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The National Labor Relations Board in the Obama Administration: What Changes are in Store?

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Aladdin Gaming, LLC. - Surveillance

- FACTS: Several off-duty employees were engaged in discussion about the union in the employee dining room and were seeking signatures on union authorization cards. A supervisor briefly interjected the company's views on unionization.

- ISSUE: Whether the supervisor's conduct constituted unlawful surveillance under the Act?

Aladdin Gaming, LLC. - cont'd

- HELD, no. Surveillance is only unlawful where it is out of the ordinary or coercive.
- IF REVERSED...employers will be much more likely to be found in violation of the Act for relatively routine communication with employees. This may have a chilling effect on employer free speech rights under the Act.

The Register Guard – Personal use of email

- FACTS: Employer maintained a policy prohibiting the use of email for all non-job-related solicitations. Pursuant to this policy, Employer disciplined an employee for sending union-related emails. Employees alleged that the policy was enforced discriminatorily against union-related emails, while other personal emails were tolerated.
- ISSUE: Whether the Employer's policy and the manner in which it was enforced violated the Act?

The Register Guard - cont'd

- HELD, no violation with respect to the policy itself. Regarding Employer's alleged discriminatory enforcement, the Board held that discrimination consists of disparate treatment of communications of a similar character based on their union-related content.

- IF REVERSED… it will be much more difficult, if not impossible, for an employer to prohibit use of its computer systems for personal use, particularly in the case of union-related communications, concerted activity, and other Section 7 rights.

Holling Press, Inc. – Scope of Protected Activity

- FACTS: An employee solicited a coworker to serve as a witness in support of a sexual harassment claim she filed with a State agency.

- ISSUE: Whether the employee was engaged in protected activity within the meaning of the Act?

Holling Press, Inc. - cont'd

- HELD, no. Because the employee pursued the claim for purely personal benefit and not for the "mutual aid or protection" of other employees, the employee's actions were not protected by the Act.
- DISSENT: An employee's request for assistance IS for mutual aid or protection, because another employee could be the victim of harassment in the future.
- IF REVERSED...if the dissent's rationale is applied in future cases, the scope of the Act's protection will be greatly broadened. Employees who act out of purely selfish motivations will be protected under the Act so long as they solicit assistance in their personal issue from another employee. This broad protection will lead to many more "meritorious" unfair labor practice charges against employers.

Waters of Orchard Park – Scope of Protected Activity

- FACTS: Two nursing home employees called a state hotline to report excessive heat in the Employer's nursing home, expressing concern about the effect of the heat on patients.
- ISSUE: Whether the employees were engaged in protected, concerted activity under the Act?

Waters of Orchard Park - cont'd

- HELD, no. Although concerted, the employees' action did not relate to a term or condition of employment and therefore was not protected. The call was made not for mutual aid or protection of employees, but rather out of concern for elderly patients.

- IF REVERSED…disgruntled employees would be emboldened to report any potential workplace issues to State or Federal agencies, regardless of their motivation, safe in the knowledge that their activities are protected by the NLRA.

W San Diego – Union Paraphernalia

- FACTS: Pursuant to a hotel policy prohibiting all non-business uniform adornments, employees were prohibited from wearing union buttons in public areas.

- ISSUE: Whether Employer's policy violated the Act?

W San Diego - cont'd

- HELD, no. Although employees have a right to wear union insignia, Employers may lawfully restrict the right in certain circumstances. Here, Employer's interest in providing its guests with a "unique atmosphere and ambiance" warranted such a restriction.

- IF REVERSED…the Board is unlikely to accept a business image rationale for Employer rules that prohibit employees from wearing union insignia in public areas.

Leiser Construction, Inc. – Union Paraphernalia

- FACTS: Construction worker employee displayed on his hardhat a variety of union-related stickers. One sticker depicted someone urinating on a rat that was designated as "non-union."

- ISSUE: Whether Employer violated the Act by prohibiting its employee from wearing the vulgar, though union-related, sticker?

Leiser Construction, Inc. – cont'd

- HELD, no. Employers have the right to restrict the display of insignia that is vulgar and obscene.
- DISSENT: Both management and employees commonly used vulgar language in the workplace, and the employee had no contact with the public such that displaying the sticker would harm Employer's public image. Therefore, the employee should not be prohibited from wearing the sticker.
- IF REVERSED…if the dissent's position is adopted, it would restrict an employer's ability to prohibit employees from adorning themselves or their equipment with obscene paraphernalia so long as that paraphernalia has some relation to unions.

Tradesmen International – Work Rules

- FACTS: Several of Employer's work rules were challenged, including: 1) prohibition of disloyal, disruptive, competitive or damaging conduct; 2) prohibition of slanderous or detrimental statements; and, 3) requirement that employees represent Employer in a positive manner.
- ISSUE: Whether the challenged rules would reasonably tend to chill employees in the exercise of their rights under the Act?

Tradesmen International – cont'd

- HELD, no. The rules serve a legitimate business interest and reasonable employees would not construe them as intended to proscribe their rights under the Act.

- IF REVERSED…rules such as those at issue will likely be construed as intended to restrain employees' rights under the Act unless they specifically define prohibited conduct and adequately inform employees that the terms do not encompass Section 7 activity.

Guardsmark, LLC – Work Rules

- FACTS: Employer's work rules prohibited its security guard employees from fraternizing with coworkers or employees of client companies.

- ISSUE: Whether Employer's rule would reasonably tend to chill employees in the exercise of their Section 7 rights?

Guardsmark, LLC - cont'd

- HELD, no. In the context of Employer's other rules prohibiting dating and becoming overly friendly with the client's employees and coworkers, employees would reasonably understand the rule to prohibit "personal entanglements" and not to prohibit activity protected by the Act.

- IF REVERSED… the Board will be more critical of seemingly innocuous work rules and consider many more employer policies as violative of the Act.

QUESTIONS?