

Union Adherent's Antics Not Protected By Act, NLRB Rules

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The NLRB recently issued a rare decision completely dismissing all allegations against an employer; rarer still because it was unanimous. In *Brooke Glen Behavioral Hospital*, 365 NLRB No. 79 (May 15, 2017) the NLRB was confronted with a situation where an employee-union adherent engaged in behavior ultimately found to be inappropriate and unprotected.

The employer, a hospital treatment center for patients with severe emotional and mental problems, recognized a nurses' union as representative of registered nurses at the facility ("Union"). The mental health technicians working at employer's facility were represented by Teamsters. There was an attempt by the Union to raid the Teamsters unit and cause the technicians to change representation; this attempt was led by a registered nurse. These kinds of efforts can cause a great deal of friction in a workplace because the employer has legal obligations to both unions.

Registered Nurse Engages In Strident Actions

During a bargaining session between the Union and the employer, the registered nurse brought several Teamsters-represented technicians to the meeting as "witnesses." The employer objected to the presence of the technicians. When the technicians remained, the employer left the meeting. The Union and the employer met the next day for bargaining and no technicians were present.

Within a couple of days after the bargaining incident, the employer was conducting a tour of its hospital for managers and staff from a sister facility. During the tour, the group visited the unit where the registered nurse worked. The registered nurse immediately started screaming demanding to know "who the visitors were and why they were there." An adolescent patient was in the vicinity of the exchange. When the employer representative leading the tour did not respond, the registered nurse started asking the visitors why she was barred from visiting the sister hospital. Apparently, registered nurse and a Union official had made an attempt to visit the sister hospital and were denied access to the facility.

The registered nurse kept asking the visitors why she wasn't allowed to visit their hospital. As the tour was winding down in the parking lot of the hospital, the registered nurse approached the group and pointed at the leader of the tour saying, "this one don't do sh%t, she ain't sh%t. She walks around here with an air. . . I am going to get you the f*ck out of here."

The employer decided to terminate the registered nurse for her unprofessional conduct.

The Union filed charges alleging that the employer's cancellation of the bargaining session violated Section 8(a)(5) of the Act as a breach of its good faith obligation to bargain. The Union also claimed the registered nurse's termination was motivated by protected activity in violation of Sections 8(a)(3) and (1) of the Act.

Cancellation Of Bargaining Session Not A Violation Under The Circumstances

The Administrative Law Judge dismissed the bargaining cancellation allegation. The Judge noted that the "cancellation of bargaining sessions is an indicia of a failure to bargain in good faith, although ordinarily much more than a single isolated cancellation of a bargaining meeting is required before a violation is found." The ALJ considered that the circumstances present in the case, – the invitation of members of a different union who were the subject of a raiding attempt,– was not the most conducive to good faith bargaining:

Although, as shown above, parties are generally permitted to select their own bargaining team, that does not necessarily include the selection of 'observers' who are not members of the bargaining team and have nothing to add to the bargaining. Extending bargaining to such observers–by either side, over the objection to the other–would raise the potential for mischief and serious interference with good-faith bargaining.

The ALJ noted that it is one thing for a union to engage in organizing another union's employees but "it is quite another to take that fight to the bargaining table involving a separate unit." The Board affirmed this finding on appeal

Discharge Of Registered Nurse Was Not For Protected Activities

The General Counsel alleged that the registered nurse's termination was motivated by her protected activity, mainly her behavior during the bargaining session. The ALJ found that the General Counsel had not satisfied his burden of establishing that the termination was motivated by protected activity, noting that there was no linkage other than timing between the bargaining session and the tour. The Judge noted that although the employer's attorney objected to the presence of outsiders, there was no reaction at all related to the registered nurse. The ALJ found the "real motivating factor for the discharge was an independent set of circumstances completely divorced from any union or other protected activity –[registered nurse's] unprovoked misconduct that interfered with a legitimate tour group."

The ALJ also considered whether the conduct of the registered nurse was protected requiring an analysis of whether it became unprotected. The ALJ concluded that no protected activity occurred:

[the incidents] did not involve protected concerted activity by [registered nurse] or anyone else. [Registered nurse] was at work during two of the confrontations; and the third took place after work in [the employer's] parking lot. The tour and its aftermath were not an invitation for her to interfere with the tour so as to turn those acts of interference into protected activity.

The ALJ also seemed swayed by the fact the registered nurse “perceived the tour as somehow related to her union activity. But protected activity must be based on objective fact, not subjective perceptions of the party or witness making the claim.” In other words, an employee cannot immediately cloak conduct in the protection of the Act by making claims related to union activity (here, the attempt to visit a different hospital) that do not relate to an ongoing dispute. The conduct must be related to the employee’s own terms or conditions of employment. Yelling at a tour group because of a perceived slight at a different hospital does not fit into that category.

Takeaways

In the age of corporate campaigns, where the aim of conduct is often simply to cause irritation in the hopes of pressuring the employer for a larger goal, *Brooke Glen Behavior Hospital* offers good insight into how to respond to these actions. Bringing outsiders of any kind to a bargaining session can be disruptive and arguably is evidence of bad faith. In some of the more contentious bargaining situations politicians, clergy, and other public figures are invited as “witnesses” despite the fact the sole purpose of having such individuals attend is to pressure the employer. Here, the employer did not overreact. Although the employer did not continue the bargaining session it was faced with a real dilemma: permitting the technicians on this one occasion might open the door to the Union bringing these employees,—who were represented by a different union,—to more sessions. The employer made its point and then continued bargaining the very next day.

The registered nurse’s behavior towards the tour group is a trickier issue. As we have noted, actual protected activity can take very strident forms and not lose protection of the Act, even in cases where the language used is vulgar. Had the registered nurse used profanity towards a manager while expressing a legitimate workplace grievance and no outside visitors, customers or clients were present there is little doubt this conduct would be protected. Also, the fact the registered nurse here acted alone does not always mean it is not “protected concerted activity” because in the right circumstances a [single employee’s actions can be protected](#). What is significant in this case is that the registered nurse aimed her activities at a tour group, visitors who were not involved in any workplace dispute, an object that had no other purpose than to vex the employer. This might very well be a different outcome if, for example, the registered nurse targeted a tour of people who were set to take bargaining unit jobs.

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