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NLRB Protected Concerted Activity or Harassment – Will Employers Finally Get Clarity?

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Yesterday, it was announced the NLRB and EEOC will issue a guidance in an effort to help employers better understand overlapping obligations under the National Labor Relations Act (NLRA) and Title VII. The guidance no doubt is the result of a longstanding tension between an employee's right to openly communicate about workplace issues (protected concerted activity) and an employers' obligation under Title VII to prevent workplace harassment and bias, and be proactive about doing so.

Previously, I wrote about how NLRB cases many times sanction conduct that many employers find unacceptable in the modern workplace. When such conduct also butts up against an employer's legitimate and mandated obligation to address harassment and its precursor conduct, employers are often left with a Hobson's choice. Below is a brief discussion of how this issue can arise and a sampling of a few outcomes (some possibly surprising).

A starting point is *Consolidated Diesel Co.* 332 NLRB 1019 (2000) where the NLRB held that the employer's harassment investigation into complaints about comments and actions of certain union supporters violated Section 8(a)(1), notwithstanding the employers reliance on its otherwise neutral harassment policy. The NLRB held that the employer's continued investigation after it discovered the employees were engaged in protected concerted activity protected by Section 7 of the NLRA violated Section 8(a)(1). The NLRB held an employer cannot "apply a facially valid harassment policy without reference to Board law. Legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigations based on their protected activities." The board also found that employers cannot rely upon the subjective understanding of a third party to enforce harassment when Section 7 rights are concerned. Under cases like *Nobel Metal Processing, Inc*. 346 NLRB 795 (2006) the NLRB has instead found that when an employee is disciplined for conduct that is part of protected concerted activity, the only pertinent question is whether the conduct is "sufficiently egregious" to remove it from the protection of the NLRA. Additionally, the employer cannot determine that Section 7 protected conduct is harassment based on the subjective perception or "idiosyncratic" reaction of the listening employee. *Consolidated Diesel*, supra.

Anyone who has dealt with these standards knows that outcomes are hard to predict and the results under the NLRA are often confounding to employers. For example, any number of NLRB cases have

sanctioned and deemed speech such as referring to female employees as “pussies” and “cat-food lovers” in trying to garner support for the union protected. In fact, the board reversed the employer’s decision to discharge finding the term “pussies” as a reference to a weak person and not intended to have a sexual overtone. *See Frenesius Manufacturing, Inc*. 358 NLRB No. 138 (2012). However, in *PPG Industries* 337 NLRB 1247 (2002) where a male union supporter’s comment to a female colleague that employer was “screwing her” and “f***ing her” and she should sign a union card, the NLRB found the comments unprotected. *PPG*, supra (“serious employee complaint involving an issue in the nature of sexual harassment would have resulted in discharge regardless of protected concerted activity.”)

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