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NO UNION? NO PROBLEM... OR IS IT?

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A. Introduction – The National Labor Relations Act and "Concerted Activity"

The National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169, is a federal law that grants employees the right to form or join unions; to engage in protected, concerted activities to address or improve working conditions; or to refrain from engaging in these activities.

The NLRA applies to most private sector employers, including manufacturers, retailers, private universities, and health care facilities. The NLRA does *not* apply to federal, state, or local governments; employers who employ only agricultural workers; and employers subject to the Railway Labor Act (interstate railroads and airlines).

Employees at union *and* non-union workplaces have the right to help each other by sharing information, signing petitions, and seeking to improve wages and working conditions in a variety of ways. This is referred to as "protected, concerted activity," a right provided by Section 7 of the NLRA. 29 U.S.C. § 157. "Concerted activity" is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. A single employee may also engage in protected concerted activity if they are acting on the authority of other employees. For example, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action.

The National Labor Relations Board ("NLRB") recognition of the NLRA's protection of employees' activities that do not involve labor unions was explicitly endorsed by the Supreme Court in *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962). In that case, employees of a foundry were not represented by any union. Nevertheless, they chose to walk off the job as a group to protest the lack of heat in the plant during a wintertime cold spell. The employer fired them for violating a company rule that prohibited unauthorized departures from work. Management argued that the employees' concerns were merely "gripes," and that it was already working to have the furnace repaired at the time of the walkout. Both the NLRB and the Supreme Court found the conduct unlawful and ordered reinstatement of the discharged employees.

On March 31, 2021, the new Acting General Counsel of the NLRB issued GC Memo 21-03 announcing his intent to "robustly" enforce Section 7 and "vigorously" pursue the reversal of recent decisions narrowly interpreting Section 7 rights. The Board will focus its efforts not only on what activity is considered "concerted," but also what type of conduct bears on "mutual aid or protection," specifically targeting political/social justice advocacy and the reporting of pandemic-related health and safety issues as areas for expansion of the law.

When Employees Can Lose NLRA Protection?

Employees may lose the "protection" of the NLRA by saying or doing something egregiously offensive or knowingly and maliciously false, or by publicly disparaging the employer's products or services without relating the complaints to any labor controversy. Last year, in *General Motors LLC*, 14-CA-197985 369 NLRB No. 127 (2020), the NLRB modified the standard for determining whether employees have been lawfully disciplined or discharged after making abusive or offensive statements—including profane, racist, and sexually unacceptable remarks—in the course of activity otherwise protected under the NLRA. Cases involving offensive or abusive conduct in the course of otherwise-protected activity are decided under the standard articulated in *Wright Line*, 251 NLRB No. 1083 (1980). Under the *Wright Line* standard, the NLRB General Counsel must first prove that the employee's protected activity was a motivating factor in the discipline. If that burden is met, the burden shifts to the employer to prove it would have taken the same action even in the absence of the protected activity. For example, by showing consistent discipline of other employees who engaged in similar abusive or offensive

conduct. This standard is akin to the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Illustrative Cases For "Concerted Activity"

The following case examples, taken from the NLRB's website,[1] describe various examples of protected, concerted activity reviewed by the National Labor Relations Board and courts in recent years.

a. *Hispanics United of Buffalo*, NLRB Case No. 03-CA-027872

Five employees of Hispanics United of Buffalo, which provides social services to low-income clients, were fired after they posted comments on Facebook concerning working conditions. After hearing a coworker criticize other employees for not doing enough to help the organization's clients, an employee posted those allegations to her Facebook page. The initial post generated responses from other employees who defended their job performance and criticized working conditions, including workload and staffing issues. Hispanics United fired the five employees who participated, claiming that their comments constituted harassment of the employee originally mentioned in the post.

The employees contacted the NLRB's regional office in Buffalo. Following an investigation, the case went to trial, resulting in a decision that the employees' Facebook discussion was protected concerted activity because it involved a conversation among coworkers about their terms and conditions of employment, including their job performance and staffing levels. The administrative law judge (ALJ) ordered Hispanics United to reinstate the five employees and awarded the employees $58,000 in backpay. The organization appealed the decision, which was upheld by the Board. The case settled while on further appeal.

b. *Northfield Urgent Care LLC*, NRLB Case No. 18-CA-019755

When the owner of Northfield Urgent Care, Inc., Dr. Kevin B., announced to his staff of 10 that he would immediately cut wages by 10% to save the business from bankruptcy, employees were stunned and unhappy. After several conversations, they decided to write a joint, anonymous letter to express staff concerns and offer alternatives for saving money, such as eliminating the employer match to the 401K fund. The letter was written by the center's physician's assistant, Jennifer G., and edited by its radiation technologist, Michael B. It was left unsigned on the doctor's desk.

During the next few weeks, the owner met with individual employees in an attempt to learn who wrote the letter, and the atmosphere became increasingly tense. He accused several employees of whispering and cliquish behavior, and repeatedly complained of "toxic talk" and negativity". Three weeks after the letter was delivered, Michael B. was demoted. He was fired three days later. The owner then learned by examining Michael B.'s work emails that Jennifer G. had written the letter. The next day, she was fired as well.

Jennifer G. filed a charge with the National Labor Relations Board Regional Office in Minneapolis. Following an investigation, the Regional Director issued a complaint alleging the owner's actions were unlawful. The ALJ who heard the case found that the activity did not lose protection because it was not defamatory or

[1] https://www.nlrb.gov/about-nlrb/rights-we-protect/our-enforcement-activity/protected-concerted-activity

malicious; in fact, he described the letter as "both civil and respectful in its language and tone." He ordered the employer to stop the unlawful activity and offer reinstatement and full backpay to both employees. The Board affirmed.

c. *Rain City Contractors, Inc.*, NLRB Case No. 19-CA-31580

Immigrants from El Salvador learned they were building concrete foundations at a former Superfund site and became worried the soil they were handling was contaminated with arsenic and other toxins. They also claimed they were required to wear badges indicating they'd been trained to handle hazardous materials when, in fact, the badges belonged to other workers, and they had never been trained.

Three of the employees took their concerns public in a YouTube video. Speaking in Spanish, they hid their faces in shadow in an attempt to avoid retaliation. However, within 10 days, the three who appeared in the video and two others who were close to them had all lost their jobs.

The NLRB Regional Director determined that the YouTube video was protected because the employees voiced concerns about safety in the workplace, and the public airing of their complaints did not lose the Act's protection because they accurately described their concerns about working conditions.

As the hearing began, NLRB attorneys were prepared to play the video, and to present evidence that the employer had been fined for numerous violations of state law regarding the same concerns as those raised by the workers. However, on the second morning of testimony, Rain City Contractors agreed to settle the case by giving all five workers full backpay for the period from their discharges to the settlement date. The workers declined reinstatement.

d. *npm, Inc.*, NLRB Case No. 32-CA-238817

Employees at an Oakland based internet software company were discharged through a layoff soon after they raised group concerns about changes to their working conditions. The NLRB issued a complaint alleging that the discharges were unlawful because the employees' collective activities were protected. The complaint also alleged the Employer maintained unlawful policies that interfered with employees' rights to freely discuss their working conditions, among other violations.

Prior to the scheduled hearing, the case settled, and the Employer paid over $100,000 in backpay. The Employer also agreed to expunge any reference to a layoff or discharge in each employee's personnel file and to only provide a neutral reference to future prospective employers to prevent the alleged unlawful layoffs from being used to impugn their employment history. The Employer also agreed to post and electronically distribute an NLRB notice to its employees which states, among other things, that it will not restrict employees from communicating with their coworkers about their wages, across all communication platforms.

While the employees voluntarily waived their right to full reinstatement to their former job with the Employer, they were satisfied with the settlement because it required the Employer to post an NLRB notice which clearly informs their coworkers that they have the right to freely speak with each other in order to improve their wages, hours, and working conditions.

e. *The Gentle Barn Foundation, Inc.*, NLRB Case No. 31-CA-093108

A group of employees at The Gentle Barn, a non-profit animal sanctuary, had conversations complaining about several executives of the organization, including how the founder was verbally abusive and yelled at employees. Two days later, two of the employees were fired. During conversations with the employees, the founder and the president made statements that gave them the impression that their private conversations complaining about the founder's treatment of employees had been under surveillance.

The two employees filed charges against The Gentle Barn with the NLRB's Los Angeles regional office, alleging they were unlawfully fired for engaging in protected concerted activity; and that The Gentle Barn not only created an impression of surveillance, but also engaged in actual surveillance of their private conversations. The Region investigated and issued complaint against The Gentle Barn, but, prior to the scheduled hearing, the two employees and The Gentle Barn entered into a private settlement agreement.

f. *Bud of California/Dole Fresh Vegetables*, NLRB Case No. 32-CA-025336

Rick F., a storage and retrieval technician at the Dole Fresh Vegetables packing plant, complained to managers and co-workers multiple times about what he said were unsafe conditions that endangered him and other employees. At one point, he called the county health department to report a potentially dangerous situation involving rusted ammonia pipes. Hours after the Health Department disclosed to the company that it was Rick who made the complaint, he was suspended. Two days later, he was fired for allegedly leaving his work post and yelling at a supervisor -- charges he denied.

Rick contacted the California Labor Commission, which referred him to the NLRB regional office in Oakland, where he filed a charge. After an investigation, the Regional Director determined there was reasonable cause to believe Rick was fired because of his stated concerns about employee safety, which was protected activity. The Regional Office issued a complaint and called for a hearing, but the case settled before the hearing, with Rick receiving full backpay of about $20,000 and reinstatement to his former job.

g. *Hospitality Staffing Solutions, LLC*, NLRB Case No. 28-CA-022628

When a hotel housekeeping service announced a $2-per-hour wage cut, employees protested in letters to managers, written with the help of a community organization. Workers who led the effort and signed the letters were later fired. With the group's help, the workers composed letters to senior management at the staffing company, asking them to reconsider cutting the current $9.50 per hour wage by $2. A short time later, Maria, whose signature was prominent on the letter, was transferred to another hotel and then fired. Her colleague and co-signer, Juan Lopez, was interrogated and then fired as well.

Maria and Juan filed charges with the NLRB regional office, and an investigation found reasonable cause to believe their firings were unlawful. The Regional Director, on behalf of the General Counsel, issued a complaint calling for a hearing. Prior to the hearing, the employer settled the case. Both workers received full backpay and offers of reinstatement that they declined.

h. *Texas Dental Association*, NLRB Case No. 16-CA-025349

Eleven employees of the Texas Dental Association, which represents more than 7,000 dentists in the state, signed a petition that complained about unfair treatment by top management at the Austin headquarters. The employees signed the petition using aliases and delivered it to association delegates at an annual meeting.

The delegates declined to investigate, and, after the meeting, the executive director of the association set about trying to learn who had written the petition. A forensic examination of office equipment found a fragment of the petition on the computer of employee Nathan C., who was immediately fired. The association's general manager, Barbara L., was also fired after she refused to divulge the names of others involved.

Barbara and Nathan filed charges with the Ft. Worth regional office of the NLRB, which investigated and issued a complaint alleging that both firings were unlawful because they were predicated on protected concerted activity. The case was heard by an NLRB Administrative Law Judge, who ruled that both terminations were illegal. The ruling was upheld by the full Board and the case was then appealed to the Fifth Circuit Court of Appeals. While the appeal was pending, the parties reached a settlement under which both employees waived reinstatement but were awarded $900,000 in payment for lost wages and benefits.

i. *Five Star Contractors, LLC /Knights' Marine and Industrial Services, Inc.*, NLRB Case No. 15-CA-018635

Five Star Contractors supplied skilled laborers from Brazil and other countries to work in shipyards on the Gulf Coast under contract to Signal International LLC. The workers alleged that recruiters had promised free lodging, 40-hour workweeks, and plenty of overtime pay, but they were instead charged $75 a week to live in storage buildings and never worked a full week.

Several dozen workers signed a petition demanding better living conditions, full-time work, and reimbursement of travel costs to the United States. Moises S. was selected to deliver the petition to supervisors while the other workers stood behind him. He said he was immediately threatened with deportation and fired 20 minutes later.

Assisted by a local nonprofit group, the Alliance of Dignity for Guest Workers, the workers filed a charge with the NLRB Regional Office in New Orleans. Following an investigation, the Regional Director issued a complaint alleging that Five Star violated federal labor law by threatening and then firing Moises S. The parties settled, with Moises S. receiving about $13,000 in backpay for the time he would have worked had he not been fired.

j. Parexel International, LLC, NLRB Case No. 05-CA-033245

Parexel International conducts research for pharmaceutical companies at its Baltimore, Maryland location. Its staff includes individuals from South Africa. When Theresa N., a licensed practical nurse for the company, received information from a co-worker that led her to believe that the employees from South Africa were receiving special treatment, she complained to her direct supervisor. The next day, Theresa was called into the office by a Human Resources official and the Manager of Clinical Operations, who is also from South Africa, to discuss the "rumor" she had reported.

In the meeting, Theresa explained that a co-worker, who was South African, told her that he received a raise when he was re-hired by the company and that his wife would also receive a raise when she was re-hired. Theresa expressed concern that the company was paying the employees from South Africa higher wages and the

manager of clinical operations would continue favoring these employees. Theresa was then asked if she had discussed her conversation with her co-worker with anyone else besides her supervisor. Theresa said she had not. The next week, Theresa was fired.

Theresa filed a charge about her termination with the NLRB's Regional Office in Baltimore. After an investigation, a Complaint issued, and a hearing was held on the matter. The ALJS's decision was reviewed by the Board, which found the termination unlawful, as the evidence indicated the company had fired Theresa as a way to prevent her from discussing her concerns of favoritism with her co-workers. The Board held that a "pre-emptive" termination to keep an employee from discussing wages, hours, or working conditions with other employees is unlawful, even if the employee had not yet engaged in protected activity. As part of its decision, the Board ordered that Theresa be reinstated with full backpay.

The employer appealed the decision to the U.S. Court of Appeals for the District of Columbia, which appointed a mediator to the case. With the mediator's help, the parties reached a settlement under which Parexel agreed not to discharge employees to prevent them from engaging in protected concerted activities and to pay Theresa about $250,000 for back wages and medical expenses. Theresa declined reinstatement.

k. *First Student, Inc.*, NLRB Case No. 03-CA-104426

For many months, a school bus driver and some of her colleagues complained to management about the unruly behavior of students on their school buses. Students reportedly kicked, pushed, struck and spit at drivers. The driver also met with a local television news reporter and described in detail the students' behavior, the hazards it posed for drivers, and management's failure to respond to driver complaints. After the interview aired, the company fired the bus driver.

The driver's union filed a charge on her behalf with the NLRB's Buffalo regional office. The NLRB concluded that the employee was engaged in protected concerted activity when she spoke to the news crew and the company violated the law when it fired her. The case was settled just before the trial.

l. *Greater Omaha Packing Co., Inc.*, NRLB Case No. 17-CA-085735

A group of employees walked off the production line to protest the speed of the line and other working conditions, and thereafter met with the plant manager. That evening, the employees again met with the plant manager to discuss their compensation and other matters. One month later, when the Employer learned that another work stoppage was planned, three employees were separately called into the office and dismissed. The employees filed a charge with the NLRB's office in Overland Park, Kansas, which investigated and issued a complaint. An NLRB administrative law judge found the Employer had unlawfully discharged the employees in retaliation for engaging in concerted protected activity. On appeal, the Board affirmed the judge's ruling and required the Employer to reinstate the employees with full backpay and benefits.

m. *Evco Plastics*, NLRB Case No. 30-CA-17795

Soon after a supervisor started working the third shift at the Evco Plastics manufacturing plant, a group of female employees expressed concerns to each other about his aggressive attitude and preferential treatment of one of their co-workers. When an Internet search by one of the employees uncovered that the supervisor had a criminal history and was a registered sex offender, the women requested a group meeting with HR to talk about

their concerns with the supervisor's behavior and actions, which also included inappropriately touching some employees at work.

Instead of meeting with HR, each employee was called individually into a meeting with management, with the offending supervisor present. The women were questioned about what they knew, who they heard it from, and with whom they had talked about it. Based on what was said in these meetings, the employer issued written warnings to the employees, demoted two of them, reassigned one to a different shift, and terminated another -- all for having talked about the supervisor with each other.

Five of the employees filed charges with the NLRB Milwaukee Regional Office. Following an investigation, the regional director determined the employees had engaged in protected activities and there was reasonable cause to believe they had been unlawfully interrogated and retaliated against because of these activities.

After the NLRB notified Evco Plastics that a complaint would issue, the company settled the case by providing full backpay to all affected employees, eliminating written warnings from their records, and offering reinstatement.

n. *RML Specialty Hospital*, NLRB Case No. 13-CA-117668

An employee began discussing his concerns with a co-worker regarding the Employer's failure to accommodate their medical restrictions after they returned from their respective medical leaves. As the months passed and their working conditions did not improve, one of the employees spoke to his pastor. The pastor told him that he had recently heard a representative from ARISE Chicago, a workers' rights center, speak at a conference about workers' rights and suggested he go there to see if they could help. An ARISE representatives assisted these employees with drafting grievances that they presented to their Employer.

After submitting his grievance, one employee was fired. The ARISE representative who assisted him with drafting the grievance had previously attended an NLRB outreach event hosted by Chicago Regional Office. He informed the employee that he had a right to act in concert with his co-worker, and the Employer could not retaliate against him for doing so. The ARISE representative helped him file a charge against the Employer.

Following an investigation, the Regional Director of the Chicago NLRB Regional Office determined the employee had engaged in protected concerted activities with his co-worker and that there was reasonable cause to believe the Employer terminated the employee in retaliation of his protected activity of filing the grievance. On behalf of the NLRB General Counsel, the Director issued a complaint calling for a hearing before an administrative law judge. Prior to the hearing, the employee and RML Hospital Inc. reached a settlement agreement providing the employee with full backpay. The employee declined reinstatement.

o. *Kindred Transitional Care and Rehabilitation*, NLRB Case No. 25-CA-093878

During a meeting at its skilled nursing and rehabilitation healthcare facility in Muncie, Indiana, the Employer distributed a communications policy governing employees' use of social media. The Employer told employees that they had to sign the policy, and that they would be fired if they didn't. One employee expressed concerns to her co-workers that the policy too broadly restricted internet communications, including even while employees were off-duty. Ultimately, the employee refused to sign the policy. The Employer subsequently summoned her to the manager's office, where she was fired for refusing to sign the policy.

The employee filed a charge with the NLRB's Indianapolis Regional Office alleging that the policy violated her rights under the NLRA and that she was wrongfully fired. After an investigation, the Regional Director determined that the Employer's social media policy contained several unlawful sections which restricted employees' ability to discuss their terms and conditions of employment, including an overly broad provision requiring the Employer's approval to solicit certain online "friends" or other social media contacts and requiring employees to include a disclaimer in their internet postings about the company or work-related activities. The Regional Director also concluded that the employee was unlawfully discharged for talking to co-workers about her concerns with the social media policy and for refusing to sign the flawed policy.

After the NLRB notified the Employer that it intended to issue a complaint, the company settled the case. The employee was reinstated to her former job with full backpay of nearly $12,000. The Employer also agreed to remove those sections of their social media policy that were alleged to restrict employees' rights and to post a Board notice to employees advising them of their rights under the NLRA.

p. *The Ambriola, Co.*, NLRB Case No. 22-CA-061632

Supervisors at Ambriola Co., a cheese processing facility, held a meeting of all the company's employees, informing them they would be receiving merit- based wage increases. The supervisors told the employees they were prohibited from discussing the extent of their pay increases, and that anyone found to have discussed their raise with co-workers would be fired.

Later that month, an employee called another employee to complain. During this conversation, the first employee told his colleague that the supervisor had told him that he had gotten the biggest raise. The next day, the colleague talked to the supervisor, wanting to know why he didn't get the same raise as his co-worker.

When the employee returned to work, the supervisor called both him and his co-worker into his office. The supervisor asked both if they had discussed their raises, and one employee admitted he had. Four days later he was fired.

He contacted the NLRB's Newark regional office, which investigated and concluded that the company had illegally fired him for discussing his raise. Such activity is considered a protected concerted activity. The company and the employee settled, with the employee receiving $25,000 in back pay.

q. *American Medical Response of Connecticut, Inc.*, NLRB Case No. 34-CA-012576

Dawnmarie S. was a long-term paramedic for American Medical Response of Connecticut, Inc., an emergency medical service provider in New Haven, Connecticut. After a verbal disagreement with her supervisor at work, Dawnmarie went home and posted a negative comment about her supervisor on her private Facebook page. Dawnmarie's post prompted replies from other employees who were friends with Dawnmarie on Facebook.

Dawnmarie was suspended the next day and ultimately fired. In making the decision to fire her, the company relied, in part, on Dawnmarie's Facebook post, arguing that Dawnmarie violated the company's internet policy when she criticized her supervisor online.

A charge was filed with the Hartford NLRB Regional Office alleging Dawnmarie was unlawfully fired. The charge also alleged the company's handbook contained unlawful provisions which, among other things, prohibited employees from making negative comments about the company or supervisors.

After an investigation, the NLRB issued a Complaint alleging Dawnmarie was unlawfully fired because she engaged in protected concerted activity when she criticized her supervisor on Facebook. The Complaint also alleged that the company's handbook contained several unlawful provisions. Prior to a hearing, the company agreed to revise the provisions in the handbook that were alleged to be unlawful. The company also reached a private settlement with Dawnmarie regarding her termination.