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OSHA/NLRB AGREEMENT

The Occupational Safety & Health Administration ("OSHA") recently entered into a referral pact with the National Labor Relations Board ("NLRB") that will likely result in more employers being subjected to charges of unfair labor practices.

Under the agreement, OSHA will direct workers who file an untimely whistleblower claim under Section 11(c) of the Occupational Safety and Health Act of 1970 ("OSH Act"), which bars retaliation against employees who complain about safety hazards, to file a charge with the NLRB. While Section 11(c) of the OSH Act has a statute of limitations of 30 days, the National Labor Relations Act ("NLRA") gives workers a more generous time frame -- up to six months -- to file an unfair labor practice charge.

The agreement is the latest in a series of efforts by the NLRB over the last several years to expand its authority over non-unionized workforces. Although not all OSH Act retaliation

Alvin Weiss
Retired Judge, Superior Court of New Jersey

claims will fall within the scope of the NLRA, it is expected that the NLRB will take an expansive view of what constitutes concerted activity in the context of safety hazards.

While some believe this is simply another attempt by the NLRB to try to prove its relevance to workers -- particularly those not in a union and who might not believe the NLRA has any application to them -- there likely will be a substantial number of referrals from OSHA to the NLRB under this new agreement. This means that claims that would otherwise have been time-barred and therefore dismissed under the OSH Act may now survive under the NLRA.

PROFANITY AS PROTECTED, CONCERTED ACTIVITY

In a decision surprising even for the modern NLRB, the NLRB held 2-1 that an employee who had shouted a string of expletives at his supervisor had engaged in protected, concerted activity. Holding that the employee should not have been fired, the NLRB required the employer to reinstate him and provide back pay.

The Facts

Nick Aguirre was hired in August 2008 as a car salesman at Plaza Auto Center in Yuma, Arizona. Three months later, in October 2008, Aguirre met with Tony Plaza, the company's owner. During the meeting, Aguirre questioned Plaza about certain company policies and the minimum wage. Prior to the meeting, Aguirre had spoken with other Plaza employees about the company's policies, including those relating to breaks and compensation. Plaza responded that Aguirre's negativity was affecting other employees, that he had to follow the company's policies and procedures, and that he should not complain about his pay. Plaza also told Aguirre that, if he did not trust the company, he needn't work there.

At that point, Aguirre lost his temper and began shouting profanities at Plaza. Among them, Aguirre called Plaza a "fucking motherfucker," a "fucking crook," and an "asshole." He also advised Plaza that he was "stupid," that "nobody liked him and everyone talked about him behind his back." During the outburst, Aguirre stood up from his chair, pushed it aside, and threatened Plaza that if he fired him, Plaza "would regret it." Plaza did fire Aguirre after the meeting, based on his outburst, although he had not intended to do so prior to the meeting.

Procedural History

Following an evidentiary hearing, an administrative law judge found that Plaza had violated the NLRA by inviting Aguirre to quit in response to his complaints about the working conditions, which constituted protected, concerted activity. However, she found that Aguirre's "belligerent" behavior, which included "menacing conduct and language," caused him to lose the protection of the NLRA.

In considering the recommended findings of the administrative law judge, the NLRB applied what it referred to as an objective four-factor test developed in a prior decision, Atlantic Steel Co., to determine whether Aguirre's conduct cost him the protection of the NLRA. The four factors it considered were: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice. It concluded that all four factors weighed in favor of protection. Accordingly, it held that Plaza had violated the Act by terminating Aguirre.

Plaza filed a petition for review in the Court of Appeals for the Ninth Circuit. The court agreed with the NLRB that three of the four factors weighed in favor of protection. But it found that the NLRB had erred in its finding that the "nature of the outburst" factor weighed in favor of protection. The court remanded the case to rebalance the factors and properly consider whether the nature of Aguirre's outburst caused him to lose the protection of the NLRA.

The Decision

On remand, the NLRB again concluded that the balance of the factors weighed in favor of protection. As to the first factor, the place of the discussion, the NLRB found the outburst was not disruptive to other employees because it occurred behind closed doors in a manager's office. As to the subject matter of the discussion, it involved Aguirre's concerted complaints about the terms and conditions of the employment of salespeople. As to the fourth factor, the NLRB found that Plaza had provoked Aguirre's outburst by inviting him to quit if he did not like the company's policies.

On the issue of the nature of Aguirre's conduct, the NLRB went out of its way to take the position that Aguirre's conduct was not menacing, belligerent, or physically aggressive. With regard to Aguirre's comment that Plaza "would regret it" if he fired Aguirre, the NLRB found that this referred to Aguirre taking legal action, and was not a threat of physical

harm. Despite the fact that Aguirre had pushed his chair back to stand up over Plaza, the NLRB found that, because the office was small, it would have been difficult for Aguirre to stand up without pushing his chair aside.

CONCLUSION

Both the OSHA pact and the Plaza Auto Center decision make clear that the NLRB is continuing its campaign to punish employers, particularly non-union employers, that interfere with, coerce, or restrain employees engaging in concerted activity protected under the NLRA. When disciplining or terminating employees, employers should be mindful of whether the employee's conduct could be considered protected, concerted activity. Even if the employee engages in egregious behavior when engaged in such activity, he may still retain the protection of the NLRA if the other circumstances weigh in favor of protection. This does not mean that employers must necessarily look the other way when an employee's actions are insubordinate or in violation of company policy; indeed, each situation is fact-specific. At this time in history, however, the NLRB presents an additional source of concern to be considered.
