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D.C. Circuit Clarifies Boundaries of Protected Employer Expressions

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On June 1, 2021, the U.S. Court of Appeals for the D.C. Circuit overturned a NLRB determination that a manager's incorrect blaming of a union for discrepancies in an employee's paid-leave time constituted an unfair labor practice. The pivotal issue was whether the manager's statements had a reasonable tendency to interfere with employees' labor rights. As discussed below, the D.C. Circuit rejected the NLRB's determination that the manager's statements had a reasonable tendency to interfere with employees' labor rights, reasoning that the manager's misstatements were lawful expressions of the employer's opinions.

In a dispute between Trinity Services Group, Inc. (the "Employer") and United Food and Commercial Workers Union, Local 99 (the "Union"), the Union had negotiated a paid-leave plan at the Employer's unionized facilities that differed from the Employer's paid-leave plan applicable at non-unionized facilities. In accordance with the Union's plan, a bargaining unit employee believed she had accumulated three days of paid-leave time, but the Employer's records indicated she had accumulated none because the parallel schemes overwhelmed the Employer's bookkeeping software. The paid-leave discrepancy was brought to the attention of management, and one of the Employer's managers blamed the Union for the inconsistency between the employee's calculation of her paid-leave time and the Employer's records. The manager made the following statements to the employee:

- "That is a problem that the Union created regarding [paid leave]."
- "You need to fix that with the Union."
- "That's the problem with the Union."

Section 8(c) of the National Labor Relations Act protects an employer's right to express views, arguments, and opinions, so long as such expressions contain no threat of reprisal or force, or promise of benefits. Unprotected expressions, which contain threats or promises, may be used against employers as evidence of unfair labor practices. The test to determine if an employer's

expression can be used as evidence of an unfair labor practice is whether a reasonable employee would have interpreted the expression as threatening or promising a benefit. For example, statements that employees would be punished if they voted for unionization, and suggestions that employee benefits would increase if employees voted against unionization, have been found to constitute unprotected expressions.

Here, the NLRB determined that, because the Employer's manager did not have an objective basis for blaming the Union for the paid-leave discrepancies, the manager's misstatements were unfair labor practices. However, as the D.C. Circuit recognized, the NLRB's holding that mere misstatements constitute unfair labor practices has no statutory or precedential basis. The D.C. Circuit overturned the NLRB's decision, concluding that the misstatements were protected expressions of opinion under Section 8(c) of the Act. Acknowledging the often subtle and veiled nature of threats and promises, the D.C. Circuit reasoned that, under the circumstances, no reasonable employee would have interpreted any of the manager's statements as threatening or promising a benefit. Additionally, the D.C. Circuit expressly declined the NLRB's request to expand the Act to prohibit employers' misstatements that could reasonably mislead employees, but involve no threats or promises.

The D.C. Circuit's holding clarifies the scope of employer expressions protected under the Act, and limits the reach of the Act to its statutory text. This ruling is a win for employers.

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