

Employer Seeks Appellate Review of NLRB Decision Striking Down Its Handbook Policies

By former Associate Jeffrey Hord

Earlier this week, an automotive parts manufacturing company petitioned the U.S. Court of Appeals for the D.C. Circuit to review—and hopefully overturn—a recent order from the National Labor Relations Board (NLRB) concluding that the company had committed unfair labor practices. Regardless of the ultimate outcome of the company's appeal to the D.C. Circuit, the Board's decision (summarized below) highlights its continuing attack on common, seemingly neutral policies and procedures that could be read to discourage employees from exercising their right to engage in "concerted activity" regarding the terms and conditions of their employment.

The ruling under review is the NLRB's decision & order in *Component Bar Products, Inc. and James R. Stout*, Case No. 14-CA-145064 (Nov. 8, 2016). In that case, a quality technician (Stout) noticed that a co-worker (Burgess) was not at work one day. Burgess had recently resigned and then rescinded his resignation, which may have led to some confusion when he was a "no call, no show" one day last January. When Stout asked his supervisors whether they'd seen Burgess, he was told that Burgess "doesn't work here anymore." Concerned, Stout called Burgess to ask why he had not called in, telling him, "I don't think you have a job" and that the Plant Manager "[is] upset with you." Burgess hung up on Stout and called the employer; he subsequently left a message stating that he didn't appreciate an employee calling him to tell him he was fired, and that it was "management's job," not an employee's to deliver that kind of news.

Component Bar Products maintained an employee handbook which included a personal conduct and disciplinary action policy prohibiting, among other things: (1) insubordination or other disrespectful conduct; and (2) boisterous or disruptive activity in the workplace. Based on these rules, the company decided to terminate Stout's employment for "misconduct" because he had involved himself in another employee's personnel activities (the employer later claimed that Stout also violated a company policy concerning cell phone use while working). Stout subsequently filed a charge with the NLRB alleging that the employer had violated his rights under the National Labor Relations Act ("NLRA" or the "Act").

The Administrative Law Judge ("ALJ") who initially reviewed the case found that the employer's policies were facially unlawful because employees could reasonably construe these rules to prohibit the exercise of their rights under Section 7 of the Act. With respect to the rule prohibiting "insubordination or other disrespectful conduct," the ALJ found that this rule would impermissibly ban employee complaints about supervisors and working conditions that supervisors might view as "disrespectful" or "an affront to their authority." In regard to the rule that prohibited "boisterous or disruptive activity in the workplace," the ALJ felt the rule would limit an employee's right to engage in a work stoppage, as well as other activity permitted under the Act. Finally, the ALJ concluded (based on the evidence) that the company did not maintain or enforce any policy prohibiting employee cell phone use while working.

Component Bar Products filed exceptions to the ALJ's decision, prompting a review by the Board. By a 2-to-1 majority, the Board upheld the ALJ's decision that Stout's activity—calling Burgess to alert him of his possible termination—was inherently protected under the Act, and that the employer unlawfully terminated Stout for engaging in "protected concerted activity." The Board also struck down the handbook provisions prohibiting "insubordination or other disrespectful conduct" and "boisterous or disruptive activity in the workplace," holding that these policies were facially overbroad in violation of the NLRA.

It's important for all employers to ensure that their workplace policies are narrowly tailored and consistent with recent NLRB decisions/guidelines. For example, rules that solely prohibit insubordination have been upheld by the Board in the past, while rules prohibiting "insubordination or other disrespectful conduct" have been struck down. The attorneys at Paley Rothman can assist you in drafting and administering a coherent and enforceable set of workplace policies.

