DC Circ. Labor Ruling Is A Win For Employer Free Speech

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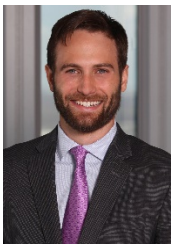

The U.S. Court of Appeals for the D.C. Circuit recently overturned the National Labor Relations Board's determination that a manager's incorrect blaming of a union for discrepancies in an employee's paid leave time constituted an unfair labor practice.

The pivotal issue before the court was whether the manager's statements had a reasonable tendency to interfere with employees' labor rights under Section 8(a)(1) of the National Labor Relations Act, or whether the manager's statements were protected employer expressions under Section 8(c).

Section 8(a)(1) of the NLRA provides that an unfair labor practice occurs when, considering all of the surrounding circumstances, an employer's conduct reasonably tends to interfere with, coerce or restrain an employee's exercise of the employee's rights under Section 7.

Section 7 rights include forming or joining unions, collective bargaining and engaging in other concerted activities to advance worker interests.

Section 8(c) of the NLRA protects an employer's right to express views, arguments and opinions, so long as such expressions contain no threats of reprisal or force or promises of benefits. Unprotected expressions, which contain threats or promises, may be used against the employer as evidence of unfair labor practices.

Congress introduced Section 8(c) to restore balance in labor relations and encourage free debate on issues dividing labor and management. The U.S. Supreme Court has recognized that Section 8(c) allows for "uninhibited, robust, and wide-open debate in labor disputes."

The test to determine whether an employer's expression is protected, or can be used as evidence of an unfair labor practice, is whether a reasonable employee would have interpreted the expression as threatening reprisal or promising a benefit.

For example, statements that employees would be punished if they voted for unionization and suggestions that employee benefits would increase if employees voted against unionization have been found to constitute unprotected expressions that threaten reprisal or promise a benefit.

Though the application of this test is relatively simple in most cases, it can be difficult to apply in certain situations where an employer's expressions are aimed at dissuading employees from unionization.

Distinguishing protected expressions from unprotected expressions in this context can be difficult because a primary way employers advocate against unionization is by informing workers of the adverse

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consequences of unionization, and this advocacy may closely resemble speech that interferes with employees' Section 7 rights.

The Supreme Court has explained that the distinction between protected and unprotected expressions depends on how the employer communicates the adverse consequences of unionization to employees.

If the employer — even unintentionally — leads employees to believe the adverse consequences may be within the employer's control, these expressions are more likely to be interpreted as threats, and thus unprotected.

Therefore, any employer expressing adverse consequences of unionization to employees must carefully phrase such expressions on the basis of objective fact.

In the case before the D.C. Circuit, Trinity Services Group Inc. v. NLRB, the board's opinion effectively expanded the Section 8(c) exceptions to protected employer expressions to include not only expressions containing threats and promises of benefits, but also false statements that may undermine employee support for a union.

In June, the D.C. Circuit rejected the board's expansive view.

The union involved in Trinity Services Group, the United Food and Commercial Workers Union Local 99, had negotiated a paid leave plan at Trinity Services Group's unionized facilities that differed from Trinity's paid leave plan applicable at nonunionized facilities.

Subsequently, during negotiations for the successor bargaining agreement, Trinity proposed the elimination of the union's paid leave plan.

While negotiations were ongoing, a bargaining unit employee believed she had accumulated three days of paid leave time in accordance with the union's plan. Because the parallel paid leave schemes had overwhelmed Trinity's bookkeeping software, however, Trinity's records indicated that the employee had not accumulated any paid leave.

The paid leave discrepancy was brought to the attention of management, and one of Trinity's managers blamed the union for the inconsistency between the employee's calculation of her paid leave time and Trinity's records. The manager made the following statements to the employee:

- "That is a problem that the Union created regarding [paid leave]."
- "You need to fix that with the Union."
- "That's the problem with the Union."

Applying its expansive view of the Section 8(c) exceptions to protected employer expressions, the board determined that Trinity had violated Section 8(a)(1) because: (1) the manager had no objective basis for blaming the union, rather than Trinity, for the paid leave discrepancies; and (2) negotiations regarding Trinity's proposal to eliminate the union's paid leave plan were ongoing, and the manager's statements would undermine the union's status as bargaining representative and cause employees to lose faith in the

union's representation on the paid leave issue.

At the same time, the board held that a second Trinity manager's statements to the same employee did not violate Section 8(a)(1).

The second manager had asked the employee if she and other employees paid fees to the union, remarked that those fees were not being put to good use because the union was not presenting anything on the employees' behalf at the bargaining table, and suggested the employees were throwing their money away by paying the union.

The board concluded that these statements were protected under Section 8(c), finding that a reasonable employee would have understood the statements to be no more than the manager's expression of his low opinion of the union's value to employees.

Additionally, because the employee did not reply to the manager's initial question, and because the manager did not pry any further, the board concluded that the question was rhetorical rather than coercive and did not restrain, coerce or interfere with employees' exercise of their Section 7 rights.

After reviewing the board's differing determinations regarding the two managers' comments, the D.C. Circuit overturned the board's determination regarding the first manager's statements, bringing it in line with the board's determination regarding the second manager's statements.

While the NLRB had distinguished the managers' statements because, in the board's view, the first manager's statements had no basis in fact, the D.C. Circuit recognized that there is no statutory or precedential basis to hold that statements are unprotected expressions merely because they are untrue.

The court expressly declined to expand the NLRA to prohibit employers' misstatements that could reasonably mislead employees, but that involve no threats of reprisal or force or promises of benefits.

Acknowledging the sometimes subtle and veiled nature of threats and promises, the D.C. Circuit found that, even under the circumstances — where the employer and the union had ongoing negotiations concerning the paid leave plan at the center of the first manager's statements — no reasonable employee would have interpreted any of the manager's statements as threatening or promising a benefit.

As such, the court concluded that the manager's statements were protected expressions of opinion under Section 8(c) and did not comprise evidence of or constitute unfair labor practices in violation of Section 8(a)(1).

The D.C. Circuit emphasized that the policy underlying Section 8(c) is to encourage free speech and debate from employers in the workspace. The court further stressed that its role is simply to enforce the NLRA, leaving Congress alone to debate the merits of the policy behind Section 8(c).

Key Takeaways

This ruling is a win for employers because it clarifies the scope of protected employer expressions and preserves the NLRA's policy of encouraging free speech and debate in the workplace.

The ruling maintains bargaining equality because it does not saddle employers with a burden unions and

employees do not bear — a burden that would have eroded the distinction between statements of opinion/perspective and statements of fact.

While the D.C. Circuit's ruling may give employers some breathing room in communicating with employees, employers should still always strive to:

- Engage employees honestly and in good faith;
- Avoid questioning employees about their union sentiments;
- Refrain from promising changes in wages, benefits or working conditions in a manner inconsistent with the NLRA (for example, during a union election campaign, during bargaining negotiations or in a way that negatively affects the way employees feel about a union); and
- Refrain from threatening employees with reprisal for pro-union activities or threatening to close a department or facility to dissuade or undermine a union.

The D.C. Circuit's ruling is not a license for employers to be fast and loose with the truth. Instead, it simply stands for the proposition that good faith but inaccurate statements that do not otherwise violate the NLRA should not be considered unfair labor practices

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