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OBAMA NLRB OVERRULES BUSH ERA NLRB PRECEDENT AND EXPANDS EMPLOYEE LABOR LAW PROTECTION FOR INDIVIDUAL COMPLAINTS OF SEXUAL HARASSMENT

In Fresh & Easy Neighborhood Market, a cashier asked her supervisor to participate in TIPS training which many states require in the regulation of the sale of alcohol. The supervisor asked the employee to write him a note on the whiteboard in the break room so that he would remember to schedule her for the training. The employee did as asked. A co-worker, thinking he was being funny, changed the word TIPS on the whiteboard to something sexual. Offended, the cashier wanted to file a sexual harassment complaint.

The cashier copied the message from the whiteboard and asked her team leader and two co-workers to sign it. The three employees signed the document to signify its accuracy, but had no interest in making their own complaint and felt forced to sign it. In fact, one of the co-workers filed a complaint against the cashier for "bullying" her in to signing the document. When questioned, the cashier explained that she obtained the signatures for her own protection. At the conclusion of the investigation, the employer disciplined the employee who altered the whiteboard message and exonerated the cashier from the allegations made against her. Ultimately, the cashier filed an unfair labor practice charge against Fresh & Easy, claiming that the employee relations manager asked her not to obtain any additional written statements from potential witnesses while he investigated the matter. However, he did advise her that she could still discuss the matter with co-workers.

The NLRB first examined whether the cashier's sexual harassment complaint constituted concerted activity under the National Labor Relations Act. The NLRB also looked at whether the employee relations manager's instruction to the cashier to stop gathering written statements on her own violated the NLRA.

To be protected under the National Labor Relations Act, an employee must be engaged in concerted activity for the purpose of mutual aid or protection. Clearly the cashier's complaint was personal, her co-workers did not share in it and her goal in raising the complaint was

personal. An NLRB decision from 2004, under a Bush dominated NLRB, made it clear that this type of complaint does not constitute protected concerted activity.

Unbelievably, the NLRB overruled its 2004 decision and found that the cashier engaged in concerted activity merely by asking her co-workers to attest to what she copied from the whiteboard. It was not relevant that the co-workers signed to stop the cashier's annoying behavior. The Board found that "solicited employees do not have to agree with the soliciting employee or join that employee's cause in order for the activity to be concerted."

The NLRB also found that the activity was for mutual aid or protection despite the singular nature of the complaint and even though the harassment was directed just at the cashier. In doing so, the NLRB affirmed as policy the "solidarity" principle. Specifically, "'An injury to one is an injury to all' is one of the oldest maxims in the American labor lexicon." Calling it a bedrock principle, the NLRB overruled the Bush era decision that runs to the contrary that it issued just ten years ago and which the current NLRB called "baseless." Thus, despite the individualized nature of this complaint, the NLRB nonetheless found it to be for mutual aid or protection by applying the solidarity principle. Fortunately, even though the Board found that the cashier's conduct was protected under the NLRA, the Board also found that the employee relations manager did not violate the NLRA when he asked her to stop gathering written statements. The Board found in favor of the employer because the employee relations manager's instruction was a narrow one and he did not prohibit the employee from continuing to discuss the matter with coworkers.

There are several troubling aspects to this decision. For starters, the decision signifies how politicized the National Labor Relations Board is. In this case, the NLRB's General Counsel, who is charged with enforcing the law, argued for the NLRB to reverse its precedent from just ten years prior. We have seen such flip flops in the past based on the political persuasion of the party in control of the White House and it is unsettling to see the law shift back and forth and back yet again. The law should be predictable, and sadly what is predictable is that the law seems to change far more often than it should.

Second, the decision opens the door to an expanded flow of complaints about issues covered by other unrelated statutes. The NLRB is in the midst of a sea change that is seemingly focused on individual complaints as the decline in the union movement continues.

Finally, this decision provides recourse to employees who might otherwise not have a valid complaint. In this instance, the cashier complained of one incident that she considered to be a form of sexual harassment. What happened was inappropriate and shameful. However, the incident did not rise to the level of statutory sexual harassment, but it still led to what had to have been an unanticipated claim that the employer had to defend.

Managers responsible for conducting workplace investigations should seek guidance from counsel during investigations or use qualified outside counsel to investigate, especially in light of the fact that employers must now worry about not only an overly aggressive EEOC, but an equally overly aggressive NLRB. For assistance with investigations, please contact Peter Bennett (pbennett@thebennettlawfirm.com) or Rick Finberg (rfinberg@thebennettlawfirm.com).