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CLIENT ALERT

NLRB Reconsideration Finds Discharge for Dishonesty in Investigation Lawful

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Reversing an earlier decision from 2012, the National Labor Relations Board (NLRB or Board) held last week that an employer did not violate federal labor law when it terminated an employee for dishonesty during a legitimate investigation of complaints of discrimination and harassment in the workplace. *Fresenius USA Mfg. Inc.,* 362 NLRB 130 (June 24, 2015). Significantly, however, the Board's opinion makes clear in certain circumstances, that the Board may consider employees to possess a legitimate, protectable interest in shielding their union activity from an employer, even when lawfully lying to an employer during an investigation.

The matter arose in 2009, when Fresenius USA Manufacturing employee Kevin Grosso scribbled vulgar messages on several union newsletters left in an employee breakroom in an alleged attempt to encourage fellow employees to support a union in an upcoming decertification vote. Fresenius received complaints that the handwritten statements were vulgar, offensive, and threatening. When questioned about the messages during a subsequent investigation, Grosso initially denied responsibility, but later admitted to authoring the statements. Fresenius terminated Grosso, citing both his dishonesty during the investigation and his conduct in authoring the offensive messages.

In 2012, a two-member Board majority consisting of then-members Richard Griffin and Sharon Block determined that Fresenius unlawfully terminated Grosso. The 2012 Board ruling concluded that while the messages were vulgar and potentially offensive, they nevertheless remained protected under the National Labor Relations Act (NLRA). The panel further concluded that Grosso did not forfeit his statutory protection by making false statements to his employer during its investigation of the matter. However, the D.C. Circuit subsequently vacated the Board's decision and order under the Supreme Court's ruling in *Noel Canning*, which held that the Board's 2012 recess appointments – Griffen and Block – were unconstitutional.

Upon reconsideration, a new Board panel comprised of Chairman Mark Gaston Pearce, and members Harry I. Johnson and Lauren McFerran held that even if Grosso engaged in "union activity, Fresenius nevertheless had a legitimate reason to fire him for his dishonesty during the company's investigation. In that regard, the Board found the company's investigation was consistent with Title VII of the 1964 Civil Rights Act, state laws, and the company's own anti-harassment policy, and its questioning of Grosso was reasonably tailored to the issue of his vulgar, offensive, and potentially intimidating statements. Finding that Grosso had no reasonable basis for believing the pro-union content of writings would expose him to retaliation, the Board found that Grosso's dishonest statements were not protected under the NLRA.

Having found that Grosso's dishonesty during the investigation served as a lawful basis for his discharge, the Board then found that Fresenius had also met its burden of showing it would have taken the same action even in the absence of any consideration of the substance of Grosso's handwritten statements. The company made this showing through evidence of similarly-situated employees who had previously been terminated for analogous reasons.

Significantly, the Board found that it could not "predict every circumstance involving employer investigations that serve a legitimate business interest, where the employer could assert that dishonesty during its investigation constitutes a valid basis for termination." However, "depending on the evidence in a particular case, employers may also satisfy their ... burden in these circumstances, for example, by demonstrating that dishonesty has served as an independent (if not sole) reason for prior terminations, or that a practice of discipline for similar acts of dishonesty exists."

Thus, although the Board reversed its earlier opinion in this particular case, false statements to an employer will not guarantee the lawfulness of discipline or discharge. Rather, the Board will continue to scrutinize the circumstances involved to determine whether an employee has a legitimate interest in shielding union activity, and whether the employer met its burden of proving its actions were based on legitimate, and lawful, business interests, in lieu of union animus.

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