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An Over-Looked Exception to the Employment-at-Will Doctrine: The Right of Employees to Engage in Concerted Activities under the National Labor Relations Act

by Richard M. Schall

While the right of employees to engage in 'concerted activities' has been protected under the National Labor Relations Act since its passage by Congress in 1935, this right—set out in Section 7 of the act—is often thought to apply only to employees who seek to form a union or those already in a union. However, the Section 7 rights of employees to engage in "concerted activities"[1] is not so limited, and, recently, the National Labor Relations Board (NLRB) appears to be putting some real teeth into enforcement of this right on behalf of those employees who are otherwise at-will.[2] For practitioners who represent the at-will employees of the world (or the employers of at-will employees), it's time to pay attention to this development.

The NLRB's reinvigorated focus on the rights of employees to engage in protected concerted activity—even in the absence of any connection to union activity—was announced by the NLRB some three years ago, in the launch of a new web page describing "the rights of employees to act together for mutual aid and protection, even if they are not in a union." In that announcement, NLRB's chairman, Mark Gaston Pearce, called out the general lack of public awareness of these rights:

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A right only has value when people know it exists....We think the right to engage in protected concerted activity is *one of the best kept secrets* of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers (emphasis added).

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On that web page, the NLRB described a number of cases it had recently handled, including those involving "a customer service representative who lost her job after discussing her wages with a coworker; an engineer at a vegetable packing plant fired after reporting safety concerns affecting other employees; a paramedic fired after posting work-related grievances on Facebook; and poultry workers fired after discussing their grievances with a newspaper reporter."[3]

There have been two cases of late—one a very modest one the author recently was able to quickly settle after NLRB intervention and one recently given front page attention by *The New York Times*—that make it clear that the NLRB is indeed serious about protecting the rights of employees, even in the absence of any union-related activity. Thus, practitioners in this field need to be alert to cases where an employee is disciplined or terminated for talking to, emailing, or discussing work-related matters with fellow employees, since such activity can constitute "protected concerted activity" under the National Labor Relations Act (NLRA).

The case the author was able to settle, where an employee was terminated after taking Family Medical Leave Act (FMLA) leave, was initially approached simply as an FMLA retaliation case, with suit filed in federal court. But, there was something else about the case that was disturbing: At the time the employer terminated this employee, the purported reason given

for her termination was that she had been overheard by a supervisor loudly (and allegedly inappropriately) complaining to a fellow employee about what she felt was unfair scheduling that negatively affected both of them. The employer had previously warned her that if she had any complaints, she should take them directly to management and not "gossip" about them to her fellow employees. This struck the author as a potential violation of Section 7 of the NLRA, and so an unfair labor practice charge was also filed with the NLRB. The NLRB representatives took an immediate interest in the case, first interviewing the client and then, based on the evidence they had collected, promptly filing a complaint against her employer and threatening to seek injunctive relief. The case then quickly settled—clearly much more so as a result of the NLRB's filing its complaint than from the FMLA case filing in federal court. This was a clear lesson for the author.

That lesson was shortly thereafter reinforced by a June 3, 2015, front page article in *The New York Times* reporting on an employee's win in a case tried to an NLRB administrative law judge—"Dalton School Ordered to Rehire Teacher Who Criticized His Bosses in Email." In that case, NLRB Judge Arthur J. Amchan found that the school had violated the teacher's Section 7 rights when it terminated him for having circulated an email to his fellow teachers discussing how badly school management had disrespected them, and proposing to his fellow teachers how they should approach management (forcefully) with their concerns.[4]

The concerns of David Brune, the teacher who took his case to the NLRB, and his fellow teachers in the school's theater department, arose in regard to the production of a school play and perceived interference in that production by the Dalton School management. As part of an ongoing discussion with his fellow teachers at the school, Brune sent a strongly worded email to them, encouraging them to demand an apology from school management. The content and flavor of that email can be gleaned from some of the excerpts below:

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I don't think we need grovel at the feet of the administration and beg for scraps, for thanks or appreciation....We are not petitioning for their sympathy or their understanding. We are seeking redress of grievances. We have been grievously wronged and we would like an apology, a direct sincere apology from all of them to all of us. [They should] [a]pologize for lying. Apologize for not allowing us to answer directly, face to face, the questions a member of the community *had about* certain aspects of the script. Apologize for not being able to trust us to be adults, to be teachers and to be committed professionals....Apologize for not being honest, forthright, upstanding, moral, considerate, much less intelligent or wise....Apologize for demonizing us, for making us the bad guys, for forcing us to toe the line or else. Apologize for the threats to our job if we didn't straighten up and fly right. What we need is a strong letter from all of us demanding an apology. If they refuse to address our grievances [sic] and hunker in the bunker on the 8th floor, then there is nothing we can do. Nothing.[5]

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In his decision, Judge Amchan, after noting that to be covered by the protections of Section 7 of the NLRA, the employee must be "engaged in with or on the authority of other employees, and not [acting] solely by and on behalf of the employee himself," found that Brune was indeed acting to "enlist[] the support of fellow employees in mutual aid and protection" and had, therefore, been engaging in "concerted activity"—a ruling that appears soundly supported by NLRB case law.[6]

However, before finding that the termination was in violation of Section 8(a)(1) of the NLRA, the judge also had to reach the issue of whether Brune, despite having engaged in "concerted activity," had forfeited the protection of the NLRA as a result of the manner in which he had raised his concerns. Under NLRB law, if, in the course of engaging in concerted activity, an employee's language and conduct is so extreme, offensive and disruptive to the employer's operations, the employee can lose the protection afforded by the NLRA.[7] As can be seen by some of the language used in Brune's email, quoted above, he did not hold back in expressing his views about school management. Nonetheless, Judge Amchan found that Brune had not crossed the line, noting that he had not sent his email directly to management, but only to his fellow teachers, and had not made "any malicious or untrue statements of fact...did not use any obscenities...did not threaten [school] management," but had merely demanded an apology. Accordingly, the judge found that Brune had not forfeited the protections of the act.[8]

There are two other points of interest that can be learned from the Dalton School decision. First, language in an employee handbook that would restrict an employee's right to engage in concerted activity (*i.e.*, discuss concerns with fellow employees) or raise those concerns to management, will be found to be in violation of Section 8(a)(1) of the NLRA. Apparently, in defense of its action in terminating Brune, the school had attempted to rely upon some of the provisions in its employee handbook. The judge rejected that defense, finding that, "[i]f Respondent contends that Brune's email violated the conditions set forth in its employee handbook, the relevant portions of the handbook violate Section 8(a)(1)."[9]

Second, Judge Amchan found that, as a result of the way the school had interrogated Brune about the email he had sent to his fellow teachers, it had further violated Section 8(a)(1). The judge found that, in summoning Brune to a meeting and questioning him, without first disclosing that it had received and read a copy of his email, the school had set a "trap" for him, which, in the judge's view, constituted an 8(a)(1) violation.

While the school retains the right to appeal Judge Amchan's decision to the NLRB itself, the author would estimate that, if it chooses to do so it will not succeed, as it seems the judge's decision is well-supported by existing NLRB law.

In sum, the NLRB is clearly taking very seriously the rights of non-unionized, otherwise at-will employees to engage in concerted activity. This is a development that can no longer be ignored.

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1. Section 7 of the NLRA, 29 U.S.C. § 157, provides as follows:

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Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of* collective bargaining or *other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title] (emphasis added).

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2. Section 8(a)(1) of the NLRA, 29 U. S.C. § 158, makes it "an unfair labor practice for an employer...to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
3. *See* June 18, 2012 NLRB press announcement at http://www.nlrb.gov/news-outreach/news-story/nlrb-launches-webpage-describing-protected-concerted-activity.
4. A copy of the decision in this case, *Dalton School, Inc., d/b/a Dalton School and David Brune*, NLRB Case No. 2-CA-138611, can be found at the following link: http://bit.ly/1KLyQWo
5. *Dalton School, Inc., d/b/a Dalton School and David Brune*, NLRB Case No. 2-CA-138611 at p.4.
6. In reaching that conclusion, the judge relied upon the two leading NLRB decisions, *Meyers Indus., Inc. v. Prill*, 268 N.L.R.B. 493, 497 (1984) (Meyers I) ("[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."), and *Meyers Indus., Inc. v. Prill*, 281 N.L.R.B. 882, 887 (1986) (Meyers II) (concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.").
7. *See Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979).
8. *Dalton School*, at p. 9.
9. *Id.* at p. 10.