



Labor Board Confirms Employees' Uniform Protest Is Protected Activity

Insights

11.18.20

The National Labor Relations Board recently ruled that an employer could not discipline a group of protesting employees who reported to work in street clothes instead of their uniforms to draw attention to a uniform shortage. The Board's October 28 decision found the employees' protest was protected concerted activity and did not cross the line to an indefensible unprotected strike or work slowdown, and therefore the employer's decision to discipline them amounted to an unfair labor practice under the National Labor Relations Act. Nevertheless, the Board did rule it was lawful to issue attendance infractions to the employees that left work following the protest to retrieve their uniforms. What do employers need to know about this decision?

Factual Background: Employees Dress Down To Get Message Heard

The Ohio Bell Telephone Company maintains a Branded Apparel Program requiring its employees to report to work wearing uniforms displaying the company's logo. The company provides its employees with five uniforms and offers periodic opportunities for the employees to acquire new apparel, but sometimes the employees run short.

In August 2018, the company announced it planned to expand the employees' work week from five days to six. In response, many of the employees discussed that the longer work week would worsen their uniform shortage and desired a supply of at least six days' worth of uniforms. Over the years, the employees complained to management about the uniform shortage and insufficient number of opportunities to order more uniforms. However, the employees felt their complaints to management did nothing to address their uniform shortage problem. This time, to draw attention to the uniform shortage, the employees made the decision to protest by reporting to work in street clothes to get their message heard.

On September 7, 2018, 29 protesting employees reported to work in street clothes in violation of the dress code. In response, the employer told the protesting employees they would not be allowed to work in their street clothes and must change into their uniforms or leave work to do so. All of the employees obeyed. Most changed into their uniforms without delay and the rest left work to do so. The employer issued all of the employees documented verbal warnings for violating the dress code. Additionally, the employer issued documented attendance infractions to the employees that left work to retrieve their uniforms and did not pay them for the time it took to retrieve and change their uniforms.

The union representing the employees filed grievances against the discipline, and the company argued in response that its actions were justifiable because the protest was an indefensible partial strike or work slowdown. Ultimately, an administrative law judge ruled the company violated Section 8(a)(1) and (3) of the National Labor Relations Act and ordered the company to remove the issued discipline from the employee's records and issue backpay for the employee's time spent retrieving and changing their uniforms. The company then appealed this decision to the Board.

Legal Standards: What Counts As Protected Concerted Activity And When Is It Unprotected?

Section 7 of the Act provides employees the right to engage in protected concerted activity. To engage in protected concerted activity, an employee must enter into some form of collective action for "mutual aid or protection" of fellow employees. Typically, this involves multiple employees, acting together, to voice concerns about the terms and conditions of their employment to achieve common goals. Accordingly, an employer may not punish or take adverse actions against employees because they engage in protected concerted activity. Such an adverse action constitutes an unfair labor practice in violation of the Act.

However, Section 7 of the Act does not protect *all* concerted activity for mutual aid or protection. In *NLRB v. Washington Aluminum Co.*, the Supreme Court summarized the normal categories of *unprotected* concerted activities as those that are unlawful, violent, in breach of contract, disloyal or are otherwise indefensible. Further, the Board has ruled that partial strikes, intermittent strikes, and work slowdowns constitute "indefensible" conduct and, even if concerted, are unprotected under the Act.

- Partial strikes are where employees refuse to perform some job duties while performing others. A partial strike will be found when an employee refuses to work as directed or depart from the premises as instructed.
- Intermittent strikes are strikes pursuant to a plan to strike, return to work, and strike again. To be an intermittent strike there must be a series of strikes in support of the same goal.
- Work slowdowns involve concerted attempts by employees to interfere with efficient production while remaining on the job.

The Board has explained partial and intermittent strikes and work slowdowns are illegal because, it would otherwise confer on employees the power to unilaterally determine their own conditions of employment.

How Did The Board Arrive At Its Decision?

On appeal, the Board affirmed the ALJ's decision by finding the employees engaged in concerted activity for mutual aid or protection when they joined together to demonstrate their concern about uniform availability by reporting to work in street clothes. As a result, the employees' protest was protected by the Act, unless it constituted or included conduct that rendered it unprotected. While the company argued the employees' protest was an indefensible partial strike, work slowdown, or intermittent strike, the Board disagreed.

The Board determined the concerted protest was not a partial strike, since at no time did the protesting employees refuse to perform their job duties, insist on working in their street clothes, or refuse to leave the premises. The Board did consider whether adhering to a uniform requirement could be characterized as a job duty. However, none of the protesting employees attempted to work in their street clothes. In fact, once the employees were instructed to change into their uniforms, they all either changed into their uniforms and began working or departed the premises until they were prepared to work in their uniform. For this reason, the Board ruled the protest could not be characterized as an unprotected partial strike under controlling law.

Similarly, the Board found the concerted protest did not involve a work slowdown. The Board found there was no evidence that any of the protesting employees performed work at a slower than normal pace or otherwise attempted to interfere with the efficient performance of work while remaining on the job. In fact, the employees did not perform any work while in their street clothes. Additionally, the Board reasoned that while the employees' protest may have had an incidental impact on work efficiency, that impact did not in itself cross the line to qualify as an unprotected work slowdown and remove the employees from the protection of the Act.

Additionally, the Board determined the concerted protest was not an intermittent strike. It noted that the event was a single protest, and there was no evidence to suggest that the employees planned to repeat the protest, which is a necessary element for it to be found in violation of the Act. As a result, the Board found that the employees' protest was protected under the Act and it was an unfair labor practice to discipline the employees for violating the dress code.

However, the Board disagreed with the ALJ's decision that it was an unlawful labor practice to issue attendance infractions. The Board determined the protest ended, as did the concerted protected activity, when the employees dispersed and either changed into their uniforms to begin work or left work to retrieve their uniform. As a result, the employees who left to retrieve their uniforms and did not begin work on time were no longer protected under the Act. The Board ruled it was acceptable to issue attendance citations and no backpay was required.

What Does This Decision Mean For Employers?

First and foremost, you must recognize the Act protects all employees who engage in lawful concerted activity for the purposes of mutual aid and protection. This applies to unionized and non-unionized workforces alike.

Any employee who takes or seeks to initiate an action among a group of employees about work-related issues, or brings complaints about the workplace to management, is covered under the statute. Therefore, if you take an adverse action against these employees for their concerted, protected activity, you could face an unfair labor practice charge.

Notwithstanding the above, employees do not have the right to stop working and simply stand in their work areas as a form of protest.

Also, if your workers are already unionized, you should review your collective bargaining agreement's no-strike clause to determine the scope of the waiver of any such protest, picket, or interference of work. Of course, consult your labor counsel before proceeding further.

Conclusion

Fisher Phillips will continue to monitor these developments at the National Labor Relations Board and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the author, or any attorney in our [Labor Relations Practice Group](#).

This Legal Alert provides an overview of a specific development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Service Focus

Labor Relations