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EMPLOYMENT LAW

Recent NLRB Decision Reminds Employers of the Need for Consistency

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Special to the Legal

If there is one theme of this column over the years, it is that employers must be both credible and consistent in their explanation for employment decisions. One without the other is helpful, but both are necessary for an employer to prevail. While we see this issue raised most often in the context of summary judgment or trial decisions in court, a recent decision of the National Labor Relations Board reinforces the point. The decision in *MCPc and Jason Galanter*, Case No. 06-CA-063690 (May 23), also serves to remind nonunion employers that all employees are entitled to the protections of the National Labor Relations Act when it comes to retaliation for “protected concerted activity”—which is usually speaking up on behalf of co-workers over the terms and conditions of employment.

COMPLAINT OF EXCESSIVE WORK IS ‘PROTECTED ACTIVITY’ UNDER THE NLRA

Jason Galanter was an engineer working for MCPc, an IT support company headquartered in Cleveland. Galanter worked in the company’s Pittsburgh office when he was invited



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to a “team building” lunch with the director of engineering, Dominick DelBalso, according to the opinion. During the lunch, Galanter raised concerns about his co-workers’ heavy workloads and urged DelBalso to hire additional engineers. He also stated that the company could have hired additional engineers for the \$400,000 salary it was paying to a recently hired executive. Galanter was joined in this sentiment by a number of his co-workers.

About a week later, Galanter was directed to report to MCPc’s headquarters in Cleveland, where he was met by the company’s CEO and the vice president of human resources.

The CEO questioned Galanter as to how he learned the salary information discussed during the previous week’s lunch. Galanter, at first, denied having such knowledge and then gave multiple explanations both as to the substance of his comment and where he “may have” learned the information in question, the opinion said. The CEO then told Galanter that the company and he needed a “divorce” and that he was thereby terminated.

EXPLANATION TO THE HEARING JUDGE

Galanter filed an unfair labor practice change with the NLRB, claiming that his statements during the lunch with DelBalso were “protected concerted activity” and that his termination was retaliatory and in violation of the NLRA.

In its initial statement to the NLRB’s regional office, the company stated that “it terminated Galanter for accessing and disseminating confidential salary information” in violation of its “confidentiality policy.” The confidentiality policy states, in relevant part, that “idle gossip or dissemination of confidential information within MCPc, such as personal or financial information, etc. will subject the responsible employee

to disciplinary action or possible termination.”

Significantly, the hearing judge at the regional level found that the confidentiality policy, itself, was overbroad and violated the NLRA. The judge then found that MCPc violated the NLRA by discharging Galanter both for his protected concerted activity at the team-building lunch (that is, speaking for his co-workers in discussing their burdensome workloads) and because the termination was based upon an unlawful policy.

POST-HEARING BRIEF BRINGS EXPLANATION

After the judge’s initial ruling, the company filed exceptions to his report and asserted that Galanter’s discharge was “unrelated” to its confidentiality policy. Instead, it argued that Galanter was discharged because he “disclosed confidential salary information and then, during the company’s investigation into his conduct, lied about where he obtained that information.”

MCPc appealed the judge’s opinion to the full National Labor Relations Board, which affirmed the decision. The company then appealed the board’s decision to the U.S. Court of Appeals for the Third Circuit, which agreed that Galanter had engaged in protected concerted activity “when he raised the engineer shortage at the team-building lunch.” It found, however, that the board had applied the wrong test for determining whether Galanter’s discharge violated the act. Specifically, the Third Circuit held that MCPc’s explanation for the termination decision should be subjected to a “mixed motive” analysis such that once the NLRB’s general counsel “showed an improper motive for Galanter’s discharge, the remaining question was whether Galanter

would have been discharged for his misconduct or dishonestly regardless of MCPc’s unlawful motivation.” The appellate court, therefore, remanded the case to the NLRB and directed that this test be applied.

PRETEXTUAL EXPLANATION IN ANY FORUM

On remand, the board found that, in a test familiar to employment law practitioners, “where the record demonstrates that the employer’s proffered reasons are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct.” Upon consideration

The board found that the shifting rationale provided by the company supports a conclusion that the proffered reasons for Galanter’s discharge—his purported dishonesty and the company’s belief that he improperly accessed confidential information—are pretextual.

of the evidence, and most particularly MCPc’s stated reasons for Galanter’s discharge, the board found that the explanations offered were pretextual.

Specifically, as noted, until its post-hearing briefing, MCPc asserted that Galanter was terminated because he violated the company’s confidentiality policy. Its post-hearing argument was, however, that Galanter’s

discharge was because he had improperly accessed confidential salary information but that the decision was “unrelated to its confidentiality policy.” Upon remand to the board, however, the board found that MCPc “abandoned the rationale that Galanter was discharged for improperly obtaining confidential information and asserted that its decision to terminate Galanter ‘was based solely on his dishonesty.’” The company went so far as to characterize Galanter “alleged improper access to the salary information as ‘the ultimate red herring.’” The board found that “the shifting rationale provided by the company supports a conclusion that the proffered reasons for Galanter’s discharge—his purported dishonesty and the company’s belief that he improperly accessed confidential information—are pretextual.”

The message is obvious. Employers and their counsel need to “pick a lane” the first time and stick to it. This doesn’t mean that explanations for employment actions can’t evolve or be given added depth, but whether it is in front of the Equal Employment Opportunity Commission (EEOC), the NLRB and most definitely by the time a case gets to court, employers and counsel need to have thought through the explanation, reviewed the policies at issue and offer an explanation that will withstand both scrutiny and the test of time. •