because employees would reasonably construe it as only limiting who may speak on the Employer's behalf. The rule began by stating that "[i]t is critical that the [Employer] communicate information about its activities consistently, accurately and in a timely manner", and went on to state that "information provided by an employee [to reporters, analysts and investors] could be incorrectly interpreted as an official [Employer] position and published as such." The rule directed that "all information provided to media, financial analysts, investors or any other 0person outside the [Employer] may be provided only by [Employer] designated spokespersons or [Employer] officers".

A second advice memorandum was also released on March 14, 2019, in the matter of *Nuance Transcription Services, Inc.* (Case 28-CA-216065). This memorandum had been originally issued to Region 28 on November 14, 2018. Several handbook policies were addressed:

No-Solicitation/Email – the employer's ban of personal email use on the company's system, which extended to non-working time, was found unlawful under extant Board law, separate and apart from *Boeing*.[22]

[20] *See* Peter B. Robb, N.L.R.B Office of the General Counsel, Memorandum GC 18-04 at 15-17.

[21] *See* Peter B. Robb, N.L.R.B Office of the General Counsel, Memorandum GC 18-04 at 17-20.

[22] See *Purple Communications,* 361 NLRB 1050 (2016).

Confidentiality – the employer's policies prohibiting dissemination of handbook contents and payroll information were deemed unlawful, as each fell within *Boeing* Category 3. These policies effectively precluded employees from engaging in the protected activity of discussing pay, benefits, and working conditions with unions and other third parties.

Recent Decisions

A number of recent NLRB decisions adopting the new *Boeing* framework provide additional guidance regarding various common handbook policies.

a. Mandatory Arbitration

In *Prime Healthcare Paradise Valley, LLC*[23], the Board found that the employer violated the NLRA by maintaining and enforcing a Mediation and Arbitration Agreement and a Mutual Agreement to Arbitrate, both of which were included in the employee handbook. The applicable language explicitly stated that "all other forums are displaced by arbitration for all claims, including federal statutory claims." The Board found that this interfered with the exercise of the "employees' fundamental right to file unfair labor practice charges with the Board."[24] Under the *Boeing* balancing test, the documents violated the NLRA because they "restrict[ ] access to the Board and its processes, that the potential impact on NLRA rights is profound, and that no legitimate employer interests justify it."[25] The Board was careful to draw "a distinction between agreements that merely require arbitration and those that also limit access to the Board", the latter being unlawful.[26]

DRAFTING TIP: It is important to avoid language creating an impression that employees are prohibited from filing charges with the NLRB. Employers should rely on the six guiding principles for drafting arbitration agreements outlined by the Board in *Prime Healthcare*.[27]

[23] *Prime Healthcare Paradise Valley, LLC*, 2019 NLRB LEXIS 351 (N.L.R.B. June 18, 2019).

[24] *Prime Healthcare Paradise Valley, LLC*, 2019 NLRB LEXIS 351, *10 (N.L.R.B. June 18, 2019).

[25] *Prime Healthcare Paradise Valley, LLC*, 2019 NLRB LEXIS 351, *5 (N.L.R.B. June 18, 2019).

[26] See also *Alorica, Inc.*, 2019 NLRB LEXIS 422, *5 (N.L.R.B. July 25, 2019) (substituting *Boeing* analysis, Board adopted ALJ finding that the employer's mandatory arbitration agreement was unlawful because it made arbitration the "exclusive forum" for resolving all disputes, including those brought under the Act).

[27] See *Prime Healthcare Paradise Valley, LLC*, 2019 NLRB LEXIS 351, *10-13 (N.L.R.B. June 18, 2019) ("1. Arbitration agreements that explicitly prohibit the filing of claims with administrative agencies, that state employees must use arbitration exclusively or cannot use any other forum for all of their work-related or statutory claims, or that otherwise use language that employees would reasonably understand as prohibiting the filing of claims with the Board should be found unlawful and placed in *Boeing* Category 3. 2. Arbitration agreements that state all employment disputes shall or must be resolved through arbitration should not be presumed to violate the Act. Such agreements require employees to utilize arbitration for employment-related disputes, but exclusivity should not be read into them absent other language indicating exclusivity. Such agreements should be placed in *Boeing* Category 2 and, read as a whole, analyzed to determine whether they would reasonably be read to interfere with the exercise of NLRA rights. 3. Arbitration agreements with a savings clause that explicitly allows employees to utilize administrative proceedings in tandem with arbitral proceedings should be found lawful and placed in *Boeing* Category 1, since employees would understand that they retain the right to access the Board and its processes, at least where the savings clause is reasonably proximate to the mandatory arbitration language so that the entire agreement would be read by employees to permit access to the Board. 4. Vague savings clauses that would require employees to meticulously determine the state of the law themselves are likely to interfere with the exercise of NLRA rights. Such clauses include, for example, those stating that *nothing in this agreement shall be construed to require any claim to be arbitrated if an agreement to arbitrate such claim is prohibited by law*, or that exclusively require arbitration but limit that requirement to circumstances where a claim *may lawfully be resolved by arbitration*. 5. In deciding whether a savings clause is adequate, the Board should be mindful of *Boeing*'s admonition that perfection [should not be] the enemy of the good. *Boeing*, above, slip op. at 2. The General Counsel points to *Securitas Security Services USA, Inc.*, 363 NLRB No. 182 (2016), and *SolarCity Corp.*, 363 NLRB No. 83 (2015), as cases where, in the General Counsel's view, the Board … required a degree of comprehensiveness and precision that should not be required in finding arbitration agreements unlawfully interfered with access to the Board. The General Counsel contends that the Board should find the arbitration clauses lawful and place those cases in *Boeing* Category 2. 6. Finally, the General Counsel asserts that arbitration agreements allowing Board charge filing but precluding or limiting Board remedies should be found unlawful, as the impact of such a limitation on employees' right to an effective Board remedy outweighs any legitimate business justification for imposing such a limitation.") (internal quotations omitted).

b. Civility Standards

In *Bemis Co.*[28], the employee handbook at issue contained the following prohibition: "Do not make or publish false, vicious or malicious statements concerning any employee, supervisor, the company or its products."[29] The employer's senior HR director "testified [that] the ban on false or malicious statements is the [employer]'s 'golden rule' reflecting its 'core value of treating each other with respect.'"[30] On this basis, Administrative Law Judge Charles J. Muhl Board found that the rule "establish[ed] acceptable behavior with a goal of creating a team work environment. . . [and] ensures employees treat each other with respect," providing a basic standard of civility that is lawful.[31]

Similarly, in *Malco Enters. of Nev.,* Administrative Law Judge Dickie Montemayor found lawful a rule requiring employees to "never speak negatively about one another in front of others whether it be customers, peers or management," and to "always conduct him or herself in a polite, professional manner, treating customers and co-workers courteously and respectfully." The ALJ found that the rule fell directly under Category 1.[32]

These decisions represent a significant departure from previous Board decisions under the *Lutheran Heritage* analytical framework, but are consistent with the Board's instruction in *Boeing* that rules requiring "harmonious interactions and relationships" or which require employees to "abide by basic standards of civility" fall within Category 1.[33]

DRAFTING TIPS: Employers now have far greater leeway to craft workplace civility rules and such rules should be presumptively valid. Nevertheless, in an abundance of caution and given the possibility of changing Board composition, employers are advised to avoid language that could reasonably be construed as preventing employees from discussing working conditions with one another, or that preclude speaking ill of management; the safest approach is simply to require workplace "professionalism", "respect" and "civility."

c. No Solicitation/Distribution

The Board has long recognized that solicitation cannot be banned during non-working times,[34] and that a prohibition against distributing union literature during non-working times in non-working areas is presumptively unlawful.[35] In *Bemis Co.*, the ALJ found an employer's rule unlawful because it banned solicitation and distribution "on Company time, in Company work areas, or using Company resources."[36] Citing the employer's use of the disjunctive, the ALJ found the rule to be overbroad, as it "could reasonably be construed as prohibiting such conduct during break times or periods when employees are not working."[37] The ALJ affirmed that *Boeing* did not alter the existing standards for solicitation and distribution policies.

DRAFTING TIPS: No-distribution and no-solicitation policies should continue to be carefully drafted in accordance with longstanding Board standards.

d. Social Media

In *Bemis,* the ALJ applied the *Boeing* analytical framework to find unlawful the following language from an employer's social media policy:

> Employees are expected to be respectful and professional when using social media tools . . . We expect our employees to exercise judgment in their communications relating to Bemis so as to effectively safeguard the reputation and interests of Bemis. Employees should: [c]ommunicate in a respectful and professional manner . . . ; [e]ach employee is responsible for respecting the rights of their

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[28] *Bemis Co.*, 2019 NLRB LEXIS 379 (N.L.R.B. July 1, 2019).

[29] *Bemis Co.*, 2019 NLRB LEXIS 379, at *245 (N.L.R.B. July 1, 2019).

[30] *Bemis Co.*, 2019 NLRB LEXIS 379, at *245 (N.L.R.B. July 1, 2019).

[31] *Bemis Co.*, 2019 NLRB LEXIS 379, at *246 (N.L.R.B. July 1, 2019).

[32] *Malco Enters. of Nev.*, 2019 NLRB LEXIS 170, at *10 (N.L.R.B. March 8, 2019).

[33] *Boeing Co.*, 2017 NLRB LEXIS 634, at *13 (N.L.R.B. December 14, 2017).

[34] *UPS Supply Chain Solutions, Inc.*, 357 N.L.R.B. 1295, 1296 (N.L.R.B. November 4, 2011).

[35] *See Waste Mgmt. of Arizona, Inc.*, 345 NLRB 1339, 1346 (2005) ("Interference with employee circulation of protected material in nonworking areas during off-duty periods is presumptively a violation of the Act unless the employer can affirmatively demonstrate the restriction is necessary to protect its proper interest."), quoting *Champion International Corp.*, 303 NLRB 102, 105 (1991); *see also Titanium Metals Corp.*, 340 NLRB 766, 774-775 (2003); *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 858-859 (2000).

[36] *Bemis Co.*, 2019 NLRB LEXIS 379, at **22-23 (N.L.R.B. July 1, 2019) (emphasis in original).

[37] *Bemis Co.*, 2019 NLRB LEXIS 379, at *23 (N.L.R.B. July 1, 2019).

> co-workers and conducting themselves in a manner that does not harass, disrupt, or interfere with another person's work performance or in a manner that does not create an intimidating, offensive, or hostile work environment.[38]

The language was unlawful because it would "significantly impact employees' discussions about their working conditions" and potentially interfere with their Section 7 rights.[39] The ALJ balanced the potential interference with the employer's business justification, as required under *Boeing,* but found unpersuasive the employer's desire to protect its customers' and its brand.[40]

DRAFTING TIPS: Employers are well-advised to draft narrowly and to maintain their social media policies in compliance with previous Board proclamations and decisions. Even though *Boeing* provides a far more balanced analytical framework, and even though civility policies are designated as Category 1, an overly broad social media policy (e.g., one which could be reasonably interpreted as banning negative on-line commentary about the employer, or prohibiting employees from seeking public support regarding terms and conditions of employment) will still be found unlawful.[41]

e. Property Access

In *Bemis,* the employer maintained the following handbook rule pertaining to "off-duty access to company property":

> Employees are not to remain on or enter company property unless: scheduled to work, attending a company-sponsored event, or meeting with a Supervisor or Human Resources Representative. To be on company property for any other reason will require approval by a supervisor or a member of management from the facility.[42]

The ALJ found the rule unlawful because "company property" included non-work areas outside the plant," and therefore the rule did not appropriately "limit access solely with respect to the interior of the plant and other working areas."[43]

DRAFTING TIPS: Policies should be drafted narrowly to avoid a misimpression that lawful protected activity is prohibited, such as banning off-duty employees form parking lots, gates, and other outside non-working areas.[44] Although the General Counsel has instructed regional offices to avoid interpreting ambiguous language against the drafter, vague and ambiguous language may still prove problematic.

f. Leaving Work Without Permission/Off Duty Conduct

In *Southern Bakeries, LLC*, two employer rules were in dispute, one which prohibited "leaving Company property during paid breaks or leaving your assigned job or work area without permission" and another which prohibited "Any off-duty conduct, which could impact, or call into question the employee's ability to perform his/her job."[45]

As for the former rule, Administrative Law Judge Arthur J. Amchan found there was "nothing illegal in the requirement that employees are required to stay on company property during paid breaks," but nevertheless found the rule was likely to be interpreted as restricting Section 7 rights because the employer did not distinguish between employee rights during working time and break time.[46] For example, a worker would be prohibited from soliciting on behalf of a union "during a paid break time in a break room," and the employer did not have a "sufficient justification to prohibit protected activity during non-working time, even if that time is paid time."[47]

As for the employer's off-duty conduct rule, the ALJ interpreted it to mean only "[u]nlawful or improper conduct . . . which affects the employee's relationship with the job, fellow employees, supervisors, or the [employer's]

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[38] *Bemis Co.*, 2019 NLRB LEXIS 379, at **246-247 (N.L.R.B. July 1, 2019).

[39] *Bemis Co.*, 2019 NLRB LEXIS 379, at *248 (N.L.R.B. July 1, 2019).

[40] *Bemis Co.*, 2019 NLRB LEXIS 379, at *247 (N.L.R.B. July 1, 2019).

[41] *Bemis Co.*, 2019 NLRB LEXIS 379, at *248 (N.L.R.B. July 1, 2019).

[42] *Bemis Co.*, 2019 NLRB LEXIS 379, at *249 (N.L.R.B. July 1, 2019).

[43] *Bemis Co.*, 2019 NLRB LEXIS 379, at *250 (N.L.R.B. July 1, 2019).

[44] *Tri-County Med. Ctr., Inc.*, 222 N.L.R.B. 1089, 1089 (N.L.R.B. February 25, 1976).

[45] *S. Bakeries, LLC*, 2019 NLRB LEXIS 98, at *4 (N.L.R.B. February 11, 2019).

[46] *S. Bakeries, LLC*, 2019 NLRB LEXIS 98, at **4-5 (N.L.R.B. February 11, 2019) (citing *Hyundai Am. Shipping Agency, Inc.*, 357 N.L.R.B. 860, 872-73 (N.L.R.B. August 26, 2011)).

[47] *S. Bakeries, LLC*, 2019 NLRB LEXIS 98, at *5 (N.L.R.B. February 11, 2019).

reputation or good will in the community."[48] As such, the rule was deemed a lawful Category 1 rule under *Boeing*.[49]

DRAFTING TIPS: Policies should be drafted narrowly to avoid a misimpression that lawful protected activity is prohibited, such as a prohibition against lawful solicitation during non-work time or a prohibition against lawful off-duty protected activities.[50]

g. Audio/Visual Recordings

On July 1, 2019, Administrative Law Judge Arthur J. Amchan issued his supplemental decision in *AT&T Mobility LLC*, finding unlawful a company policy that prohibited employees from recording "telephone or other conversations they have with their coworkers, managers or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and any applicable company policy."[51] Applying the *Boeing* analysis, the ALJ found that the rule had a material impact on Section 7 rights,[52] so the only issue to be addressed was whether such interference was justified.[53] The ALJ found insufficient justification, as the prohibition on recording was not limited to work time or work areas, and the employer could have protected its interest with a narrower rule. Notably, the employer already had a rule to protect the compelling interest proffered as a justification, i.e., protecting customer information.

Similarly, in *Argos Ready Mix LLC*, Administrative Law Judge Kimberly R. Sorg-Graves found unlawful an employer policy that forbade employees from using their cell phones while driving heavy commercial vehicles.[54] Despite the employer's safety concerns, the ALJ found "that the employees' Section 7 rights to communicate with other employees and union representatives and to take pictures or recordings of their terms or conditions of work during the majority of their workday outweigh[ed] [the company]'s asserted business justification for the total ban on the possession of a cell phone in its commercial vehicles/ready-mix trucks."[55]

These ALJ decisions were issued despite the fact that the Board in *Boeing* expressly stated that "no-camera rules, in general, fall into Category 1, types of rules that the Board will find lawful."[56] In *Boeing* a "no-camera" rule was found lawful even though the rule "in some circumstances may potentially affect the exercise of Section 7 rights", because the adverse impact "is comparatively slight" and "outweighed by substantial and important justifications."[57]

DRAFTING TIPS: Although no-photography and no-recording rules presumptively fall into Category 1, such rules implicate Section 7 rights and so the employer's justification for the rule is important. An employer should articulate the business justification in its policy and draft narrowly. Even if a justification is compelling, the employer's rule might still be found unlawful if the employer can achieve the same objective without encroaching on Section 7 rights.

h. Confidentiality Rules

In GC 18-04, the General Counsel opined that "certain types of confidentiality rules" belong in Category 1, for example "rules banning the discussion of confidential, proprietary, or customer information that make no mention of employee or wage information."[58] The critical inquiry is whether the rule prevents employee discussions about terms and conditions of employment.

In *Entergy Nuclear Operations,* Administrative Law Judge Paul Bogashe found unlawful the employer's "confidentiality" restriction because employees would reasonably interpret it to interfere with their right to

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[48] *S. Bakeries, LLC*, 2019 NLRB LEXIS 98, at *6 (N.L.R.B. February 11, 2019).

[49] *S. Bakeries, LLC*, 2019 NLRB LEXIS 98, at *6 (N.L.R.B. February 11, 2019).

[50] *Tri-County Med. Ctr., Inc.*, 222 N.L.R.B. 1089, 1089 (N.L.R.B. February 25, 1976).

[51] *AT&T Mobility LLC*, 2019 NLRB LEXIS 377, at *4 (N.L.R.B. July 1, 2019).

[52] *AT&T Mobility LLC*, 2019 NLRB LEXIS 377, at *11 (N.L.R.B. July 1, 2019).

[53] *AT&T Mobility LLC*, 2019 NLRB LEXIS 377, at *13 (N.L.R.B. July 1, 2019).

[54] *Argos Ready Mix LLC*, 2019 NLRB LEXIS 283, at *49 (N.L.R.B. May 14, 2019).

[55] *Argos Ready Mix LLC*, 2019 NLRB LEXIS 283, at **59-60 (N.L.R.B. May 14, 2019).

[56] *Boeing Co.*, 2017 NLRB LEXIS 634, at *74 (N.L.R.B. December 14, 2017).

[57] *Boeing Co.*, 2017 NLRB LEXIS 634, at **73-74 (N.L.R.B. December 14, 2017).

[58] *See* Peter B. Robb, N.L.R.B Office of the General Counsel, Memorandum GC 18-04, *Guidance on Handbook Rules Post-Boeing*, June 6, 2018, *available at* https://www.nlrb.gov/news-publications/nlrb-memoranda/general-counsel-memos, at 9.

discuss their wages and benefits.[59] The policy defined all employee information as confidential and prohibited employees from disclosing such information to anyone inside or outside of the company unless the person had a business need related to the company's operations or management.[60] The ALJ held that restricting conversations related to all employee information "would be reasonably understood by employees to prohibit them from discussing their wages and other benefits of employment with one another and with their union or other outside entity."[61]

Similarly, in *Argos Ready Mix LLC*[62] the ALJ concluded that the employer's confidentiality policy was unlawful where the policy defined confidential information as "all private information not generally known in the industry and not readily available, written or otherwise including, but not limited to, information regarding… earnings, … [and] employee information."[63] The ALJ found that this itemized list was lawful, except for "earnings" and "employee information."[64] The ALJ noted that the rule was not limited to sensitive employee information "such as bank account and social security numbers, medical information, etc."[65]

DRAFTING TIPS: Once again, recent decisions illustrate that a Category 1 rule (confidentiality) can be found unlawful if not drafted appropriately.[66] A well-drafted confidentiality policy should make clear it is not intended to restrict the sharing of information about wages and benefits, but instead is intended to prevent the unauthorized dissemination of sensitive or proprietary information, or customer information. Draft narrowly and do not assume that a simple disclaimer or limiting sentence will cure an otherwise fatally overbroad policy.[67]

Peter J. Moser is a partner in the law firm Hirsch Roberts Weinstein LLP where he concentrates in the areas of labor and employment law. He represents management-side clients in a wide variety of labor and employment matters. Peter is as an adjunct professor at Boston University School of Law and is a frequent speaker and author on labor and employment topics. Peter received his J.D. from Boston College Law School and his B.S. from Boston College. Kaila D. Clark is a third-year law student at the Northeastern University School of Law in Boston, Massachusetts, where she serves as Editor of Northeastern University Law Review's Online Forum. After graduating in May 2020, Kaila will serve as a judicial clerk for the Connecticut Supreme Court. Kaila holds a Bachelor of Science degree in Administration of Justice from the Pennsylvania State University, a Master of Arts degree in Criminal Justice from the University at Albany-SUNY, and a Master of Science degree in Adolescent Special Education from Hunter College.

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[59] *Entergy Nuclear Operations, Inc.*, 2019 NLRB LEXIS 331, at *17 (N.L.R.B. June 4, 2019).

[60] *Entergy Nuclear Operations, Inc.*, 2019 NLRB LEXIS 331, at **17-18 (N.L.R.B. June 4, 2019).

[61] *Entergy Nuclear Operations, Inc.*, 2019 NLRB LEXIS 331, at *17 (N.L.R.B. June 4, 2019).

[62] *Argos Ready Mix LLC*, 2019 NLRB LEXIS 283 (N.L.R.B. May 14, 2019).

[63] *Argos Ready Mix LLC*, 2019 NLRB LEXIS 283, at *40 (N.L.R.B. May 14, 2019).

[64] *Argos Ready Mix LLC*, 2019 NLRB LEXIS 283, at **40-41 (N.L.R.B. May 14, 2019) ("If the list contained only terms confined to Respondent's proprietary interests, a reasonable employee may read the term 'earnings' to apply solely to earnings of the company, but the inclusion of the term 'employee information' in the list clarifies to the reader that the definition encompasses more than company proprietary business information. Thus, applying the reasonable employee standard articulated in *Boeing*, I find that a reasonable employee would interpret the inclusion of the term earnings to include employee wages in the context of this rule.").

[65] *Argos Ready Mix LLC*, 2019 NLRB LEXIS 283, at *43 (N.L.R.B. May 14, 2019).

[66] Even a properly worded policy can be applied unlawfully. See e.g., *ADT, LLC and International Brotherhood of Electrical Workers, Locals 46 and 76*, 19-CA-216379 (ALJ, July 9, 2019) (employer violated the Act by terminating two employees who secretly taped captive audience meetings, pursuant to company policy prohibiting audio or video recording at work where "such recording occurs without explicit permission from all parties involved in those states with laws prohibiting consensual recording…"; despite the state being a two-party consent state the ALJ found that the two employees' activities were not covered by state law and were protected under the NLRA).

[67] *Pfizer, Inc.*, 2019 NLRB LEXIS 199 (N.L.R.B. March 21, 2019) (analyzing the text of the company's confidentiality clause with and without the "limiting sentence" purporting to make an exception allowing employees to engage in certain protected activities, and finding the limiting sentence had no effect on the clause's illegality because the employees would not have reasonably understood it to carve out an exception to the prohibition that would allow them to freely exercise their Section 7 rights without repercussion).

Stability in Bargaining and Employee Free Choice: A Balancing of Policies that Divides the Board in *Johnson Controls, Inc.*

By Elizabeth Torphy-Donzella

The right of employees to engage in "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" is enshrined in Section 7 of the National Labor Relations Act. So, too, is the right "to refrain from any or all such activities."[1]

Consistent with the goal of genuine employee choice, free from interference, the secret ballot election has been deemed by the NLRB to be the preferred means of determining employee support for unions.[2] However, the Board's application of these bedrock principles to a unionized workplace where continued support for the union is in doubt, has been anything but consistent. Indeed, the tension between the presumption of majority support that a union enjoys after being selected as the representative of employees and the reality that employees sometimes change their minds has been the subject of shifting legal standards by the NLRB over time.

As explained in this article, the NLRB's recent decision in *Johnson Controls, Inc.,*[3] represents the latest "shift." As also explained, the dueling majority and dissenting opinions reveal the ideological "fault lines" that underly viewpoints on the proper method for measuring employee support (or lack thereof) in an existing bargaining unit.

Facts of the Case

In August of 2010, a majority of employees at Johnson Controls' Florence South Carolina facility voted to be represented by Local 3066 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union"). Johnson Controls ("the Employer") and the Union negotiated a collective bargaining agreement ("CBA"), which was effective from May 7, 2012 through May 7, 2015.[4]

The parties began negotiations for a successor CBA on April 20, 2015.[5] The day after negotiations began, the Employer was presented with a petition signed by 83 of the 160 bargaining unit employees. The petition stated that the undersigned employees no longer wished to be represented by the Union for collective bargaining or any other purpose and that they understood the petition could be used to obtain an election supervised by the NLRB or to withdraw recognition. The record before the Board showed no evidence that that employer had solicited the petition.[6]

Later that same day, April 21, the Employer notified the Union of the petition and that it was cancelling the remaining bargaining sessions. The Employer stated that it intended to withdraw recognition. The Union responded on April 22, stating that it had not received any such petition and demanded that the Employer return to the bargaining table. On April 24, the Employer refused to provide the Union with the Petition or to resume bargaining.[7]

On May 5, the Employer informed the Union that it had not received evidence that the Union continued to enjoy majority support among bargaining unit employees. As such, the Employer said absent such evidence, it would withdraw recognition from the Union when the contract expired on May 7. Unbeknownst to the employer, however, the Union had been collecting authorization cards from employees beginning on April 24 stating their desire to be represented by the Union. By May 7, the date the CBA was to expire, the Union had collected cards from 69 employees. Six of the employees had also signed the petition for decertification (so-called "dual signers").[8]

On May 6, the Union responded that it had credible evidence that it continued to enjoy majority support and would be "happy to meet" to compare evidence. By letter dated May 7, the Employer rejected the Union's request, stating that the Employer was unwilling to share the names of employees who had signed the petition. The Employer advised the Union that it would withdraw recognition based on the evidence before it of loss of majority support absent contrary evidence from the Union. Receiving no response from the Union, the Employer

[1] 29 U.S.C. § 157.

[2] *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 602 (1969).

[3] 2019 NLRB LEXIS 384, 368 NLRB No. 2020 (July 3, 2019).

[4] 2019 NLRB LEXIS 384 at *9.

[5] All dates referenced are 2015 except where otherwise noted.

[6] 2019 NLRB LEXIS 384 at *9-10.

[7] 2019 NLRB LEXIS 384 at *10-11.

[8] 2019 NLRB LEXIS 384 at *11.

withdrew recognition on May 8 and implemented improvements to wages and benefits.[9]

On August 28, an employee filed a petition for a decertification election, but the petition was blocked by the Union's unfair labor practice ("ULP") charges challenging the withdrawal of recognition. At the ULP hearing, the six dual signers testified about their position on Union representation on May 8, the day the Employer withdrew recognition. Four of the six testified that they no longer wished to be represented by the Union as of that date. Crediting this testimony, the administrative law judge concluded that the Union did not enjoy majority support when recognition was withdrawn because these four, combined with the 77 other employees who has signed only the petition seeking to end the relationship with the Union, comprised a majority: 81 of 160 bargaining unit employees. As such, the Union's complaint was dismissed.[10]

The Opinions of the Board Majority and Dissent

The majority and dissenting Board members agreed on one thing: the judge's analysis was inconsistent with controlling precedent. That precedent disregards the sentiments of dual-signers when a union has obtained authorization cards in an effort to show majority support after an employer's declared intent to withdraw recognition. In this case, disregarding the signatures of the six employees would mean that on the date the employer refused to bargain, only 77 of the 160 employees had conclusively requested that the employer no longer recognize the union.

To the dissent, properly analyzed, the facts and established precedent made the outcome clear: the employer's refusal to bargain was unlawful. Holding otherwise would undermine stability in bargaining relationships.[11] To the majority, properly analyzed, the facts and the outcome established that precedent needed to be changed in order to effectuate employee free choice.

Relevant Provisions of the NLRA and Controlling Precedent

When a union is selected as the employees' representative for purposes of collective bargaining, the employer has a duty to bargain with the union. A refusal to bargain with the certified union violates Section 8(a)(5).[12]

The union enjoys an irrebuttable presumption of majority support for a year from the date of Board certification ("the insulated period") absent some extraordinary circumstance, such as the union becoming defunct. The union also enjoys a presumption of majority support during the term of a CBA or up to three years (the "contract bar" period).[13] In endorsing these presumptions, the U.S. Supreme Court has observed, "[t]hese presumptions are based not so much on an absolute certainty that the union's majority status will not erode as on the need to achieve stability in collective-bargaining relationships."[14]

In *Auciello Iron Works, Inc. v. NLRB* the Court identified a "third presumption, though not a conclusive one."

> At the end of the certification year or upon expiration of the collective-bargaining agreement, the presumption of majority status becomes a rebuttable one. . . . Then, an employer may overcome the presumption (when, for example, defending against an unfair labor practice charge) by showing that, at the time of [its] refusal to bargain, either (1) the union did not in fact enjoy majority support, or (2) the employer had a "good-faith" doubt, founded on a sufficient objective basis, of the union's majority support.[15]

After years of conflicting precedent about what evidence was sufficient to permit an employer to withdraw recognition based on "good faith doubt" (as opposed to evidence of actual loss of majority support) the Board abandoned the good faith doubt standard in *Levitz Furniture Co. of the Pacific*.[16] Under the new standard announced in *Levitz*, only actual loss of support will suffice for an employer to withdraw recognition. However, an employer that has announced a lawful anticipatory withdrawal of recognition "withdraws recognition at its peril."[17]

> If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer

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[9] 2019 NLRB LEXIS 384 at *12-13.

[10] 2019 NLRB LEXIS 384 at *13.

[11] 2019 NLRB LEXIS 384 at *76-77.

[12] 29 U.S.C. § 158(a)(5).

[13] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996). Challenges to a union's representational status also may be made by a rival union or the bargaining unit employees by the filing of an election petition during the "open period" (i.e. the 30-day period beginning at 90 days before the CBA expires and ending at 60-days before expiration in all contexts other than healthcare). In healthcare, the open period begins at 120 days and ends at 90 days before the contract expires. *Trinity Lutheran Hospital,* 218 NLRB 199 (1975).

[14] *Auciello*, 517 U.S. at 786.

[15] *Auciello,* 517 U.S. at 787 (citations and internal quotations omitted).

[16] 333 NLRB 717, 725 (2001). The majority opinion in *Levitz* sets forth the statutory and case history on the standards governing employer withdrawal of support from an incumbent union. *Id.* at 720-723.

[17] 333 NLRB at 725.

> will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).[18]

After *Levitz*, an employer believing that its employees no longer supported the union has had two choices in the period immediately before the expiration of a contract.[19]

An employer with evidence of actual loss of majority support (like Johnson Controls) may announce an intent to withdraw recognition, refuse to bargain, and then withdraw recognition once the contract expires. If the union can show that it reacquired majority support, then the employer will be found to have engaged in a ULP despite its good faith at the time.

Alternatively, an employer with evidence establishing "reasonable uncertainty" about the union's majority status (or one that is unwilling to withdraw recognition at its peril) may, under *Levitz,* file a petition for election (RM petition) to test the Union's support. However, such an employer must continue to recognize and bargain until the election, and if the Union files ULPs against the employer, the election will be blocked pending the final disposition of the case (often for years).[20]

Notably, employees may also during this period, independently of the employer, file a decertification petition (RD petition) to challenge the union's continuing majority status. However, as with the RM petition, the employer must continue to bargain with the union, and the election may be delayed for years by blocking charges.

The Board Majority's Decision

The Board majority (Members Ring, Kaplan and Emanuel) overruled *Levitz* "and its progeny insofar as they permit an incumbent union to defeat an employer's withdrawal of recognition in an unfair labor practice proceeding with evidence that it reacquired majority status in the interim between an anticipatory and actual withdrawal."[21] The majority deemed a change to be necessary because, in its estimation, the existing standard neither promotes stability in labor relations nor effectuates employee free choice.

First, the majority reasoned, the rule disregarding dual signers' initial expression of support fails to take account of the practical realities that such employees may be confused about the effect of a subsequently signed authorization card. On the other hand, permitting their testimony at an ULP hearing does not solve the problem. "Employees' testimony about their representational wishes, given the presence of the parties' representatives and bound to displease one of them, is an unreliable substitute for a secret ballot, cast within the safeguards of a Board-conducted election."[22]

Second, given that the union is not obligated in response to an employer's anticipatory withdrawal announcement to disclose that it has evidence of majority status, the employer may unwittingly become ensnared in an ULP proceeding. The majority reasoned that this is an unwarranted disruption of the bargaining relationship. "The union may obtain a decertification-barring affirmative bargaining order as a result, but the bargaining relationship has been unlawfully and unnecessarily disrupted"[23] (something that would not happen if a union were permitted to reestablish its majority status through an election).

Third, the majority noted an "unjustified asymmetry" at work in the *Levitz* standards that has not been explained by precedent. One aspect is that the employer may only rely on evidence in its possession at the time it acted to prove loss of majority support. By contrast, the union and Board's General Counsel are able to challenge the alleged lack of majority support by use of after-acquired evidence of authorization cards unavailable to the employer. Another aspect of asymmetry is the treatment of authorization cards under Board standards, which cannot effectively be revoked without notice to the union. Yet, an employee's signature on a petition expressing disaffection with the union effectively is negated prior to the withdrawal of recognition without notice to the employer.

Finally, the majority pointed out that a fairly recent decision from the D.C. Circuit had questioned whether an employer could be found to have violated the NLRA where it withdrew recognition based on information about employee lack of support and the union intentionally failed to disclose its "restored majority status."[24] Although in that case the court upheld the finding that the employer's

[18] 333 NLRB at 725.

[19] 333 NLRB at 725-26.

[20] The NLRB has issued a notice of proposed rulemaking to, in part, rescind the blocking charge policy in order to address "a systemic problem in blocking charge cases, which have been identified as the likely cause of what has been characterized as 'the long tail' of delay in the Board's processing of representation cases." 84 Fed. Reg. 39,930, 39,931 (Aug. 12, 2019).

[21] 2019 NLRB LEXIS at *7.

[22] 2019 NLRB LEXIS at *26.

[23] 2019 NLRB LEXIS at *27.

[24] 2019 NLRB LEXIS at *31, *citing Scomas of Sausalito, LLC v. NLRB,* 849 F.3d 1147, 1160 (D.C. Cir. 2017).

withdrawal violated Section 8(a)(5), the court refused to enforce the bargaining order. The court suggested that, on remand, the Board order an election.[25]

The majority explained what it saw as the practical problem with the aftermath of *Levitz*.

> In combination, the change from the . . . "good-faith doubt" standard to the "actual loss of majority status" requirement, plus the *Levitz* "peril" rule, created an opportunity that unions reasonably seized. An employer's anticipatory withdrawal of recognition became a signal to the union to mount a counter-offensive. If, in the interim between anticipatory and actual withdrawal, a union were able to reacquire majority status, the employer's withdrawal of recognition would violate Section 8(a)(5). The remedy for that violation would most likely include an affirmative bargaining order, which would insulate the union's majority status from challenge for up to one year. And if a successor contract could be concluded within that insulated period, a new contract bar would take effect, giving the union up to 3 more years during which its majority status would be irrebuttably presumed. Moreover, an incumbent union need not show the employer its evidence of reacquired majority status prior to contract expiration. From one perspective, this rule is justified by concern that an employer might retaliate against employees should their identities and preferences be revealed. But it is also true that the union's ability to *covertly* reacquire majority status increases the odds that the employer's withdrawal of recognition will unwittingly violate Section 8(a)(5), potentially resulting in an affirmative bargaining order, concomitant decertification bar, successor contract, and another contract bar.[26]

In place of the *Levitz* proof scheme, the Board majority adopted the following standard:

> [W]e hold that proof of an incumbent union's actual loss of majority support, if received by an employer within 90 days prior to contract expiration, conclusively rebuts the union's presumptive continuing majority status when the contract expires. However, the union may attempt to reestablish that status by filing a petition for a Board election within 45 days from the date the employer gives notice of an anticipatory withdrawal of recognition.[27]

Thus, under the new standard, the Board will not consider whether a union has reacquired majority support in an unfair labor practice proceeding. Instead, the union must file a petition for an election. The majority stated, "We recognize that so long as the contract remains in effect, the union's majority status is irrebuttably presumed. The election, however, is to determine whether a majority of unit employees wish the union to continue to represent them *after* the contract expires. Although a union typically enjoys a rebuttable presumption of majority support post-contract, the fact that at least fifty percent of the unit has signaled its nonsupport of the union rebuts the presumption."[28]

To address the concern about the amorphous "reasonable period of time before the contract expires" measure for an employer to announce an intention to withdraw recognition, the Board majority specified that this period shall be no more than 90 days before the contract expires.[29] In adopting this period, the majority aligned the announcement with the start of the "open period" during which challenges to a union's majority status may be made.[30] (For example, during this period, employees may file a decertification petition, or a rival union may file a representation petition.) Thereafter, the union has 45 days to file a petition for election (regardless of whether the employer has given notice more or fewer than 45 days before the contract expires) and the usual bar to election petitions filed within the 60-day "insulated" period before the expiration of the CBA will not apply.[31]

If no petition is timely filed by the union, the employer will be able to rely on the disaffection evidence in its possession when it announced its anticipatory withdrawal. In that event, the withdrawal will be lawful if there are no grounds to render the underlying evidence of disaffection to be unlawful. If, however, a petition is filed by the union, the employer *may* withhold recognition until the union's status is determined by a vote. However, the Board majority included in its new standard an exception to Section 8(a)(2) (and, as to the Union, 8(b)(1)(A)) where employers choose to continue to recognize and bargain with the previously certified union.[32]

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[25] 2019 NLRB LEXIS at *31-32.

[26] 2010 NLRB LEXIS 384 at *23-24 (emphasis in original).

[27] 2019 NLRB LEXIS at *7-8.

[28] 2019 NLRB LEXIS at *36.

[29] 2019 NLRB LEXIS at *36. In the healthcare context, the open period is from day 120 to day 90. See note 13, *supra.*

[30] 2019 NLRB LEXIS at *36. See note 13, *supra*, discussing the open period.

[31] 2019 NLRB LEXIS at *36. The majority noted that the union's showing of interest is satisfied by its status as the currently certified representative.

[32] 2019 NLRB LEXIS at *43-44. The majority noted that if a rival union has filed a petition or seeks to intervene, continued recognition will be impermissible.

The majority noted that employers may be wise to refrain from making unilateral changes in the terms and conditions of employees' employment after an election petition has been filed but before the election – the so-called "critical period." Doing so could result in the union being able to claim that a loss was tainted by the employer's conduct.[33] In addition, an employer that refrained from unilateral changes might still wisely refrain if the union lost the election and challenged ballots. This is because if the challenges are sustained and would have resulted in a union victory, the unilateral changes will be unlawful under Section 8(a)(5). At the same time, even without outcome determinative challenges, a second election might be ordered if the union prevailed on its objections.[34] Other risks would arise where the union won.

"Accordingly, as a practical matter, whereas withdrawing recognition after the contract expires following a lawful anticipatory withdrawal will generally be a risk-free act, making unilateral changes poses considerable risks. An employer should take these risks into consideration in its decision making, although we are well aware that the exigencies of running a business may exert other pressures."[35]

Member McFerran's Dissent

In dissenting, Member McFerran asserted that the majority's decision amounted to a change in "longstanding principles" without the sort of reasoned decision-making required of the agency.[36]

In the dissent's estimation, the balance struck by *Levitz*, to which the courts of appeals have uniformly deferred, properly respected a union's position as the certified representative, entitled to a continuing presumption of majority support. This precedent also provided an employer that had a basis to question continued majority support for a union with two options (which the dissent thought reasonably borne by the employer). The employer could withdraw recognition, subject to the requirement that it prove an actual loss of majority support as of the date of withdrawal (which the employer would admittedly do at its peril).[37] Alternatively, an employer with simply a good faith doubt could file an RM petition seeking a Board conducted election. "Thus, the *Levitz* framework is clearly designed to encourage employers to pursue the preferred route of a Board election rather than the riskier – and more destabilizing path of withdrawing recognition unilaterally."[38]

By contrast, requiring an incumbent union to file a petition to establish that is has not lost majority support, to the dissent, flies in the face of the established presumption the union enjoys. According to the dissent, the issue as framed by the majority misstates what is at work in cases involving an anticipatory withdrawal of recognition. These "cases do not involve a union's supposed 'reacquisition' of majority support but rather the employer's inability to meet its burden to demonstrate that the union has actually *lost* majority support at the crucial time: when the employer withdrew recognition after the collective bargaining agreement expired (and not earlier, when the agreement remained in effect and the employer was not allowed to withdraw recognition."[39] That is why, under established precedent, an employer concerned about whether it can prove actual loss of majority support at the time of withdrawal must file an RM petition, during the pendency of which "the incumbent union (because it is the incumbent union) remains in place unless and until employees reject the union in a secret ballot election vote."[40]

Seeming to lay out the analysis for a willing court of appeals on review, the dissent asserted,

> Incredibly, the majority states that its new framework is a 'better option' than the *employer*-initiated election option under *Levitz,* without explaining why the latter option does not adequately serve the policies of the National Labor Relations Act. Because it has "failed to consider an important aspect of the problem" ostensibly before the Board, the majority has not engaged in reasoned decision-making.[41]

Analysis

The Board's withdrawal of recognition precedent brings to mind the "old saw" – it is easier to get into a relationship than out of it. The barriers to employees who want to get out

[33] 2019 NLRB LEXIS at *44-45.
[34] 2019 NLRB LEXIS at *46.
[35] 2019 NLRB LEXIS at *46-47.
[36] 2019 NLRB LEXIS at *64.
[37] Ironically, the General Counsel appointed by President Obama (who also appointed Member McFerran), advocated overturning *Levitz Furniture* but for quite a different purpose than the Board majority in this case. Richard Griffin's proposal was to eliminate an employer's right to withdraw recognition without an election, thereby further limiting the options for ousting an incumbent union. See Memorandum GC 16-03 (May 9, 2016).
[38] 2019 NLRB LEXIS at *70.
[39] 2019 NLRB LEXIS at *82.
[40] 2019 NLRB LEXIS at *83.
[41] 2019 NLRB LEXIS at *83 (emphasis in original). In footnote 28, the dissent cites to *Hawaiian Dredging Construction Co., Inc. v. NLRB*, 857 F.3d 877, 881 (D.C. Cir. 2017) in which the court specified that a failure to engage in reasoned decision-making (including to engage the arguments of a dissenting Board member) renders its actions arbitrary and capricious.

of their "relationship" with a union that has been certified as the bargaining representative are significant and real.

First, the window to challenge the union's majority status is short; the "open period" begins on the 90th day before the expiration of a CBA and ends on day 60. Thus, employees untutored in the applicable rules may fail to act in time to effectuate their Section 7 right to forego representation by a union.

Second, petitions for elections to challenge the union's continuing majority support (whether filed by employees – assuming they can navigate that process without employer assistance, as they must – or by the employer based on reasonable doubt) are an ineffective solution. Such petitions are invariably met with unfair labor practice charges that block any election from proceeding. As the Board majority noted, "[u]nder the blocking-charge policy, the pendency of an unfair labor practice charge–regardless of whether it is meritorious–may prevent an election from occurring for an extended period of time."[42] During this extended "limbo" period, an employer must continue to recognize and bargain with the union (one that may no longer represent the will of a majority of employees).[43]

By putting the onus on the union to petition for an election when an employer announces an anticipatory withdrawal of recognition, the majority in *Johnson Controls* appears to be attempting to implement a process that may more quickly resolve questions about a union's majority support (and by a more reliable means – a secret ballot). Presumably, unions will be less inclined to file charges to block a union-initiated election, although blocking charges remain available[44] (at least for the time being. The Board has issued a notice of proposed rulemaking to change these procedures, which would involve holding elections and impounding the ballots pending a determination of unfair labor practice charges rather than blocking elections.[45]) In addition, although the employer is permitted, despite the filing of a petition by the union, to cease recognizing the union and bargaining, the majority makes clear that "peril" still exists for employers that make unilateral changes. This is because the union may win the election, successfully challenge a loss, or prove that the information on which the employer relied in announcing the anticipatory withdrawal was tainted. Thus, the Board majority adopted a safe harbor from liability under Section 8(a)(2) and 8(b)(1)(A) where the employer refrains from withdrawing recognition in this context.[46]

The dissent contends that the majority has changed the standard without adequately explaining the "rational connection between the reasons offered . . . for rejecting established law and the new approach it adopts here."[47] In failing to explain why the requirement that the employer initiate an election, as *Levitz* provides, is the "better option" the dissent asserts that the majority has not engaged in reasoned decision-making. Tellingly, however, the dissent omits any discussion of the Board's blocking charge policy and how it interferes with the free choice right of those employees who oppose a union.

The U.S. Supreme Court has cautioned that "[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice."[48] In practical application, the processes established by *Levitz* seemed to favor the position of incumbent unions (in the name of labor stability) and interposed barriers to employee efforts to reject their unions. The new process implemented by the Board (assuming it survives judicial scrutiny) may allow more opportunity for the expression of employee free choice. Only time and experience will tell.

Elizabeth Torphy-Donzella is a Partner at Shawe Rosenthal, a law firm that represents management in labor and employment matters in litigation, arbitration, and before State and Federal agencies. Ms. Torphy-Donzella is a Fellow of the Litigation Counsel of America and is a "recognized practitioner" by Chambers USA: America's Leading Lawyers for Business. Shawe Rosenthal attorney, Chad M. Horton, provided helpful input for this article. Before joining Shawe Rosenthal, Horton was a Field Attorney with the NLRB where his duties included investigating and litigating unfair labor practice charges and handling all aspects of representation cases.

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[42] 2019 NLRB LEXIS at *40. The majority further observed, "For this reason, among others, the Board plans to revisit the blocking charge policy in a future rulemaking proceeding. As of the issuance of this decision, however, the Board has not yet revisited the policy. Thus, for institutional reasons, we continue to maintain extant law pertaining to blocking charges." *Id.*

[43] Employers that have tried to take a middle path between outright withdrawal of recognition (which permits the employer to make changes without dealing with the union, albeit at its peril) and full-scale bargaining with what may be a union lacking majority support have not fared well. *See generally* E. Torphy-Donzella, *"T-Mobile, Inc. v. National Labor Relations Board: Why the Perilous Choice Is Best"* 18 Bender's Lab. & Empl. Bull. 138 (April 2018).

[44] 2019 NLRB LEXIS at *37 n. 45.

[45] 84 Fed Reg. 39,930 (August 12, 2019).

[46] 2019 NLRB LEXIS at *43.

[47] 2019 NLRB LEXIS at * 64.

[48] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973) *quoting NLRB v. Tower Co.*, 329 U.S. 324, 330 (1946).

Cafeteria Solicitation and Eliminating the Public Space Exception Under NLRB Case Law

By RyAnn McKay Hooper and Steven M. Swirsky

Navigating the standards for non-employee access to employer property under the National Labor Relations Act (Act) *should* become a little easier following the National Labor Relations Board's recent decision in *UPMC Presbyterian Hospital.*[1] The decision expressly overruled the Board's long-standing "public space exception," which allowed non-employee union organizers access to a portion of the employer's premises if it was open to the public, as long as the organizers were not disruptive and used the areas in a manner consistent with its intended use.[2] While the decision appears to have far-reaching implications, in reality, its impact is likely to be limited, given its language and the fact that organizing in modern times - thirty-seven years after the Board established the public space exception – looks very different. Organizing in a world well versed in smart-phone technology and social media presents challenges not contemplated by current Board case law.

Historical Case Law Regarding Non-Employee Access to Employer Premises

The Board decision in *NLRB v. Babcock & Wilson Company*[3] first set the standard for non-employee access to employer premises. *Babcock* recognized an employer's right to control what occurs on its property, requiring an employer to permit union solicitation by non-employee union representatives on company property in two circumstances: (1) where the union can demonstrate that employees were otherwise inaccessible (the "inaccessibility exception"), or (2) where the employer specifically discriminated against union solicitation by permitting other kinds of solicitation but not union solicitation. (the "discrimination exception").[4] A further exception emerged 1982, with the Board decision in *Montgomery Ward*.[5] That decision gave organizing campaigns a bit of a boost in creating the "public space exception" noted above, which the Board overturned in *UPMC Presbyterian Hospital*. Again, the public space exception allowed non-employee organizers access to portions of company premises open to the public, if the organizing was done in a manner consistent with the public area's use and it was not disruptive.[6]

The boost of *Montgomery Ward* was partially thwarted in 1992 with the Supreme Court holding in *Lechmere, Inc. v. NLRB*.[7] In *Lechmere* a union attempted to organize retail employees by handbilling cars parked in the employee parking area of the shopping plaza which housed the retail store targeted by the union's organizing campaign. When the store learned of the handbilling, it denied union organizers access to the parking lot.[8] This forced the union organizers to distribute their materials from a strip of public land, adjacent to the parking lot.

The Board determined in *Lechmere* that the employer violated Section 8(a)(1) of the Act by barring the union organizers' access to its public parking lot.[9] This determination was overruled by the Supreme Court, which held that an employer is not required to give non-employee union organizers access to their property under most circumstances. While the Court acknowledged that Section 7 of the Act[10] allows employees to self-organize

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[1] 368 NLRB No. 2, published at 2019 NLRB LEXIS 346 (June 14, 2019).

[2] 2019 NLRB LEXIS 346, at **11-12, citing *Montgomery Ward & Co.,* 256 NLRB 800, 801 (1981).

[3] 351 U.S. 105 (1956).

[4] *See NLRB v. Babcock & Wilcox Co*., 315 U.S. 105, 113 (1956) (holding that nonemployee distribution of union literature in parking lot permitted because union had no other reasonable alternative channel of communication); *see also Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978) (holding nonemployee union representatives may be barred unless there is no alternative means of communication.

[5] 256 NLRB 800, 801 (1981), enfd. 692 F.2d 1115 (7th Cir. 1982).

[6] *Montgomery Ward & Co*., 256 NLRB 800, 801 (1981), enfd. 692 F2d 1115 (7th Cir. 1982).

[7] 502 U.S 527 (1992).

[8] 502 U.S. at 529.

[9] 295 NLRB. 92 (1989). A divided panel of the First Circuit denied Lechmere's petition for review and enforced the Board's order. *See* 502 U.S. at 531, citing 914 F.3d 313 (1990).

[10] Section 7 of the NLRA provides in relevant part that "employees shall have the right to self-organization, to form, join, or assist labor organizations." 29 U. S. C. § 157. Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158(a)(1).

and that is right "depends in some measure on [their] ability . . .to learn the advantages of self-organization from others,"[11] it held that Section 7 cannot compel an employer to allow for distribution of union literature by nonemployee organizers on the employer's property, unless the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them through the usual channels.[12]

Stated differently, the *Lechmere* Court held that Section 7 of the Act only applies to non-employee union organizers where, "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels."[13] In the words of the Court:

> As we have explained, the [inaccessibility] exception to *Babcock's* rule is a narrow one. It does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective, but only where "the *location of a plant and the living quarters of the employees* place the employees *beyond the reach* of reasonable union efforts to communicate with them." Classic examples include logging camps, mining camps, and mountain resort hotels. *Babcock's* exception was crafted precisely to protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society. The union's burden of establishing such isolation is, as we have explained, "a heavy one," and one not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication.[14]

Rejecting the notion that employees are inaccessible merely because they did not reside on the employer's premises or because they lived in a large metropolitan area, the Court found that the union failed to show that "unique obstacles" prevented its reasonable access to the employees outside of the employer's premises and, thus, rejected the Board's conclusion that the employer violated Section 8(a)(1) of the Act.[15]

While *Lechmere* did not expressly overrule the public space exception, it did make it easier for employers to close the loophole created by that exception by adjusting their non-solicitation policies to prohibit all types of solicitation on company premises. The *Lechmere* holding glossed over initial pronouncements of the public space exception, which required the organizing activity to be non-disruptive nature. Instead, *Lechmere* focused on whether the union had reasonable access to employees outside of the company premises and whether the company treated all solicitations in the same manner. The Court held, in particular, that an employer did not have to open any space – public or otherwise – to non-employee organizers where inaccessibility to employees or disparate enforcement of a non-solicitation policy was not at play.[16]

Courts of appeals interpreted and applied *Montgomery Ward* in different ways after *Lechmere*, with the United States Court of Appeals for the District of Columbia taking the stance that *Lechmere* effectively overruled the public space exception.[17] Despite the new case law ushered in by *Lechmere*, the public space exception still existed on the books and was recognized by the Board until the recent holding in *UPMC Presbyterian Hospital*.[18] As the Board stated in *UPMC Presbyterian Hospital*, "[w]e agree with the judicial criticism of extant precedent permitting nonemployee union representatives to gain access to public areas on private property in contravention of *Babcock's* principles."[19]

The Board's 2019 *UPMC* Holding

In *UPMC Presbyterian Hospital*, a hospital security guard removed two non-employee union organizers from the hospital cafeteria. The organizers were sitting with at least six (6) employees at two tables, eating lunch, and discussing union organizing campaign matters. The Hospital cafeteria, which was on the eleventh (11th) floor of the hospital building was open to the public.[20] The Union organizers had distributed union pamphlets and pins while meeting with employees in the cafeteria. The security guard approached the union organizers, asked

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[11] 502 U.S. at 532, citing *Babcock,* 351 U.S. at 113.

[12] 502 U.S. at 539.

[13] 502 U.S. at 539.

[14] 502 U.S. at 539-40 (internal citations omitted; emphasis added).

[15] 502 U.S. at 540.

[16] 502 U.S. at 540-41.

[17] *See also Farm Fresh, Inc.*, 326 NLRB 997 (1998), review granted in part, enforcement granted in part *UFCW Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000) (holding *Lechmere* effectively overruled *Montgomery Ward & Co.* by holding that an employer's prohibition of non-disruptive solicitation of off duty employees in a public snack bar location on the employer's premises was permissible because there was no showing of a disparate application of a no-solicitation policy).

[18] 368 NLRB No. 2, 2019 NLRB LEXIS 346 (June 14, 2019).

[19] 2019 NLRB LEXIS 346, at *15.

[20] 2019 NLRB LEXIS 346, at *5.

them to present identification, and proceeded to eject them from the cafeteria.

The Union later filed unfair labor practice charges alleging *inter alia* that both the guard's ejection of the union representatives and the request to present identification were unlawful. The record at hearing suggested the employer frequently ejected individual participating in various types of solicitations from the cafeteria and that union solicitation was not treated disparately. After an unfair labor practice hearing, the Administrative Law Judge (ALJ) concluded that the employer had committed three violations of Section 8(a)(1) of the National Labor Relations Act (Act). Reversing the ALJ, the Board majority found that removal of the non-employee union organizers was consistent with the hospital's prior practice of enforcing its non-solicitation policy and that the security guard's request for the non-employee union organizers to produce identification did not violate the Act.[21]

In reaching this 3-1 split decision, the Board majority (Ring, Emanuel, Kaplan) reviewed the Supreme Court's decision in *NLRB v. Babcock and Wilcox Co*.[22] which permitted the solicitation of employees by a non-employee union representatives on company premises *only* where the union can demonstrate that employees were otherwise inaccessible, or where the employer specifically discriminated against union solicitation, permitting other kinds of solicitation on company property. The Board in *UPMC* restored the original *Babcock* standard, only rejecting what it considered "the public space exception detour" which expanded the *Babcock* rules for access. The Board also reaffirmed that an employer may enforce rules and practices which protect its property interests, so long as the practices neither violate the Act nor fall within the *Babcock* exceptions.[23]

What Does UPMC Mean for Employers?

Practically speaking, this holding is not likely to have a significant impact on how most employer's approach union organization and non-solicitation given the fact that so few employers' facilities have areas that are otherwise open to the public and the fact that in most instances union organizers will have numerous other opportunities and means to reach workers they are seeking to organize. The language of the *UPMC Presbyterian Hospital* decision does, however, present as employer friendly, affirming that an employer has no duty to allow the nonemployee union representatives use of the employer's facility for organizational activities, even if the activity is not disruptive. Despite this language, under the *Babcock* standard, discriminatory enforcement of an employer's non-solicitation policy – rather than the existence of a public space exception – has always been the greatest risk and surefire way to draw an unfair labor practice charge.[24] It is notable that the hospital in the *UPMC Presbyterian Hospital* decision had a well-drafted non-solicitation policy and that it consistently uniformly enforced its non-solicitation policy. The hospital did not enforce its policy more onerously against union solicitation over other forms of solicitation which occurred in its public spaces.[25]

The *UPMC Presbyterian Hospital* decision does not preclude solicitation in public spaces by *employee* organizers.[26] Section 7 of the Act grants employees the right to discuss mutual aid and protection and organizing, and further to pass union materials out and solicit employees in their off-duty time. Further, the presence and use of union salts – individuals who apply for and obtain employment with an employer for the purpose of organizing employees from the inside – is still common in construction and other industries. Once a salt is hired, the general rights afforded an employee organizer apply.

Even more notably, the *UPMC Presbyterian Hospital* case does not impact the special circumstance acknowledged by the Board for off-duty contractor access to solicit employees in public spaces inside a related business. In *New York-New York Hotel and Casino v. NLRB*, a restaurant was operated by a contractor, located inside the hotel and casino.[27] The restaurant contractor employees sought

[21] The Board did however find a violation where the security guard sought identification from the employees meeting with the non-employee union representatives present. The Board held this action chilled Section 7 activity.

[22] 351 U.S. 105, 112 (1956).

[23] 2019 NLRB LEXIS 346, at *17.

[24] *See K-Mart Corp.*, 313 NLRB 50, 58 (1993) (holding the Employer violated Section 8(a)(1) by asking the police to remove non-employee handbillers while permitting the Salvation Army and donation seekers for religious organization to solicit in front of the store on the same day).

[25] 2019 NLRB LEXIS 346, at *7.

[26] *First Healthcare Corp.*, 336 NLRB 646 (2001), review denied, enforcement granted by 344 F.3d 523 (6th Cir. 2003).

[27] *New York New York Hotel & Casino*, 356 NLRB 907, 911 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 568 U.S. 1244 (2013).

to distribute union materials to restaurant employees and customers of the restaurant at its entrance of the restaurant inside the public area of the hotel and casino. The Board held that the hotel and casino could not bar the contractor employees from solicitation because they were unable to show that the activity of the subcontractor's employees significantly interfered with the hotel's use of the property or another legitimate business reason to justify the exclusion.[28] This retail sub-contractor exception is analogous to the *Montgomery Ward* public space exception the Board recently eliminated.

Finally, organizing is no longer limited to face-to-face solicitation. The techniques unions employ for organizing have changed drastically from the time of the *Babcock* and *Lechmere* decisions. Union organizers now commonly access employees through the use of email and social media, in spaces such as Facebook and LinkedIn, where employees often identify where they work and employers have no proprietary interest in preventing Union solicitation or contact. Only time will tell how the Board will address the ever-expanding universe of public spaces.

Steven M. Swirsky is a Member in the Employment, Labor & Workforce Management and Health Care & Life Sciences practices, in the New York office of Epstein Becker Green. He is a member of the firm's Board of Directors and Co-Chair of the firm's Labor Management Relations practice group. RyAnn McKay Hooper is an Associate in the Employment, Labor & Workforce Management practice, in the New York office of Epstein Becker Green.

RECENT DEVELOPMENTS

ADA

There Was a Genuine Issue of Material Fact As To Whether Realtor Association Offered An Auxiliary Aid or Service That Would Provide Effective Communication to Plaintiff

Tauscher v. Phoenix Bd. of Realtors, Inc., 2019 U.S. App. LEXIS 22180 (9th Cir. July 25, 2019)

Mark Tauscher was a profoundly deaf individual who was a licensed real estate salesperson in Arizona. Tauscher filed a lawsuit against the Phoenix Association of Realtors ("PAR"), alleging that PAR did not comply with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, and the Arizonans with Disabilities Act ("AzDA"), A.R.S. §§ 41-1492 to 41-1492.12. Tauscher alleged that PAR failed to comply with federal and state laws when it denied Tauscher's requests for an American Sign Language ("ASL") interpreter at continuing education courses. The United States District Court for the District of Arizona held that PAR's obligations under the ADA were satisfied when it engaged in a dialogue with Tauscher about his request for an ASL interpreter, and PAR was relieved from any further obligations under the ADA because Tauscher had refused to discuss any measures other than an ASL interpreter. The district court granted summary judgment to PAR. Tauscher appealed and the Ninth Circuit reversed the district court's judgment.

The court noted that Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." The court stated that under the applicable regulations, a public accommodation has an obligation to "take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services" [28 C.F.R. § 36.303(a)]. The court further stated that a public accommodation is relieved of this obligation only if it "can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense."

According to Tauscher, PAR failed to discharge its ADA obligations because it failed to provide an ASL interpreter. The court stated that the regulations did not require PAR to provide the specific aid or service requested by Tauscher; the regulations make clear that "the ultimate decision as to what measures to take rests with the public accommodation," so long as the measures provide effective communication [28 C.F.R. § 36.303(c)(1)(ii)]. However, the court agreed with Tauscher that there was a genuine issue of material fact as to whether PAR offered an auxiliary aid or service that would provide effective communication to Tauscher.

[28] 356 NLRB at 911.

CBA

District Court Had Jurisdiction To Enter a Status Quo Injunction in the Dispute Between Pilots' union and Airline Carriers

Atlas Air, Inc. v. Int'l Bhd. of Teamsters, 2019 U.S. App. LEXIS 20057 (D.C. Cir. July 5, 2019)

Atlas Air, Inc. and Polar Air Cargo Worldwide, Inc. (collectively, "Atlas") were global commercial air carriers that operated domestic and intercontinental flights for the U.S. military, DHL, and Amazon, among others. Atlas's pilots were represented by the International Brotherhood of Teamsters; the International Brotherhood of Teamsters, Airline Division; and the Airline Professionals Association of the International Brotherhood of Teamsters, Local Union No. 1224 (collectively the "Union"). In 2011, after a protracted negotiation process, the union and Atlas entered into a collective bargaining agreement ("CBA"). The CBA prohibited the union from engaging in a work stoppage or slowdown and permitted Atlas to seek an injunction if the union did so. The CBA also created a process to resolve any "grievances" that Atlas had over the "interpretation or application" of its provisions. On February 16, 2016, the union notified Atlas that it would seek to amend the existing CBA. The union encouraged pilots to "SHOP," or "stop helping out Purchase," named for the location of Atlas's headquarters in Purchase and also asked pilots to "BOOT," which stands for "block out on time." Atlas viewed SHOP and BOOT as part of a union attempt to orchestrate a work slowdown in an attempt to ratchet up pressure on Atlas during their negotiations over an amended CBA. When Atlas could not convince the union to stop this behavior, the company asked the United States District Court for the District of Columbia for an injunction. The union disputed Atlas's allegations and moved to dismiss for lack of jurisdiction. After a three-day evidentiary hearing, the district court determined that it had jurisdiction and entered a preliminary injunction to prevent the union from encouraging pilots to "block out on time," call in sick on short notice, and refused to volunteer for overtime shifts. The union appealed. The D.C. Circuit stated that the district court had jurisdiction to enter a status quo injunction in this major dispute, and did not abuse its discretion in enjoining this conduct.

The court stated that Atlas had presented compelling evidence in support of its assertion that this case involved a major dispute. The union's own statements demonstrated that it frequently encouraged pilots to take the very actions Atlas challenged as a means to gain leverage in the negotiations over amending the CBA. The court stated that a dispute over the terms of a new or amended collective bargaining agreement is unequivocally major and because the existing CBA did not even arguably speak to whether this conduct was permissible when done in furtherance of that particular goal, this is a major dispute.

The court stated that the purpose of the Railway Labor Act status quo requirement is to maintain the parties' respective positions while they negotiate future rights. When one party alters the status quo in order to put "economic pressure" on the other to enhance its own bargaining position, that conduct is part of a major dispute and may be enjoined. The court stated that Atlas had made every reasonable effort to resolve its disputes with the union. In addition, the court stated that the district court sufficiently found that Atlas "made efforts to resolve the slowdown short of litigation," as demonstrated by communications with the union and its counsel.

Further, the court stated that the even though section 7 of the Norris-LaGuardia Act applies to all cases "involving or growing out of a labor dispute," courts have consistently interpreted subsection (e) to apply only where one party has threatened violence against the person or physical property of another. A union is allowed to educate its members about their contractual rights and safety obligations, and in that context, it may not be a problem to call for strict compliance with the contract. A union may not, however, encourage strict compliance with the terms of an existing agreement in an effort to gain leverage in negotiations for a new or amended contract. When a union changes the status quo in aid of such an effort, the district court may enjoin the union's conduct. The court stated that is just what happened here with respect to blocking out, short-notice sick calls, and overtime.

Ordinary Contract Principles Regarding the Incorporation of Documents Compelled Finding the Fund Had Adequately Alleged That the employer Was Liable For An Exit Contribution

Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Four-C-Aire, Inc., 2019 U.S. App. LEXIS 19953 (4th Cir. July 3, 2019)

The Board of Trustees of the Sheet Metal Workers' National Pension Fund (the "Fund"), a multiemployer pension plan, filed this suit claiming a delinquent exit contribution from Four-C-Aire, Inc., a former participating employer, pursuant to § 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1145. The United States District Court for the Eastern District of Virginia granted Four-C-Aire's motion to

dismiss, the Fund appealed. The Fourth Circuit reversed the district court's order granting the motion to dismiss, vacated the judgment as to the exit contribution claim, and remanded for further proceedings.

The court stated that because the Fund's governing agreements (the "trust documents") and Four-C-Aire's collective bargaining agreement (the "CBA") required participating employers to pay an exit contribution when they no longer had a duty to contribute to the Fund due to the expiration of the underlying CBA, the complaint alleged a viable claim. Among other things, the complaint alleged that all the events triggering an exit contribution occurred as to Four-C-Aire: that is, the corporation ceased having an obligation to contribute to the Fund because of the CBA's expiration; this cessation resulted in an event of withdrawal; but Four-C-Aire did not have to pay the statutory withdrawal liability because of ERISA's *de minimis* rule. The court stated that altogether, this was sufficient to allege that Four-C-Aire's duty to pay an exit contribution survived the CBA's expiration, even if the triggering event was the CBA's expiration.

In sum, the court stated that as alleged in the complaint, Four-C-Aire agreed to be bound by both the CBA and the trust documents. Thus, the terms of the trust documents had to be considered to determine whether any specific obligations survived the CBA's expiration. The court stated that because the district court's analysis failed to look to the plain language of the trust documents and instead centered exclusively on whether the CBA called for the incorporation provision to survive the CBA's expiration, the court's analysis was in error.

The court concluded by noting that the district court's analysis would also undermine the statutory protections Congress set in place for multiemployer pension plans. In providing a cause of action permitting plans to enforce contribution requirements according to the plain terms of the controlling documents, Congress created a statutory scheme that would allow plans to enforce their contribution obligations uniformly and thereby avoid discrepancies in the enforcement of such obligations. But the court stated that was precisely what the district court's holding permitted: if the unique evergreen clause in Four-C-Aire's individual CBA dictated the extent of its obligations to the Fund, the Fund would be prevented from uniformly enforcing exit contribution requirements because other withdrawing employers would be able to point to similar individual CBA terms to limit their particular obligations to the Fund. The court stated that instead, by enforcing the terms of the trust documents and amendment according to their plain language, the Fund was able to ensure uniform application of the exit contribution requirements.

DISCRIMINATION

Plaintiffs Did Not Need To Identify "Concrete, Systemic Deficiency" in District of Columbia's Transition Services

Brown v. District of Columbia, 2019 U.S. App. LEXIS 20058 (D.C. Cir. July 5, 2019)

In Olmstead v. L.C. ex rel. Zimring, the U.S. Supreme Court held that the unjustified segregation of disabled individuals in institutions is a form of disability discrimination barred by federal law. 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999). Consequently, the District of Columbia violated the Americans with Disabilities Act of 1990 ("ADA"), and the Rehabilitation Act of 1973, if it cares for a mentally or physically disabled individual in a nursing home notwithstanding, with reasonable modifications to its policies and procedures, it could care for that individual in the community.

Plaintiffs were a class of physically disabled individuals who had been receiving care in the District of Columbia nursing homes for more than ninety days but wished to transition—and were capable of transitioning—to community-based care. They sought an injunction requiring the district to alter its policies and procedures in order to help them transition to the community. After a nine-day bench trial, the United States District Court for the District of Columbia entered judgment in favor of the district. The D.C. Circuit reversed and remanded the district court's judgment.

The court stated that the district court erred in placing the burden of proof on plaintiffs because the district bore the burden of showing the unreasonableness of a requested accommodation once plaintiffs showed community placement was appropriate and they did not object to transfer to a restrictive setting. The court stated that the district court's fundamental error was looking for the existence vel non of a "concrete, systemic deficiency" in the district's transition services. Having determined that plaintiffs bore the burden of demonstrating the existence of a concrete, systemic deficiency, the district court considered four potential systemic deficiencies at trial. At the end of the trial, the district court concluded that plaintiffs had not proved any of the four and therefore entered judgment against them. The court stated that the district court's formulation led it to require plaintiffs to meet a burden they should not have been made to shoulder.

The court stated that commonality of the class under Fed. R. Civ. P. 23 had been established because common

proof would lead to common answers to each of the questions on which resolution of plaintiffs' claims turned. On remand, the district court was directed to consider whether the requested accommodations were reasonable because, inter alia, it had not concluded whether the district's "Olmstead Plan" was adequate and that all requested accommodations were categorically unreasonable.

EEOC

Substantial Evidence Supported the National Labor Relations Board's Factual Finding that Petitioner Engaged in Direct Dealing with Employees

NLRB v. Ingredion Inc., 2019 U.S. App. LEXIS 21405 (D.C. Cir. July 19, 2019)

Ingredion, Inc. petitioned for review of the decision and order of the National Labor Relations Board on the ground that five of the board's findings, including that Ingredion violated the National Labor Relations Act ("the Act") by dealing directly with employees and denigrating a union in the eyes of employees, were unsupported by substantial evidence. The D.C. Circuit concluded that Ingredion failed to meet its burden in this regard. The court further concluded that Ingredion's contentions that the board violated its due process rights and improperly imposed a notice-reading remedy lacked merit. Accordingly, the D.C. Circuit denied the petition and granted the board's cross-application for enforcement of its order.

The court stated that the National Labor Relations Board's finding rested on substantial evidence that the employer's negotiation's conduct in directly dealing with employees undermined the exclusive agency relationship between the union and its members, illustrating one of the ills Congress sought to guard against by enacting Sections 8(a) and 9(a) of the National Labor Relations Act [29 U.S.C.S. §§ 158(a), 159(a)].

Ingredion's contention that the manager's statements were non-threatening, misunderstood the nature of its violation. The court stated that the board did not find that the statements were threatening, but rather that they were misleading. The record evidence supported the board's finding that Ingredion violated Section 8(a)(1) by misrepresenting the union's position in a way that tended to cause employees to lose faith in the union.

The court stated that the record showed that Ingredion's contemporaneous explanation for the delay differed from the explanation it presented to the court. The court noted that chief negotiator, Meadows, did not tell the union that the information would be difficult or time-consuming to retrieve, but rather that Ingredion might not provide pension-related information because it intended to discontinue the existing pension plan. The court stated that this was not a valid reason for delaying compliance with an information request; regardless of what Ingredion intended, it had an obligation to provide the information in a timely manner because it was relevant to the union's proposals. The court stated that given Ingredion's inadequate and changing explanation for the delay, the board was entitled to conclude that the delay was unreasonable. Ingredion maintained it did not have a meaningful opportunity to respond to the unlawful-threats allegation because it was added to the complaint just two days before the administrative hearing. Yet the record showed Ingredion received a "full and fair opportunity to litigate the matter," and in any event Ingredion pointed to no prejudice. Thus, the court stated that Ingredion had shown no basis for reversing the board's findings of unfair labor practices.

FLRA

District Court Erred Holding It Had Jurisdiction Because Unions' Claims Fell Within Exclusive Statutory Scheme Under Federal Service Labor-Management Relations Statute

AFGE v. Trump, 2019 U.S. App. LEXIS 20957 (D.C. Cir. July 16, 2019)

In the 1960s, Presidents used executive orders to grant federal employees "limited rights to engage in concerted activity" through unions. In 1978, Congress enacted the Federal Service Labor-Management Relations Statute (the "Statute" or FSLMRS) to govern labor relations between the executive branch and its employees. The Statute is set forth in Title VII of the Civil Service Reform Act ("CSRA") [5 U.S.C. §§ 7101-35]. The Statute grants federal employees the right to organize and bargain collectively, and it requires that unions and federal agencies negotiate in good faith over certain matters.

In May 2018, President Trump issued three executive orders regarding federal labor-management relations. Among other requirements, the "Collective Bargaining Order" provides agencies with certain procedures that they should seek to institute during negotiations with unions. The American Federation of Government Employees ("AFGE") and sixteen other federal labor unions immediately challenged the executive orders in four separate suits against the President, Office of

Personnel Management ("OPM"), and the Director of OPM [*AFGE v. Trump*, 318 F. Supp. 3d 370, 391 (D.D.C. 2018)]. On the merits, United States District Court for the District of Columbia ruled that the President had constitutional and statutory authority to issue executive orders in the field of federal labor relations generally, but nine provisions of these executive orders violated the Statute: Some did so by removing from the bargaining table subjects that "must" or "may" be negotiable, others by preventing agencies from bargaining in good faith. The court enjoined the President's subordinates within the executive branch from implementing these provisions. The government appealed, arguing that the district court lacked subject matter jurisdiction and erred in holding unlawful the various provisions of the executive orders. The D.C. Circuit held that the district court lacked jurisdiction and vacated its judgment.

The court stated that the unions must pursue their claims through the scheme established under the Statute, which provides for administrative review by the Federal Labor Relations Authority ("FLRA") followed by judicial review in the courts of appeals.

The court noted that with the FSLMRS, as with all of the CSRA: 'Congress passed an enormously complicated and subtle scheme to govern employee relations in the federal sector.' "Thus, the court discerned that Congress intended the statutory scheme to be exclusive with respect to claims within its scope. Further, the court stated that, even if the FLRA could not address the claims, circuit courts could do so on appeal from the FLRA. The statutory scheme provides that the courts of appeals "shall have jurisdiction of the [FLRA] proceeding and of the question determined therein" and "may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the [FLRA]."

Requiring the unions here to proceed through the FSLMRS's scheme did not foreclose "all meaningful judicial review." The court stated that although the unions are not able to pursue their preferred systemwide challenge through the scheme, they can ultimately obtain review of and relief from the executive orders by litigating their claims in the context of concrete bargaining disputes.

The court stated that the unions' challenge in this case was of the type that was regularly adjudicated through the FSLMRS's scheme: disputes over whether the Statute had been violated. Their challenge was not wholly collateral to the statutory scheme. All three considerations demonstrated that the unions' claims fell within the exclusive statutory scheme, which the unions could not bypass by filing suit in the district court. Finally, the court stated that lacking jurisdiction, the district court had no power to address the merits of the executive orders.

NLRA

Company Unlawfully Suspended an Employee For Engaging in Protected Concerted Activity in Violation of the National Labor Relations Act

St. Paul Park Ref. Co., LLC v. NLRB, 2019 U.S. App. LEXIS 20205 (8th Cir. July 8, 2019)

St. Paul Park Refining Company ("SPPRC") operated an oil refinery with 450 employees in St. Paul Park, Minnesota. The refinery maintained constant operations, processing crude oil into products like gasoline. The International Brotherhood of Teamsters, Local No. 120 (the "union") represented some of the refinery employees, including vacancy relief operator Richard Topor, who had served as a union steward for several years. Due to the hazards of refinery work, both SPPRC's collective-bargaining agreement and its employee handbook emphasized that employees had to notify supervisors if they believed work conditions were unsafe and assist in remedying the dangerous conditions. Michael Rennert one of Topor's co workers had been assigned the task restarting a machine known as the Penex. Doing so required injecting hydrochloric acid from pressurized cylinders into the Penex to clear out water and rust. SPPRC implemented a new technique for injecting the acid that involved heating the cylinders with steam. However, no one had updated the written procedure to reflect the new method. Topor questioned the safety of the new steam-heating method of the machine known as the Penex. Topor noted that, contrary to the form's instructions, other cylinders were near the cylinder to be heated. Topor's supervisor, Gary Regenscheid, instructed him to mitigate the hazard by placing insulation blankets over the cylinders that were not in use, but Topor insisted the procedure called for removing the additional cylinders from the area, fearing his Regenscheid's suggestion was unsafe and risked explosion. Topor wanted to initiate a safety stop, but Regenscheid again said to use insulation. In response, Topor repeated his safety stop request, asking that the safety department review Regenscheid's suggestion. Topor began filling out a safety-stop form.

Topor initiated two unfair labor practice cases before the National Labor Relations Board against SPPRC, both alleging SPPRC had retaliated against him by disciplining him and denying his bonus to discourage his union activities. The board's Office of the General Counsel pursued his claims, bringing a consolidated complaint before an administrative law judge. After a hearing, the ALJ held in Topor's favor. The ALJ found Topor's consistent and

confident testimony believable but noticed that Regenscheid's testimony was hesitant and inconsistent and that Regenscheid could not recall everything that occurred. Based on a conversation in which Regenscheid told Rennert to expect reprisal from SPPRC due to ongoing union negotiations, the ALJ ordered SPPRC to cease threatening employees for their union activity. As to the incident with Topor, it ordered SPPRC to restore any loss of earnings or benefits and remove any evidence of his discipline from his file. The board adopted the ALJ's decision in full. It denied a motion from SPPRC to reopen the record to admit an arbitration award, finding SPPRC had not demonstrated that the evidence was newly discovered or previously unavailable as required by the Board's rules and regulations. SPPRC appealed. The Eighth Circuit denied the petition and enforced the board's order.

The court stated that there were multiple indications of discriminatory motive here. SPPRC abruptly indicated its hostility to Topor's behavior by sending him home after his repeated refusal to work. Crediting the ALJ's finding that Topor did not engage in insubordinate behavior, SPPRC's use of that reasoning was pretextual. This conclusion was supported by SPPRC's internal investigation, which relied almost entirely on supervisors' accounts of the interaction. Further, the court stated that SPPRC's asserted reasons for disciplining Topor did not remain consistent. At times, the reason for Topor's discipline was described as his refusal to work, then his refusal to discuss mitigation, and finally his belligerent behavior. The court stated that together, these facts provided substantial evidence that SPPRC had a discriminatory motive. Considering SPPRC's evolving stories and inadequate investigation, the court stated that this case did not involve "extraordinary circumstances" justifying the reversal of the ALJ's credibility findings. Therefore, the court agreed that there was substantial evidence that SPPRC committed a labor violation.

SPPRC argued the board should have reopened the record after final briefing on its exceptions to the ALJ decision and admitted evidence of an arbitration award from a parallel proceeding that denied Topor's grievance but was issued after the Board's hearing closed. The court stated that under 29 C.F.R. § 102.48(c)(1), the board may reopen the record in "extraordinary circumstances." The evidence must be newly discovered, only available since the close of the hearing, or believed by the board to have been taken at the hearing, and if credited, the evidence must require a different result. 29 C.F.R. § 102.48(c)(1). The court stated that because the arbitration award was not issued until after the hearing, the board did not abuse its discretion in declining to reopen the record to admit the evidence.

RETALIATION

Employer Adhered to Company Policy in Firing Plaintiff After He Refused to Conduct Himself Professionally and Delayed Reporting a Safety Concern

Tatum v. Southern Co. Servs., 2019 U.S. App. LEXIS 21766 (5th Cir. July 22, 2019)

Southern Company Services, Inc. ("SCS") hired Brandon Tatum as an operations technician at its biomass power generation facility. As per the Family and Medical Leave Act ("FMLA"), SCS provided eligible employees with job-protected leave for certain medical reasons. Tatum took extended leave to undergo gallbladder surgery in 2012 and to participate in drug rehabilitation in 2015. He experienced no criticism or disciplinary action for his medical absence. Instead, he was recognized as a "valuable" employee with "strong technical expertise" and "knowledge ... in power generation." SCS promoted him in 2013 and 2016. On February 1, 2017, Tatum received an email from human resources, informing him that he was eligible for FMLA leave. The next day, SCS fired him for failure to reform his behavior and to report the safety concern timely. Tatum sued, alleging, *inter alia*, that SCS had interfered with his right to protected leave under the FMLA and had retaliated against him for taking such leave. The United States District Court for the Eastern District of Texas denied Tatum's motion and granted summary judgment for SCS. The district court dismissed his FMLA claims, finding that SCS was not equitably estopped from asserting a non-coverage defense. Tatum appealed. The Fifth Circuit affirmed the district court's decision.

The court stated that Tatum was properly awarded summary judgment on the employee's FMLA retaliation and interference claims because the employer articulated a legitimate reason for the employee's discharge. Tatum averred that the district court erred in holding that SCS was not equitably estopped from asserting a non-coverage defense. The court stated that assuming that equitable estoppel applied and that Tatum could establish a *prima facie* case of interference or retaliation, summary judgment was still warranted because SCS articulated a legitimate reason for his discharge. The court noted that after years of counseling and coaching by his supervisors, Tatum continued to behave in-appropriately toward his managers and coworkers. In the two months preceding his termination, he repeatedly interrupted a company meeting and made a sarcastic comment over the plantwide radio to a coworker. He also delayed reporting a potentially fatal safety risk for over a month.

The court stated that even accepting that Tatum was well-intentioned in waiting to disclose the safety concern, SCS had ample cause to terminate him. "For the purposes of an FMLA claim, what matters is not whether [an employer] was objectively correct about [an employee's] dishonesty, but whether it had a good-faith belief that dishonesty existed, and that such belief was the basis for the termination." *DeVoss v. Sw. Airlines Co.*, 903 F.3d 487, 492 (5th Cir. 2018). SCS had a good-faith reason for firing Tatum, given a co worker's account that Tatum had held onto photographs of the potential safety violation as "job security."

The court stated that Tatum had not pointed to any company policy guaranteeing an employee the right to be heard before termination. And he did not allege—nor could he—that he enjoyed a cognizable property interest in continued employment. To the contrary, SCS's discipline policy provided that "employees may be terminated at any time for serious infractions, including . . . insubordination . . . or violations of company policies." Therefore, the court stated that SCS adhered to company policy in firing Tatum after he had refused to conduct himself professionally and had delayed reporting the safety concern.

Employee Failed to Produce Specific and Substantial Evidence to Overcome Employer's Stated Nondiscriminatory Reasons for His Termination

Shokri v. Boeing Co., 2019 U.S. App. LEXIS 19808 (9th Cir. July 2, 2019)

Behrouz Shokri was laid off as part of a 2015 Reduction in Force ("RIF") at Boeing Company. Shokri filed suit against Boeing, alleging race and national origin discrimination and retaliation in violation of 42 U.S.C. § 1981 and the Washington Law Against Discrimination ("WLAD"). Boeing moved for summary judgment, which was granted by the United States District Court for the Western District of Washington. Shokri appealed. The Ninth Circuit affirmed the district court's judgment.

Shokri argued that the district court impermissibly failed to view inferences in the light most favorable to him as the nonmoving party, and that he successfully raised genuine issues of material fact with regard to both his discrimination and retaliation claims. The district court concluded that Shokri established a prima facie case for both retaliation and discrimination, and the court assumed that determination was correct. The burden then shifted to Boeing to establish a "legitimate, non-discriminatory reason" for its employment decisions. Boeing did so, pointing to Shokri's low scores both on his 2014 year-end review and during the 2015 RIF as reasons for his termination. The burden then shifted back to Shokri to raise a triable issue of fact that the offered reasons were pretextual by presenting "specific, substantial evidence." The court stated that Shokri failed to produce "specific and substantial" evidence to overcome Boeing's stated nondiscriminatory reasons.

The court stated that Shokri failed to meet his burden to rebut Boeing's stated reasons for his termination. In addition, he failed to raise a genuine issue of material fact as to who the correct comparators for his position were and as to whether he was treated differently than others who were similarly situated. The court stated that the district court's grant of summary judgment as to his discrimination claim was proper.

Further, the court stated that Shokri failed to meet his burden to rebut Boeing's stated legitimate reasons for his termination. The record supported that the district court's finding that Shokri failed to show any genuine issue of material fact as to pretext. The court noted that Shkori first engaged in protected activity on January 5, 2015, when he voiced his dissatisfaction to his manager about his 2014 performance management review scores ratings ("PM"), refused to sign off on them, and indicated that he was making an ADR complaint. This was followed by adverse employment actions culminating in Shokri's termination. However, the court stated that these adverse actions, were premised on the pre-complaint 2014 PM scores. Shokri's RIF rating comported with his middling performance evaluation, which predated any protected activity. In addition, Shokri's manager assigned him RIF ratings that were initially higher than those of several of his peers before they were reduced during a consensus meeting with other managers. The court stated that it was not reasonable to infer, based on that action, that Shokri's new manager was attempting to retaliate against him, given that the lower-ranked employees would have been laid off before Shokri based on the new manager's initial scores. Accordingly, the court stated that the record did not raise a genuine question whether Boeing acted with a retaliatory motive.

TITLE VII

Conduct Alleged by Employee, While Unacceptable, Did Not Amount To Constructive Discharge

Hunt v. Wal-Mart Stores, Inc., 2019 U.S. App. LEXIS 22357 (7th Cir. July 26, 2019)

Tristana Hunt worked the overnight shift in the electronics department of a Wal-Mart store and Daniel Watson

was her supervisor. After Watson made several unprofessional remarks toward Hunt over a four-month period, Hunt filed a complaint with human resources. Wal-Mart promptly investigated the claims but was unable to substantiate them. Hunt then filed a complaint in federal court alleging Watson sexually harassed her by creating a hostile work environment in violation of Title VII of the Civil Rights Act of 1964. At summary judgment, the United States District Court for the Northern District of Illinois held that Wal-Mart established the *Faragher-Ellerth* affirmative defense to liability because it reasonably prevented and corrected sexual harassment, and Hunt unreasonably delayed in reporting the harassment. The Seventh Circuit agreed and affirmed.

The court stated that no evidence indicated that Hunt was forced into involuntary resignation due to Watson's conduct. Further, the court stated that quite the contrary, Hunt continued to work the same shift at the same Wal-Mart store for several years without alleging any additional incidents of sexual harassment. Not until more than three years later, when Hunt failed to return to work after a period of medical leave, was she let go. The court stated that this failure to present evidence that her employment ceased due to an intolerable working environment precludes a finding of constructive discharge as a matter of law.

The court stated that the conduct alleged here by Hunt while unacceptable, did not amount to constructive discharge. While inappropriate comments, liked the ones made here, have no place in the workplace, the court's precedent made clear that a plaintiff must provide evidence of an environment of significantly greater severity before an actionable claim of constructive discharge materializes. Hunt alleged that Watson made several sexually suggestive comments that were inappropriate. But the court stated that Hunt had not alleged that she was ever touched by Watson, that she was ever threatened by Watson, nor that she was concerned for her safety at any point. On this ground the court agreed with the district court's holding that constructive discharge was not established.

Further, the court stated hat find that Wal-Mart did what a reasonable employer should. It promulgated a comprehensive sexual harassment policy, trained its employees, maintained an effective reporting system, expeditiously investigated Hunt's complaint, and communicated its zero-tolerance policy and retrained Watson even though the investigation failed to substantiate the allegations against him.

The second element of the *Faragher-Ellerth* defense requires the defendant to show plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities the employer provided. This is a functional test that asks "whether the employee adequately alerted her employer to the harassment, thereby satisfying her obligation to avoid the harm, not whether she followed the letter of the reporting procedures set out in the employer's harassment policy." The court stated that here, Hunt failed to take advantage of any reporting mechanisms for four months and thereby prevented Wal-Mart from taking corrective measures. Hunt argued that she did not report Watson's behavior because she was unaware of the anonymous hotline and believed that she had to report to Turner. She further asserted that she feared retaliation for reporting. But the court stated that "an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty to alert the employer to the allegedly hostile environment." Further, the court stated that because Hunt could have utilized the reporting systems implemented by Wal-Mart without undue risk or expense, but failed to for several months, the court found Wal-Mart had carried its burden of showing Hunt's delay was unreasonable.

WHISTLEBLOWER

General Services Administration had Strong Evidence of Misconduct of Employee Therefore, Removal Was Justified

Smith v. GSA, 2019 U.S. App. LEXIS 21401 (Fed. Cir. July 19, 2019)

Robert Smith worked at the General Services Administration ("GSA") for nearly 30 years before GSA removed him. Smith appealed that decision to the Merit Systems Protection Board, asserting that the agency failed to show his actions warranted removal and that the agency had retaliated against him for his repeated disclosure of gross mismanagement and waste. The board agreed that Smith was a whistleblower and that his protected disclosures contributed to the agency's decision to remove him. The board nevertheless affirmed the agency's decision. Without addressing evidence relevant to the agency's motive to retaliate or its treatment of other similarly situated non-whistleblowers—legal error in itself—the board ruled that because the agency had introduced strong evidence of misconduct, removal was justified. In doing so, the board conflated two distinct inquiries: whether the agency's penalty was reasonable and whether the agency would have imposed that same penalty absent Smith's protected whistleblowing. The Federal Circuit, reversed those charges, affirmed others, and vacated the board's decision. The court remanded for it to address the merits of Smith's whistleblower defense, as well as the agency's chosen penalty, under the proper legal standards.

The court stated that the board's independent decision to sustain the disrespectful conduct charge—however strong the underlying evidence—did not eliminate Smith's reprisal defense. And it did not excuse the board from analyzing the entire record and determining whether the agency clearly and convincingly proved that it would have removed Smith even absent his whistleblowing, not merely that it could have justifiably done so. The court stated that on remand, the board had to ensure that the agency was held to its "high burden of proof." The Board should have considered the evidence relevant to the strength of the agency's motive to retaliate. Smith made a number of disclosures, most of which the board failed to address.

The court stated that the board's decision to sustain the charge of failure to comply with IT policy lacked substantial evidence support. The agency asserted that Smith violated IT policies applicable to him when he failed to remove his computer access card ("PIV") card from his laptop. In affirming the agency's charge, the board cited evidence favorable to the agency's position. It noted that the policy required users to remove PIV cards from their laptops, that. Smith, a quadriplegic, was physically unable to remove the card. The court concluded that given Smith's disability and his supervisors' knowledge that he could not remove his computer access card, the GSA policy did not apply to him.

The court stated that, the board's decision to sustain the weekend work specification, offered by the agency in support of its failure to follow supervisory instructions charge, similarly lacked substantial evidence support. The agency introduced no formal policy forbidding weekend work, no evidence that other employees had been instructed to not work on the weekend, and no supporting rationale for imposing this ban on Smith alone. In addition, it was undisputed that Smith had regularly worked over the weekend to timely complete work due to his health issues; that the email at issue was written during business hours and required only minutes to complete over the weekend; and that he sent the email over the weekend only because another employee first sent him information over the weekend. The court stated that in light of the whole record, the board's determination was unsupported by substantial evidence.

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