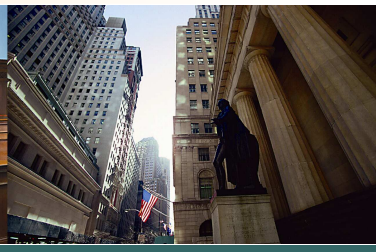
NATIONAL LABOR RELATIONS ACT — SECTION 7



"MANY ASSUME THAT THE NLRA CANNOT APPLY IF THEIR EMPLOYEES ARE NOT REPRESENTED BY A UNION. THIS IS, HOWEVER, INCORRECT."

Employees have many legal protections pursuant to both federal and state law. One provision which employers sometimes forget to consider is the National Labor Relations Act ("the NLRA").[1] Many covered employers assume that the NLRA cannot apply if their employees are not represented by a Union. This is, however, incorrect.

One of the most important provisions of the NLRA Section 7 does provide covered employees with some "union related" protections - for example, the right to "form, join, or assist labor organizations."[4] What surprises many covered employers, however, is another portion of Section 7 which refers to a right to engage in "concerted activities for the purpose of . . . mutual aid or protection."[5] The actions of employees can sometimes fall within the scope of this right even if the employees are not represented by and are not seeking representation by a union.

The decisions of the National Labor Relations Board ("the Board") and courts show that whether protection will be afforded in a particular case typically depends on whether the following are true: (1) the activity was "concerted;" (2) the activity was for the purpose of "mutual aid or protection;" and (3) the type of activity, or the manner in which the activity was conducted, will allow for the protection of the NLRA. This article will briefly comment on these three issues and on the Board's decision in *Epilepsy Foundation of Northeast Ohio*.[6]

CONCERTED ACTIVITIES

If a group of employees together take some action with the knowledge of their employer there is typically little issue as to whether the activity is "concerted." The applicable decisions in regard to this issue, however, show that the Board and courts have used and applied a broader interpretation.

In *Myers II*[7] , for example, the Board adhered to a definition of concerted activity set forth in an earlier decision which indicated that "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[8] This standard has allowed the Board and courts to sometimes find activity by a single employee to be "concerted."[9] In *Mobil Exploration and Producing U.S. v. N.L.R.B,*[10] for example, the Court of Appeals for the Fifth Circuit stated that "it is now well recognized that an individual employee may be engaged in concerted intends to induce group activity, and that in which the employee acts as a representative of at least one other employee."[11]

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TYPE AND MANNER OF ACTIVITIES CONDUCTED

There obviously must be some limitations to the Section 7 right to engage in "concerted activities for the purpose of . . . mutual aid or protection."[28]

In one case, for example, it was stated that "offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service." [29]

It is clear, therefore, that not all "inappropriate" conduct will necessarily suffice to remove employees from Section 7 protection. The Court of Appeals for the Fifth Circuit, for example, stated as follows in this regard in *Mobil Exploration and Producing U.S. v. N.L.R.B.*[30]:

"*Flagrant conduct of an employee even though occurring in the course of Section 7* activity, may justify disciplinary action by the employer. Not every impropriety does, ."[31] *however, because the employee's right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.*"

A good case to begin one's research in this area is the U.S. Supreme Court's decision in *NLRB v. Local Union No. 1229,* International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting).[32] Technicians who worked for the Jefferson Standard Broadcasting Company ("the company") became involved in a labor dispute with the company.[33] Some of the technicians eventually decided to distribute handbills which attacked "the quality of the company's television broadcasts" and which made "no reference to the union, to a labor controversy or to collective bargaining" [34]

The employer discharged some of the technicians charging them "with sponsoring or distributing these handbills."[35]

The Court concluded that "the means used by the technicians in conducting the attack have deprived the attackers of the protection" of Section 7.[36]

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MUTUAL AID OR PROTECTION

A good starting point for research concerning whether a particular activity is for the purpose of "mutual aid or protection" is the U.S. Supreme Court's decision in *Eastex, Inc. v. N.L.R.B.*[12] The Court in this case held that distribution of two sections of a newsletter was "protected under the 'mutual aid or protection' clause" of Section 7.[13] One section urged employees to write to legislators in opposition to the incorporation of a right to work law in the state constitution. [14] The other section criticized a veto by the President of an increase in the minimum wage and urged employees to register to vote so as to "defeat our enemies and elect our friends."[15] The Court declined to "delineate precisely the boundaries of the 'mutual aid or protection' clause."[16] At the same time, the Court did admit that "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity"[17] and further assumed that "at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause."[18]

N.L.R.B. v. Motorola, Inc.[19] is an example where a court held that the "point of attenuation" referred to in *Eastex* had been reached.[20] The employer in this case was commencing random drug testing and some of the employees were opposed to the same.[21]Some of the employees joined a non-profit organization which desired the passage of a municipal ordinance restricting random drug testing.[22] An employee, who was a member of the organization, was refused permission to distribute some of the organization's materials (including a membership application) on the employer's property. [23] The Court of Appeals for the Fifth Circuit refused to enforce the portion of the Board's order which held that this refusal was an unfair labor practice.[24] The court pointed out that the "attempted distribution of the literature was initiated and orchestrated" by the organization and that organization members stated they did not represent the employees and "had no direct goal of changing management policies."[25] The court stated that "the facts in this case reach that 'point of attenuation' posited by the Supreme Court in *Eastex*." [26]

It is important to note, despite the Fifth Circuit decision in *N.L.R.B.* v. *Motorola, Inc.*, that "mutual aid or protection" generally has been interpreted in a broad pro-employee manner so as to include most work-related issues.[27]

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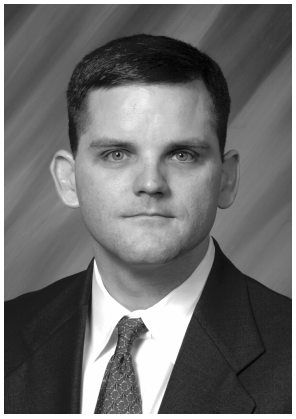

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CONCLUSION

Although the NLRA is one of the older federal employment related provisions, covered employers are wise to understand its requirements. As is explained above, employees can have Section 7 rights regardless of whether they are represented by or desire a union.

— Mike Garrard, Ed Hardin, and Terry McCay

EPILEPSY FOUNDATION OF NORTHEAST OHIO

A July, 2000 decision by the Board in *Epilepsy Foundation of Northeast Ohio*[37] should cause all covered employers to pay closer attention to the NLRA.

Two Foundation employees, Arnis Borgs and Ashraful Hasan, prepared a memo to their supervisor, Rick Berger, the Foundation's director of vocational services, basically informing him that they no longer required Berger's supervision. A copy of this memo was also sent to the Foundation's Executive Director, Christine Loehrke. Borgs was an employment specialist and Hasan a transition specialist for a Foundation research project concerning school-to-work transition for teenagers with epilepsy. Borgs and Hasan were critical of Berger's involvement in this program. Loehrke ordered Borgs to meet with her and Berger, but he refused unless Hasan could be present as well, or he could meet with Loehrke alone. Both requests were denied by Loehrke, and Borgs was terminated the following day for "gross insubordination." Hasan received a similar directive to meet with Loehrke and Berger and complied. Hasan was reprimanded and eventually terminated.[38] The Board referred to an earlier decision of the U.S. Supreme Court in *National Labor Relations Board v. J. Weingarten, Inc.*[39] and stated in part that:

"Our examination of this issue begins with the Supreme Court's seminal Weingarten decision. There, as noted above, the Court held that an employer violated Section 8(a)(1) by denying an employee's request that a union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action."[40]

The Court of Appeals for the District of Columbia agreed with the Board's extension of *Weingarten* indicating in part that "the presence of a co-worker gives an employee a potential witness, advisor, and advocate in an adversarial situation" and that the "Board's determination that an employee's request for a coworker's presence at an investigatory interview is concerted action for mutual aid and protection and thus within the realm of § 7 is . . . reasonable."[43]

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