Labor Board Finds Employer Guilty Of "Textual Harassment"

MANAGER'S TEXT MESSAGE DURING UNION CAMPAIGN DEEMED UNLAWFUL INTERROGATION

Insights
6.14.17

In what appears to be a first-of-its kind decision, the National Labor Relations Board recently determined that an employer committed an unfair labor practice when one of its managers asked a pointed question via text message to an employee about whether his loyalties lie with the company or with the union. While most employers know – or quickly learn – that they should avoid interrogating their employees about union matters, this decision demonstrates that the Labor Board could take a very broad approach when determining the contours of the law, and serves as an important lesson for management personnel dealing with a union drive (*RHCG Safety Corp. and Construction & General Building Laborers, Local 79*).

Manager Uses Texts To Question Worker's Loyalty
RHCG Safety Corp. is engaged in the general construction trade in New York City. The company, also known as Redhook, found itself in an organizing campaign when a construction union commenced efforts to convince employees to vote in favor of union representation in the summer of 2015. At the same time, one of the employees – Claudio Anderson – needed to take time off to travel to Panama to visit his ailing mother. Anderson's direct supervisor, David Scherrer, granted the request for an extended leave of absence.

Before Anderson was scheduled to leave for Panama, he stopped by the union offices and signed an authorization card indicating his support for a representation election. Several other Redhook employees were also present when this occurred.

Anderson's mother must have taken a turn for the better because she contacted him by phone to let him know he didn't need to return to Panama to visit her. Anderson immediately reached out to Scherrer, his manager, to let him know he would not need to take the extended leave of absence. Their communication was via text message, so we have an exact record of what was said:

Anderson, July 30, 4:11 p.m.
Hi david I can work tomorrow and Saturday?

Scherrer, July 30, 8:36 p.m.
What's going on with u?

U working for Redhook or u working in the union?
U got to tell me what's going on

Anderson, July 30, 11:04 p.m.
I was there to talk you today but you left

[No response from Scherrer]

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Anderson, August 1, 6:38 p.m.
Hi david can I start work Monday with you?

[No response from Scherrer]

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Anderson, August 2, 10:16 p.m.
Hi David I can start work tomorrow?

Scherrer, August 3
Not right now! I filled your spot…
Come meet me tomorrow

Anderson visited the jobsite the next day as Scherrer requested, and Scherrer told him in person that there was no work for him. Anderson followed up with another employee who sometimes conveyed messages to Spanish-speaking employees on behalf of management, and that employee confirmed for Anderson that he could not work for the company anymore. The union filed an unfair labor practice charge against the company for the way it treated Anderson, and an administrative law judge concluded that Redhook violated the National Labor Relations Act (NLRA) because of Scherrer's text messages. The National Labor Relations Board (NLRB) reviewed the case and issued an opinion affirming the judge's ruling on June 7, 2017.

Here's A Tip: Avoid TIPS
Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their protected rights. Although there are a whole host of restrictions preventing management from interfering with a union organizing drive, labor lawyers often reduce their advice to employers to the following four-letter acronym: TIPS.

T – You cannot **threaten** your workers.

I – You cannot **interrogate** your workers.

P – You cannot **promise** your workers something of value in exchange for them voting against the union.

S – You cannot **surveil** or **spy** on your workers during an election campaign.

With regards to the second letter – the "I" – it is well-settled that management is prohibited from interrogating their workers about their support of the union, or asking them to reveal details about how their coworkers are leaning. Prohibited behavior under the NLRA includes asking them for names of coworkers who attended union organizing meetings, asking if they have signed an authorization card, and directly asking them how they plan to vote.

NLRB To Employer: "U R In Trouble"

The three-member panel of the NLRB ruled in the union's favor and agreed that Redhook committed an unfair labor practice when Scherrer sent him the text message that read: "U working for Redhook or u working in the union?" The text was sent in direct response to the employee's inquiry about whether he should return to work, which seemed to place inappropriate pressure on Anderson to disavow support for the union. "By juxtaposing working with Redhook with working in the union, Scherrer's text strongly suggested that the two were incompatible," the Labor Board found. When Anderson failed to pledge his loyalty to the company, he was fired, which was the final nail in the coffin for the NLRB.

What puts this case in the first-of-its-kind category is the fact that the company's inappropriate interrogation was carried out by text message. The company argued to the Labor Board that a text message cannot constitute an unlawful interrogation. But the NLRB pointed out that prior Board decisions demonstrated that interrogations need not be face-to-face in order to violate the NLRA. It cited to a 1980 case where an unfair labor practice was upheld based on coercive writings and a 1981 case involving a phone call. Applying these same principles to a 21st-century method of communication, the Labor Board found "no reason why [there should be] a safe harbor for coercive employer interrogations via text messages."

Conclusion

This decision should not be all that surprising to employers. With the prevalence of text messages among workers and supervisors, it is in fact somewhat surprising that such a decision was not reached several years ago. It serves as a valuable lesson for employers, however, to ensure that you properly train your managers on their conduct during union election campaigns.

It also reminds managers to treat text messages to employees with caution, recognizing they might be more casual in style but still create a permanent record of communication that can serve as admissible evidence in a legal proceeding. Some employers prohibit their supervisors from texting their workers about company business altogether, which is a policy you may want to consider adopting to avoid a similar fate.

For more information about this decision or how it may affect your business, feel free to contact any member of our Labor Relations Practice Group, or your regular Fisher Phillips attorney.

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

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