If You Can't Fire A Teacher For Criticizing Management, Who Can You Fire?

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Most school administrators would be shocked to learn that the National Labor Relations Board (NLRB) could, in some circumstances, find that their school engaged in an unfair labor practice for disciplining or terminating an employee who criticizes management. A recent New York case provides a perfect example.

Teacher Blasts School Head; Teacher Gets Fired

The trouble began when the Dalton School, an Upper East Side Manhattan private K-12 academy, staged a musical theatre production of "Thoroughly Modern Millie." The musical comedy depicts Chinese characters in ways some consider offensive to Asian Americans. The school administrators required the theatre department faculty to rewrite portions of the script and dialogue.

Although the production was successful, bad feelings remained among some in the faculty who believed their efforts were not appreciated and that they were unfairly blamed for the controversy. In addition, faculty members complained about restrictions placed on them as to what could be said to parents who asked questions about the show.

In an email chain circulated among faculty members, one teacher criticized the Head of School, accusing her of lying and of failing to be "honest, forthright, upstanding, moral, considerate, much less intelligent or wise." When the administration learned of the emails, it questioned the teacher and then terminated his employment. The teacher filed an unfair labor practice charge with the NLRB.

Yes, You Are Covered By The NLRA

What the Dalton School might not have realized is that the National Labor Relations Act (NLRA) provides that all employees, not just unionized workers, have a legal right to engage in "concerted activities" for the purpose of mutual aid or protection. This essentially covers any activity engaged in by two or more employees aimed at addressing employee working conditions. The right has been construed to permit all employees to criticize managers over employment issues of common concern, not just those protected by a union. Employers who discipline for such criticism are deemed to "interfere with, restrain or coerce" employees in the exercise of their rights.

Judge Reinstates Teacher

The administrative law judge ruled that the email exchange among the faculty was concerted activity

protected by the NLRA because it was a "discussion amongst employees in the theater department as to how to address their concerns regarding" the manner in which the play was handled. The judge ruled that the teacher could not legally be disciplined for exercising his protected rights. The judge also ruled that the school committed an additional violation by interrogating the teacher in connection with his protected activity.

The judge ordered the school to reinstate the teacher, pay him back pay accruing from the date of termination, remove the firing from the school's records, and refrain from interrogating employees about concerted activity.

What's Happened To Private Employer Rights?

The NLRB has targeted all segments of nonunion employers who discipline employees for complaining to coworkers about management. Seemingly reasonable rules of civility, confidentiality, and nondisparagement that previously escaped NLRB scrutiny are now deemed unlawful. Although this case involved email, other NLRB decisions hold that social media and other forms of communication have similar protection.

The line separating lawful discipline from unlawful interference with protected activity is ill-defined and often counterintuitive. Personal gripes are unprotected, but gripes that express the thoughts of a group or seek support from others are "concerted" and therefore protected, often to the surprise of employers unschooled in NLRB law. Any decision to discipline an employee for communication critical of the school administration should be reviewed by your school's education or labor counsel for NLRA compliance.

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