Protected Concerted Activity Under Section 7 of the National Labor Relations Act: A New Frontier for Non-Union Employees to Organize to Improve Terms of Employment Without a Union

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Normally the National Labor Relations Act is thought of a providing protections for unionized workers. Notwithstanding the fact that the law was designed to protect unionized workers Section 7 of the law covers all employees be they union or non-union to engage in "protected concerted activity" Recently the NLRB has made efforts to inform non-union employees if their rights under Section 7. The paper focuses on NLRB decisions where the NLRB has upheld the right of non-union employees to engage in "protected concerted activity" concerning their terms and conditions of employment.

APPLICATION OF SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT (HERINAFTER REFERRED TO NLRA) TO NON-UNION WORKERS

The percentage of private sector employees in the United States who are members of labor unions is at an all time low of below 7%. Attempts by organized labor to successfully organize have been met with great opposition from employers who have been successful in dramatically shrinking the membership of unionized workers in unionized work environments. This change in the balance bargaining power between labor and management has resulted in an erosion of wages and a shrinking of employee benefits for virtually all private sector workers. Much attention has been given in recent months to the issue of income inequality. While many factors account for this economic development, it is generally agreed among commentators that the decline in unionization is a factor in this development. Recent demonstrations by non-union employees of Wal-Mart and McDonalds have highlighted this issue, particularly with the declining value of the minimum wage relative to the consumer price index as well as the reluctance of Congress to make a meaningful raise in the minimum wage. Often overlooked is that the NLRA, normally associated with the protection of unionized workers does in fact have a provision within the laws which protects all employees whether they are unionized or non-union to engage in what is referred to as "protected concerted activity"

Protected concerted activity as set forth in Section 7 is a legal concept to define employee protection against employer retaliation when workers act together to try to improve their pay and working conditions or act together to address work related problems. What is important to remember and not often known by employees and even some employers is that non-union employees are entitled to engage in protected concerted actives just as their union counterparts.

The significance of the fact that non-union employees are allowed to engage "protected concerted activity" under the NLRA is that if the employees are fired, suspended or penalized in some way for taking part in the group's activity they have legal recourse under the NLRA to redress the wrong or wrongs committed by the employer.

The concept of "protected concerted activity" arises out of Section 7 of the NLRA. Specifically, Section 7 states

> Employees shall have the right to self-organization, to form, join or assist in labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[1]

The concept of protected concerted activity usually applies whenever two or more employees act together to improve their terms and conditions of employment. While generally speaking concerted activity involves more than one employee there are situations where the concept of concerted activity has been applied to individual employees. An individual employee can be engaged in concerted protected activity if he/she is speaking individually on behalf of himself and one or more other coworkers concerning his complaints regarding terms and conditions of employment. An employee speaking only on his own behalf is not considered to have acted in protected concerted activity unless that employee represents a common concern.

It is important to remember that employees who engage in concerted activity can lose the protection of this law if the NLRB or the courts consider the conduct of the employees in some way as going beyond the acceptable form of protest.

If determining if an employee's conduct is protected concerted activity several questions need to be addressed (a) given the facts of the case is the concerted activity protected (b) has the employee's conduct resulted in their losing the laws' protection (c) has the manner in which the employees have acted such that the activity is concerted (d) does the activity of the employee or employees seek to benefit other employees in the work place.[2] These questions have been particularly relevant in the social media cases where the manner of the employees presentation of grievances on social media impacts the NLRB 's and the court's determination if the activity is "protected."[3]

Recently the NLRB has been more active in protecting the rights of "nonunion employees" in asserting their interest in improving their terms and conditions of employment. The NLRB has addressed the rights of nonunion employees to strike; the relationship between employment at will clauses and the rights of employees not to be discharged for protesting employment conditions; the right of employees to institute class action law suites notwithstanding the fact that they have signed as a condition of employment a mandatory arbitration agreement whereby they waived the right to bring a class action claim; the right of an employer to issue a work rule which prohibiting employees from discussing an ongoing internal investigation; the degree to which employees can be disciplined for posting common employee concerns on social media.[4]

RIGHT TO STRIKE AS PROTECTED CONCERTED ACTIVITY

Normally, one would assume that the right to strike or engage in a work stoppage is a right asserted by unionized employees and that the NLRB provides legal protection only for unionized employees and that if nonunion employment at-will employees refuse to work (strike) the employer can fire them for not showing up for work. Yet, the act of striking or engaging in a work stoppage to protest working conditions is a protected concerted activity under Section 7- whether the employees are union or nonunion.

In the California Gas case a group of truck drivers presented the company with a written description of their grievances, which included obtaining a wage increase and other benefits including improved maintenance of their trucks. When the company refused to address any of their grievances some of the drivers refused to work. Three days after the work stoppage, the company terminated the workers who struck. In meeting with the remaining employees who had not engaged in the work stoppage the supervisors told the remaining employees that the discharge of the nine drivers who struck was due to the working conditions demands made by them and the fact that they stopped work in an effort to advance their complaints.[5]

The Administrative Law Judge who heard the case held that "it is beyond question that the drivers were acting in concert and that their goal of obtaining a wage increase and other benefits including improved benefits constituted protected concerted activity. Clearly within the ambit of Section 7

concerted activity. Their spontaneous bonding together to strike was a reasonable action, which did not remove them from protected status."[6] The NLRB upheld the ALJ's decision.[7]

EMPLOYMENT-AT-WILL AND PROTECTED CONCERTED ACTIVITIES BY NON-UNION EMPLOYEES

From the late 1950s to the late 1980s State Court decisions have been carving out exceptions to the doctrine of employment at will which states that an employer can fire an at will and employee for virtually any reason even if it's not for just cause providing the firing is not done in violation of Title VII protected class protection.[8] Thus private sector employers have enormous latitude in firing employees even if the firing is unjust. However, the courts over time (late 1950s -1980s) have carved out three exceptions to the doctrine (1) Public policy (employee cannot be fired because he refused to perjure himself in a trial when the employer fired him because he refused to perjure himself for the employer) (2) Good Faith and Fair Dealing (an employee was fired by an employer because the employer wanted to avoid paying a commission of $100,000 of a $1,000,000 sale by the employee) (3) Implied Contract activity from employee handbook (employee handbook held to be an implied contract).[9]

In order to ensure that employees would not claim, in particular, the "implied contract" exception to the employment-at-will doctrine employers added an expressed statement in the handbook that employees could not assert the handbook as an implied contract The concept of employment at-will comes in conflict with "protected concerted activity" because employees by engaging in "protected concerted actives" are in effect modifying or limiting the power of the employer to fire them at will. Normally if an employee does not like his/her working conditions and/or pay and refuses to work the employer can fire them at-will, but when several employees complain about work conditions or even go on strike, the relationship between employer and the employee changes from an at-will relationship to a "just cause" relationship typical of a unionized environment.

Several cases have been decided by the NLRB where the NLRB dealt with employment at will clauses in employee handbooks and their relationship to Section 7 "protected concerted activity." On October 31, 2012 the NLRB office of the General Counsel issued advice memorandums related to "at-will-employment" language in employee handbooks. The advice memorandums arose as a result of the NLRB case of American Red Cross Arizona Blood Services Region NLRB Case 28-CA-023443 decided on February 1, 2012.[10] In that case an employer had required employees to sign an agreement and acknowledgement of receipt of the employee handbook. In an effort to ensure that any protected concerted activity by employees could not be considered to modify the employment-at-will relationship the handbook agreement required the employees to agree to the following statement: "Further agree that their employment at will relationship cannot be amended, modified or altered in any way." The office of the General Counsel, in its decision found that the handbook's wording had a "chilling effect" on the exercise of Section 7 rights by the employees.[11]

Two other cases were also addressed in the General Counsel's Memorandum. In SWH compensation d/b/a Mimi's Café, the employment at-will language was set forth by the employer in the following terms

> The relationship between you and Mimi's Café is referred to as "employment-at will". This means that your employment can be terminated at any time for any reason with or without notice, by you or the company. No representative of the company has authority to enter into any agreement contrary, to the foregoing employment-at-will relationship.[12]

The NLRB's General Counsel did not find the language as violating employees Section 7 rights. Part of the General Counsel's reasoning that no violation of Section 7 rights had taken place was due to the fact that the language in the handbook was not promulgated in response to union or nonunion protected concerted activity.[13]

In the Rocha Transportation[14] case, language similar to that in the Mimi's Café case was also found not to "chill" employee exercise their Section 7 rights. Similar reasoning was applied in this case because the language in the handbook was not in response to union or nonunion concerted activity. The decisions in the two NLRB cases where the handbook language was not found to be "chilling" of Section 7 rights

raises the issue of the employer including such language as a way the prevent or pre-empt the exercise protected concerted activities.

INTERNAL INVESTIGATIONS

In Banner Health Systems 358 NLRB No.93 (July 30, 2012)[15] the NLRB concluded that an employer work rule asking employees subject to an internal investigation to refrain from discussing the matter while the employer concluded an investigation violated Section 8(a(1) because "viewed in context" [the work rule] had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights.[16]

This case raises interesting issues because it is not unusual to prohibit persons involved in an ongoing investigation from discussing the matter because such discussions may prejudice the outcome of the investigation. The Administrative Law Judge concluded that the work rule was reasonable to preserve the integrity of the investigation.

The NLRB in reviewing the case took a more restrictive view on the employer work rule arguing "that work rules of the kind promulgated can only be justified if the investigation witnesses needed protection, evidence was in danger of being destroyed, technology was in danger of being destroyed or there was a need to prevent a cover-up "[17]

CLASS-ACTION WAIVERS

In 2002 Supreme Court issued a landmark decision in the Circuit City case.[18] In that case the Supreme Court held that an employer, could as a condition of employment in a nonunion environment, require employees to sign a statement saying that in the case of a controversy with the employer concerning Title VII or other work-related issue the employees exclusive remedy would be through arbitration, thus in a Title VII discrimination claim an employee losing his/her (protected classes) claim in the arbitration proceeding would be not allowed to appeal through the Federal Courts as is mandated under Title VII. After the Circuit City case the Supreme Court decided another case (the Waffle House case)[19] allowing an exception to arbitration as the exclusive remedy available to employees who bring a class-action discrimination claims notwithstanding the fact that individual employees had signed the arbitration agreements waiving the right to bring a class action suite. This Waffle House case exception applies where the EEOC brings class actions suits on behalf of a group of employees.

Employers responding to the Supreme Court's decision in the Waffle House case in allowing class-action claims, put in their arbitration agreements with employees express language prohibiting employees from bringing class-action-suits in the Federal Courts.

In 2011 in AT&T Mobility LLC v. Conception the Supreme Court held that arbitration agreements prohibiting individuals from commencing or participating in class action suites are generally enforceable under the Federal Arbitration Act. Notwithstanding the Supreme Court's holding on this issue in the AT&T case the NLRB held in January 2012 in DR Horton Inc v. Cuda[20] that employers may not require their employees as a condition of employment to sign an agreement preventing them from filing class-action claims when such claims address wages, hours, or other working conditions it is clear that the language in the NLRB's decision is such that the NLRB regards employers class action waivers as essentially denying employees the right to engage in protected concerted activity under Section 7.

EMPLOYER SOCIAL MEDIA POLICIES AND EMPLOYEE EXERCISE OF SECTION 7 PROTECTED CONCERTED ACTIVITIES

Social Media has transformed the way people communicate in the 21st century and people are not timid as to what and how they express themselves on social media. Recently company social media policies have come under the scrutiny of the NLRB. On January 24, 2012 the NLRB's Acting General Counsel issued a report warning that many provisions routinely included in corporate social media policies-such as blatant restrictions on the publication of confidential information and rules requiring a professional tone in online posts-may violate the NLRA by inappropriately restricting protected concerted

activity rights.[21] The report of the General Counsel stated social media includes various online technology tools that enable people to communicate easily via the Internet to share information and resources. These tools can include text, audio, video, images, podcasts, and other multimedia communications.

The cases that have come before the NLRB on whether employees social media communications are within the ambit of protected concerted activity center on the following questions (a) Is the employer's policy on the restriction of social media communication overly broad (b) Did the employee by the manner in which they communicated their posts lose the protected status of the communication?[22]

With respect to the first issue respecting the degree an overly broad employer policy has on "chilling" the exercise of Section 7 rights the NLRB has held that

> An employer violates Section 8(a)(1) through the issuance of a work rule, if that rule " would reasonably tend to "chill" employees in the exercise of their Section 7 rights" Lafayette Park Hotel 326 NLRB 824, 825 (1998) *enfd.* 203 F.3d 52 (D.C. Cir. 1999. The Board uses a two-step inquiry to determine if a work rule would have such an effect. Lutheran Heritage Village-Livonia 343 NLRB 646, 647 (2004) First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon showing that (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.[23]

In a case involving an employer that is a collections agency the employee was discharged for violating the employer's non-disparagement rule as well as for the employee comments made on Facebook. The NLRB addressing both issues held the "disparagement rule" was overly broad and the employee's comments on Facebook are a "protected concerted activity." The first question was decided by the board in the following terms: "The Board reasonably held that discipline reprisal punishment to an unlawfully overly broad rule violates the Act in those situations in which the employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise indicates concerns underlying Section 7 of the Act" The Continental Insurance Inc. 357 NLRB 39 slip op at 4 (2011).[24]

However, the Board also stated that ["An employer will not be liable for discipline imposed pursuant to and overbroad rule if it can establish that the employees conduct actually interfered with the employees own work or that of other employees or otherwise actually interfered with the employer's operations and that the interference was the reason for the discipline."[25] In the collections agency case even though the employee used expletives in the Facebook post the NLRB concluded that her conduct was protected concerted activity.

In another case, the NLRB decided as in the previous case that the employer's social media policy and non-solicitation rule was overly broad. But unlike the previous case the NLRB found that the employer's discharge of the employee for her Facebook comments was lawful. In this case the court held that the employee's conduct was not protected concerted activity under the Myers II case 281 NLRB 882 (1986) which stated that protected concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action."[26] In finding that the employer had properly discharged the employee the Board found that the employees Facebook postings were merely an expression of an individual gripe and that the nature of her Facebook posts were such that she did not act out to represent other employees in the expression of a common concern nor did she seek to engage other employees to join her. This type of case comes under what is referred to as an individual employee "venting" which is not protected concerted activity.

In another case the NLRB found an employer's Team Member Conduct and Work Rules were unlawfully overbroad because the prohibition against "disrespectful conduct" and "inappropriate conversations" could be reasonably considered by employees to "chill" (preclude) protected Section 7 activity.

However, while holding the employer work rule as overly broad the Board found the employees Facebook post was not protected. In this case the employees complaint related to the quality of the service given by another bartender, which resulted in customers being overcharged for drinks. The employee

claimed that her posts were protected because they were related to terms and conditions of employment. The Board found that her protest concerns were only tangential to the employment relationship. However, the Board said

> On the other hand, when employees engage in conduct to address the job performance of their coworkers or supervisors that activity impacts their working conditions, thus their activity is protected see eg. Georgia Farm Bureau Mutual Insurance Case. 333 NLRB 850, 850 – 51 (2001).[27]

The NLRB has consistently held employer's social media policies as being overbroad. In one case the Board found that an employer's policy which prohibited "defamatory" entries as being overbroad. However, when the employer amended its policy into a list of especially "egregious conduct" such as sexual harassment, race or religion the Board found the policy to be lawful.[28]

In another case the Board considered whether the employee was unlawfully discharged after she posted comments on Facebook about a personal concern. The Board found that employee's post was protected because her individual concern was one common to the other employees.

> Under the Myers case, the Board's test for such concerted activity is whether the activity "is engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself.[29]

As set forth previously employees discussion of shared concerns about terms and conditions of employment even when "in its inception (it) involves only the listener and speaker, is an indispensable preliminary step to employee self organization."[30]

In another case employees had posted complaints about their supervisors. The Board in finding that the posts were protected stated:

> It is well established that employee complains and criticism about a supervisor's attitude and performance maybe protected by the Act. See Arrow Electric Company Inc. 323 NLRB 968 (1997) and that the protest of supervisory actions is protected conduct under Section 7 (see Datwyler Rubber and Plastics, Inc. 350 NLRB 669 (2007).[31]

THE JEFFERSON STANDARD (NLRB V. IBEW LOCAL NO. 1229 (JEFFERSON STANDARD)[32]

Under the so-called Jefferson Standard statements will be found unprotected where they constitute "a sharp, public disparaging attack upon the company' product and its business policies, in an act reasonably calculated to harm the company's reputation and damage its name 346 US at 471."[33] The Board however distinguished between "disparagement" and the airing of what may be highly sensitive issues" in the Allied Aviation Services Co. case 248 NLRB 229, 231 (1980)[34]

In another case decided by the NLRB, the NLRB analyzed the holding of Jefferson in relation to posts by a nurse who posted sharp criticisms of the employer's "management style" and abuse of its employees. The Board found that the employee's postings were protected under Section 7, the Board found that the employee's posting did not lose their protection under the Jefferson Standard because the criticisms of the CEOs leadership focused on work related issues such as allegations of multiple unfair labor practices filed, forced policy changes, a murder/suicide, unfair firing, harassment and workplace bullying.[35]

THE ATLANTIC STEEL STANDARD (245 NLRB 814, 816-817 (1979)[36]

The Atlantic Steel Standard was developed in 1979 to deal with situations where employee communications (concerted activities) loses its protections when it disrupts or undermines shop discipline. The Board in that case used an "opprobrious" standard of communication. To determine if the communication is "opprobrious" it looks to the nature of the outburst, and whether the outburst was provoked by the employer's unfair labor practices.

The Atlantic Standard developed before the existence of Facebook illustrates some of the differences between Facebook outbursts and an outburst in the physical workplace. In the case decided by the Board

where the Atlantic Steel Standard was applied, the Board found that posts did not lose "protected concerted activity" status because they occurred during non-work hours and they were not sufficiently disruptive of workplace discipline to lose "protected concerted activity" status.[37]

RECENT NLRB CASE LAW ON SOCIAL MEDIA POLICIES

On September 7, 2012 the NLRB issued an opinion on Costco Wholesale Company's policy prohibiting employees from electronically posting statements that "damage the company or damage any persons reputation." Consistent with other decisions concerning corporate social media practices, the Board found the policy overbroad and thus unlawful restraint on protected concerted activities."[38]

On December 14, 2012 in the matter of Hispanics United of Buffalo, Inc. and Carlos Ortiz[39] the NLRB addressed the application of a company "zero tolerance" policy for bullying and harassment. An employee at the company communicated with a coworker by social media criticizing their coworker's job performance and further stating that she intended to communicate with a member of the company's management leadership regarding the coworker's poor performance. The person she communicated with communicated to other employees her comments. The other employees responded in kind resulting in the employee who sent the original message to claim she was being defamed herself and harassed by other employees in violation of the company's policy. The HRM manager fired the employees who responded to the initial employees comments: the NLRB reinstated the dismissed employees claiming that their responses were protected activity under Section 7 of the NLRA.[40]

WHEN CAN EMPLOYEES BE FIRED FIRST SOCIAL MEDIA POSTINGS?

Generally speaking an employee can be discharged for social media postings when the employee is merely "venting." On this issue the NLRB has held that an employee's social media postings can be a lawful basis for discharge if the:

(1) . Employee was merely expressing an individual gripe
(2) The employee had no particular audience in mind when he/she first made the post
(3) The post contains no language suggesting that he she sought to incite or influence coworkers to engage in action
(4) And the Post did not grow out of a prior discussion about the terms and conditions of employment with his/her coworkers[41]

An exception to these standards can occur when the initial employee post is a "venting" of a common concern. If the post draws attention of other employees to the issue as it commonly affects their terms and conditions of employment, then the factual setting of the post as it develops can be a basis for "protected concerted activity" under Section 7 of the NLRA.

WHAT DOES NLRB SECTION 7 RIGHTS MEAN TO NONUNION WORKERS?

Since the vast majority of private sector employees are employees-at-will they have very little protection against being fired by their employers and have little recourse for dismissal by their employer. The increased application of Section 7 of the NLRA to nonunion employees provides an increased measure of protection for at-will employees because the exercise of "protected concerted activity" in effect breaks the "employer-at-will" defense. Thus, normally if an employee or employees refuse to perform work for the employer, under the at-will doctrine the employer clearly can discharge them. However, if the employees are found to be engaged in "protected concerted activity" their at-will shackle is broken in that the employee cannot be fired even for engaging in a work stoppage with other coworkers.

Given the enormous decline in formal unionization, Section 7 could provide a significant legal channel for nonunion employees to organize and assert common interest pertaining to their terms and conditions of employment.

ENDNOTES

1. Pub L. No 74, 198 49 Stat. 449, 5 (1935) "the Wagner Act (codified as amended at 29 USC. Sec. 15 through 169. The current NLRA is the Wagner act as amended by the Taft Hartley act amendments of 1947 and the Landrum-Griffin Act of 1959. Labor Relations Act 29 USC Sec. 157.
2. National Labor Relations Board website Protected Concerted Activities- Home, Rights we Protect
3. Report by the Acting General Counsel concerning social media cases (http://mynlrb.nlrb.gov/link/document.aspx/09031d45807d6567,om +21-31) January 24, 2012.
4. Protected Concerted Activity: The New Frontier in the NLRB's Increasing Focus on Non-Unionized Employers, David C. Kurtz, Erika J. Lindberg, Mark E. Schreiber http://www.martindale.com/labor-employment-law/article_Edwards pp1-2
5. California Gas Transport. 347 NLRB No. 118 (2006) in Management Report/ November 2006 pp.7-8
6. Ibid p.7
7. Idem p.7
8. Dawn Bennett Alexander, Laura Hartman, Employment Law for Business McGraw-Hill/Irwin pp. 49-53
9. Ibid pp. 53-59
10. NLRB Non-Union Concerted Activity Developments http://www.tmfattorneys.com/index.php?option=com_content&view=article&id=81:client-alert-nlrb-non-union-concerted-activity-developments&catid=3&Itemid=3
11. Ibid, p.3
12. Ibid, p.4
13. Idem
14. Idem
15. Ibid at note p.1
16. Idem
17. Idem
18. Circuit City v. Adams 534 US 1112 (2002)
19. EEOC v. Waffle House Inc. 534 US 279 (2002)
20. Ibid at note 4 p.1
21. Ibid at note 3 (The General Counsel's repot describes the facts and holdings of some cases cited in the report, but does not name the cases)
22. See holdings of General Counsel's reports Ibid at note 3 pp. 3-35
23. Ibid at note 3 pp.3-4
24. Ibid at note 3 p. 5
25. Ibid at note 3 pp.5-6
26. Ibid at p.5
27. Ibid at p.10
28. Ibid at p.16
29. Ibid at p.20
30. Idem at p.20
31. Ibid at p.23
32. Ibid at p.24
33. Ibid at p.29
34. Idem
35. Ibid at p.30
36. Ibid at p.24
37. Ibid pp.24-25
38. Ibid at note 4 p.2
39. NLRB: Employees' Facebook Comments Are Protected Concerted Activity http://www.jdsupra.com/legalnews/nlrb-employees-facebook-comments
40. Ibid at p.1
41. When Employees May Be Fired for Social Media Postings, Robin Paggi-HR Solutions http://www.kdghrsolutions.com/home_page_news.asp/csasp/HomePage