



Could Barring Former Employees From Your Premises Lead To A Lawsuit?

Insights

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Hospitality employers open to the general public should be aware of a recent decision by the National Labor Relations Board (NLRB) with implications across the industry. In a 2-to-1 decision, the NLRB ruled that a hotel and casino unlawfully retaliated against a former employee by barring her from its premises after she filed a suit for unpaid wages (*MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino/HG Staffing*). Following this decision, employers should think twice before limiting access to former employees because of a pending lawsuit, claim, or charge.

Former Employee Barred From Premises After Lawsuit

The Grand Sierra Resort & Casino in Reno, Nevada is a facility with restaurants, lounges, clubs, bars, a casino, and performance venues, all open to the general public. Tiffany Sargent was employed there briefly in December 2012 as a beverage supervisor. On June 21, 2013, she filed a collective and class action against the resort for unpaid wages.

In January 2014, her boyfriend began working at the Lex Nightclub, one of the resort's facilities. Sargent visited the nightclub and attended other events at the resort on various occasions between the end of her employment and July 2014. The resort even had a long-standing policy allowing former employees to access the facilities and attend social functions.

However, in early July 2014, Sargent attempted to attend an event at the Lex Nightclub but the resort denied her access. On July 25, 2014, a representative of the resort sent a letter to Sargent's legal counsel stating that, "in light of the ongoing litigation," the resort was invoking the Nevada trespass statute and revoking any permission to enter the resort that she might have been granted previously.

Labor Board Finds Retaliation

Sargent filed unfair labor practice charges against the resort in connection with the denial of access and trespass warning. She claimed the resort's actions violated Section 8(a)(1) of the National Labor Relations Act (NLRA) which makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7" of the Act. Section 7 guarantees employees "the right to self-organization, to form, join or assist in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In May 2015, an administrative law judge found against the resort on both counts, and the case wound its way up to the Labor Board.

In a 2-1 decision issued late May 2017, the Board held that the resort clearly violated Section 8 by retaliating against a former employee for exercising her rights under Section 7 when she filed a legal action relating to her workplace. The Board also found that the resort's exclusion of Sargent would reasonably tend to chill current employees from exercising their Section 7 rights.

The reasoning behind the Board's ruling is useful for a broader discussion about the scope of a property's ability to exclude former employees from their premises. The Board was not concerned that the decision risked compromising the legitimate business interests of the resort. If an employer has legitimate concerns about conflict in the workplace, the Board stated, nothing in Section 7 would prevent the employer from continuing to apply lawful, uniformly enforced rules to protect the safety of its workplace and the continuity of its operations. However, nothing like that existed in Sargent's situation, and the Board found no legitimate justification for a ban from the premises.

The Board further limited its holding by stating that nothing in Section 7 would prevent an employer from directing its managers and supervisors not to discuss the lawsuit with the former employee. Finally, the Board pushed back against the idea that this ruling would create a "per se violation of the NLRA whenever any former employee pursuing a non-NLRA employment claim with one or more other employees is denied access to the employer's private property." The Board responded that, under the "unusual facts of this case," the resort could not bar Sargent from its facility, which was open to the general public, and to which the resort had granted routine and unfettered access to members of the public and former employees alike. This reasoning is a good reminder that all employers must take care that their policies are applied in a non-retaliatory and nondiscriminatory manner.

Three-Step Plan To Avoid A Similar Fate

The Board's decision applies broadly to hotels, restaurants, retail establishments, and other facilities open to the general public. Businesses that fall into any of these categories will want to apply a simple three-step plan to avoid the same fate as the Grand Sierra Resort.

1. Take Retaliation Claims Seriously

Many hospitality employers have a policy or practice similar to the one at issue here, allowing former employees to continue to access their premises for social or other non-work-related purposes. Once an employee engages in protected activity, it is even more crucial that you enforce such policies uniformly. Protected activity, for example, would include filing a wage and hour or discrimination claim. More broadly, protected activity also includes an employee's complaint about workplace conditions or refusing to engage in illegal conduct. Before taking adverse action against an employee or former employee who has engaged in protected activity, you must carefully consider all available information, including the specific reasons for the decision.

2. Be Sure To Maintain Updated Company Policies

This case also highlights the importance of well-crafted employer policies. Here, the Grand Sierra Resort could have benefitted from a policy that highlighted the employer's right to restrict

access to its premises only in the interest of employee safety and continuity of operations. In addition, all hospitality employers should regularly update their employment policies, including those against harassment, discrimination, and retaliation.

3. **Consistently Train Managers**

The Board's finding in this case should remind all employers that the inconsistent application of policies to employees (both current and former) who engage in protected activity is a breeding ground for retaliation claims and findings of unfair practices by the NLRB. Bear in mind, even with updated policies, managers and human resource professionals must be trained to spot issues related to retaliation, and then to handle such situations in a consistent manner. This includes handling visits by former employees or employees who are currently in litigation with the company.

Train your managers to take note of such visits and to look for evidence of disruptive behavior, which could support a decision on your part to legitimately bar a former employee from your premises. Moreover, managers must refrain from discussing the lawsuit or claims, so training them on this principle is also important.

Conclusion

Findings of retaliation by the NLRB (or a civil court) often arise based on circumstances and risks that an employer may not even realize exist. Therefore, any adverse action relating to employees should be reviewed on a case-by-case basis, taking into account all available information, and in consultation with your Fisher Phillips attorney. Though barring a former employee from company property may seem like a perfectly legitimate decision, this NLRB ruling proves that sometimes things are not always what they seem.

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