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Employment Law Note

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Damned if You Do, Damned if You Don't: Employer Enforcement of Harassment Policies May Be Found to Violate Labor Laws

By Jillian Barron, jbarron@sebrisbusto.com

Most employers are aware of their duty to prevent discrimination and harassment in the workplace, to investigate any complaints about such conduct, and, if violations are found, to take effective corrective action. But what if the alleged harasser contends their discriminatory conduct was a form of protected concerted activity under federal labor law? Now the employer is faced with the dilemma of how to comply with discrimination laws while not violating employee labor rights.

Possible conflicts between discrimination and labor law requirements have come to light in several decisions by the National Labor Relations Board ("NLRB" or "Board"). For example, in *Fresenius USA Manufacturing, Inc.*, 358 NLRB No. 138 (2012), an employee made vulgar, offensive, and arguably sexist remarks that led to complaints by several female employees and an investigation by the employer. The employee first denied, then later admitted making the remarks. The company discharged him for both the comments and lying during the investigation.

The employee then filed an unfair labor practice charge with the NLRB, claiming his offensive remarks were intended to support the union during a decertification campaign, were thus protected conduct under federal labor law, and his resulting termination was unlawful. Citing longstanding recognition "that, in labor relations matters, feelings can run high and individuals sometimes make intemperate remarks," the Board agreed and found the employee's comments were not so egregious as to cause him to lose protection under the National Labor Relations Act ("NLRA"). His termination was therefore set aside and he was ordered reinstated.[1]

More recently, the NLRB again found that an employee's right to engage in concerted action, particularly in the context of union-related activities, trumped his employer's ability to discipline him for discriminatory comments. *In Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885 (8th Cir. 2017), the Eighth Circuit Court of Appeals upheld that decision. The case involved a strike in which replacement workers, many of them African-American, were brought in vans across the picket line. One striking worker yelled at the vans, "Hey, did you bring enough KFC for everybody?" and "Hey anybody smell that? I smell fried chicken and watermelon." (An unidentified person was heard saying the replacements should "Go back to Africa.") At the conclusion of the strike, the employer refused to call back the employee who made the racially-charged comments and instead discharged him for that conduct.

The Eighth Circuit found substantial support for the NLRB's conclusion that the employee's comments were not directed at any one individual, were not "on display for an extended period," were not violent in character, and did not contain any overt or implied threats to replacement workers or their property. Nor did the employee engage in any threatening physical behavior. Proceeding on this foundation, the court rejected the employer's argument that reinstating the employee would have conflicted with the company's obligations under federal discrimination law. Not only were the employee's comments made outside the workplace, the court noted, but they were not severe or pervasive enough to create a hostile work environment. Additionally, Title VII did not require the employer to *fire* the employee, but only to

[1] The NLRB also found the employer could not lawfully discipline the employee for lying during the investigation. In reconsidering the case for procedural reasons in 2015, the NLRB reversed itself on that issue, now concluding that even if the employee's offensive comments were protected under the NLRA, his termination for lying was lawful because it was consistent with the discipline the employer previously issued to others for similar violations.

take prompt and sufficient remedial action reasonably calculated to end the harassing conduct. For these reasons, while implicitly acknowledging the employee's comments were racist in nature, the court deferred to the NLRB's conclusion that his termination violated the NLRA.

The *Cooper* decision is silent on what remedial action the company could have taken that would have been effective enough to meet discrimination law requirements, while not running afoul of the employee's NLRA rights. While a lower level of discipline, such as a strong warning, might have been reasonable if the employee had no history of racist comments, it is not clear that even those milder actions would have been considered acceptable to the NLRB.

Since the *Cooper* decision, the NLRB has begun to pull back from its position that protecting NLRA rights virtually always takes precedence over legitimate employer policies and interests. In January 2018, the NLRB issued an Advice Memorandum rejecting the claim by a former Google employee, James Damore, that his termination was based on NLRA-protected activity and was therefore unlawful. The case involved Damore's distribution of a memo expressing concern about Google's diversity programs. In support of his position, Damore argued there are immutable biological differences between men and women that are likely responsible for the gender gap in the tech industry, including that women are more prone to "neuroticism" and are less likely to fall within the top end of the IQ scale. A number of employees complained to HR about Damore's memo, and two female job candidates withdrew from consideration, citing his memo as the reason.

The NLRB Memorandum concludes that, even assuming Damore's communications were concerted and for mutual aid and protection, his memo included not only protected but also unprotected statements. In particular, the NLRB found Damore's use of gender stereotypes purportedly based on biological differences to be a form of sexual harassment and "so harmful, discriminatory, and disruptive as to be unprotected." Appearing to retreat from the *Cooper* decision, the Memorandum refers to the NLRB's duty to balance employee NLRA rights with employer rights to enforce their workplace rules, such as anti-discrimination and anti-harassment policies, and states that such polices should be given special deference in light of employers' duty to comply with EEO laws. Finding that Damore's termination was based solely on his *unprotected*, discriminatory statements, the NLRB concluded his termination was not unlawful.

Further evidencing a shift in the NLRB's position, in the *Boeing Company* decision issued in December 2017, the Board announced a new balancing test for reviewing employer rules governing employee conduct. No longer will the Board simply rely on the potential that employees could "reasonably construe" an employer rule to limit their protected conduct, but instead there must be a weighing of the potential impact of the rule on employee protected rights versus the employer's legitimate justification for implementing the rule.

So what should employers do when faced with employee conduct that violates their discrimination and harassment policies, but could be considered a form of NLRA-protected activity? There is no clear answer at present, though it appears the NLRB will be more sympathetic to employer actions enforcing their policies. Ongoing cooperation between the NLRB and Equal Employment Opportunity Commission to author a joint guidance memorandum regarding how to balance the rights and obligations under the NLRA and federal discrimination laws may result in clearer direction. Until the guidance is issued, employers must carefully consider the nature of an employee's arguably discriminatory or harassing conduct, whether it relates to union activity or the terms and conditions of employment, and what corrective action would be appropriate under the circumstances.

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