NLRB v. EEOC – The Ultimate "Would You Rather"

Kelly A. Coyle, Clark Baird Smith LLP

Employers can end up between a rock and a hard place when dealing with interpersonal employee conflicts. For example, let's say you have Employee A claiming that Employee B has been harassing him based on Employee A's race. You investigate and find that Employee B made several racially inappropriate remarks toward Employee A. Sounds pretty straightforward. But, what if Employee B is the union president? And, what if Employee B was trying to talk Employee A into supporting a union position and made the racially inappropriate remarks during that conversation? Now what?

While labor and anti-harassment laws don't conflict on their face, harassment concerns and protected, concerted activity issues can (and have) repeatedly intersected, much to the employer community's chagrin. The Equal Employment Opportunity Commission ("EEOC") through the myriad of federal harassment laws, mandates employers make reasonable attempts to prevent and address harassment. The National Labor Relations Board ("NLRB"), on the other hand, will scrutinize cases involving an employee who was disciplined for engaging in misconduct (such as harassment) that also involved protected, concerted activity. Thus, employers can be faced with a Hobson's choice. Would I rather discipline Employee B and face a ULP charge? Or, would I rather avoid discipling Employee B and face a harassment charge from Employee A? What's an employer to do?

The EEOC and the NLRB have yet to truly combine forces to provide employers with helpful guidance on how to untangle these types of questions. The EEOC is slated to issue updated enforcement guidance on harassment in the workplace. Unfortunately, the current draft of the proposed guidance provides little insight or suggestions to employers when dealing with harassment that also arguably involves protected, concerted activity.

By contrast, the NLRB has directly addressed this quagmire (with mixed results). *See Detroit Newspaper Agency*, 342 N.L.R.B. 223, 268 (2004) (holding that striking employee who called the nonstriker "fucking n[****]r loving bitch whore" who was responsible for "the n[****]rs taking their jobs" did not lose protected status); *see also Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1047–48 (7th Cir. 2002) ("Although Title VII does not guarantee a happy workplace, it does provide protection for employees who suffer from discriminatory terms and conditions of employment through a work environment that is permeated with racial epithets that are tolerated by the employer.").

In 2020, the NLRB seemed to throw employers a bone by slightly relaxing its analysis of employee discipline for engaging in alleged harassing behavior. *See General Motors, LLC*, 369 NLRB No. 127 (2020). For years, the NLRB had used a "setting-specific standards" for evaluating misconduct occurring during protected activity, standards which could be viewed as onerous on employers. Seeming to recognize the rock and a hard place between which employers can be placed for harassment and protected activity cases, in *General Motors, LLC*, the NLRB moved away from the "setting-specific standards" approach towards the Board's *Wright Line* analysis, a burden shifting method that allows employers to avoid liability by demonstrating they would have taken the same action absent the protected activity. *Id*. at *1.

In *General Motors, LLC,* the NLRB explained its rationale for implementing the *Wright Line* analysis, acknowledging that it has long been concerned with taking "into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Id*. at *12. (internal citations omitted). The NLRB stated, "however, that this rationale is overstated and has largely swallowed employers' concomitant right to maintain order, respect, and a workplace free

from invidious discrimination. We read nothing in the Act as intending any protection for abusive conduct from nondiscriminatory discipline, and, accordingly, we will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful." *Id*. This certainly seems reasonable, particularly from the employer's perspective.

But the employer community's respite was brief. In 2023, the NLRB pendulum swung back to the old standards. *See Lion Elastomers LLC*, 372 NLRB No. 83 (2023) (reestablishing "setting-specific standards" for evaluating misconduct occurring during protected activity). The *Lion Elastomers LLC* NLRB claimed the concerns in *General Motors* were overblown, largely dismissing the potential conflict between the NLRA and Title VII:

> The Supreme Court has said repeatedly that Title VII is not "a general civility code for the American workplace." . . . There is no obvious or inevitable conflict, then, between the Board's approach as reflected in the setting-specific standards and Federal antidiscrimination law. The *General Motors* Board cited no judicial support for the proposition that employers have a legal duty under antidiscrimination law to discipline or discharge employees in every instance involving the sort of "offhand comments and isolated incidents"--those that are not "extremely serious"--which the Board typically would find retained the protection of the Act if they occurred in the course of Section 7 activity.

Id.

It is important to note that the NLRB only governs private sector employers. Nevertheless, state labor agencies often look to the NLRB for guidance when intepretating their own state public sector labor laws. As a result, it may only be a matter of time before the *Lion Elastomers* decision comes to a public sector labor agency near you.

Since it appears that we may be continually stuck between a rock (protected, concerted activity) and a hard place (federal anti-discrimination laws), employers will have to figure out a way to carefully navigate their way free. No matter our level of care, we will at some point be

faced with picking one or the other, i.e. a ULP charge or a discrimination claim. Your best option is to carefully evaluate your liability.

Remember that most public sector labor acts have much more limited damages provisions than federal anti-discrimination laws. While it is certainly not ideal to be ordered to cut a check for backpay to an employee reinstated following a ULP complaint, the financial liability associated with federal or state discrimination lawsuits is significantly worse than backpay alone. Attorneys fees, pain and suffering, and even individual liability are all on the table in a discrimination case. So, when it comes down to choosing the rock (labor laws) or the hard place (discrimination laws), the analysis is relatively simple. What is going to cost you more? That being said, you may very well determine that you have a better argument for one type of case versus the other. Don't just automatically assume that you should ignore the potential ULP. Always get your attorney's advice before trying to navigate through this difficult position.