November 2014 King County Bar Bulletin

Challenges at the Intersection of the NLRA and an Employer's Obligation to Investigate

By Trish K. Murphy

The National Labor Relations Board recently held that an individual employee who sought assistance from coworkers in raising a sexual harassment complaint to her employer was engaged in "concerted activity" for the purpose of "mutual aid or protection" within the meaning of the National Labor Relations Act.[1]

Through this expansion of the scope of activities protected under the NLRA, *Fresh & Easy* will increase the challenges of employers' harassment investigations. Employers should proceed cautiously whenever a workplace investigation involves protected activity.

Section 7 of the NLRA affords employees the right to engage in "concerted activities for the purpose of ... mutual aid or protection." Employers may not "interfere with, restrain, or coerce employees in the exercise" of these rights.[2]

In *Fresh & Easy*, the complainant sought her coworkers' assistance in raising a sexual harassment complaint to management. She informed the coworkers of her intent to complain and solicited three of them to sign a piece of paper on which she had handwritten a reproduction of content on a break room whiteboard she perceived as harassing. During the employer's investigation, the employee relations manager asked the complainant why she asked her coworkers to sign the paper and also instructed her not to obtain any further statements from coworkers.

The NLRB majority ruled that the employee engaged in concerted conduct by asking for the other employees to sign her paper and further held that because she was seeking the assistance or support of her coworkers in raising a sexual harassment complaint, her conduct was for "mutual aid or protection" and constituted protected activity under the NLRA. However, the Board concluded that under the particular facts of the case, the manager's question and instruction to the complainant during the investigation did not violate the employee's Section 7 rights.

Two board members vigorously dissented, focusing in part on the potential for Section 7 "process restrictions" to impact the investigations employers are obligated to conduct under other workplace laws, such as Title VII. Concern also was expressed about the holding creating greater potential for unlawful interrogation and surveillance in employer investigations.

While *Fresh & Easy* expanded the scope of protected activity, the investigation-related challenges are not new. Employers should look to *Fresh & Easy* and prior NLRB precedent for guidance in navigating the potential landmines.

Protected Activity

Recognition that an investigation involves or potentially involves protected activity is critical, raising the question, "Have one or more employees engaged in 'concerted activities for the purpose of ... mutual aid or protection?'"

In the context of investigations, protected activity may arise in a variety of forms. Multiple employees joining to raise a concern, and discussion between employees about an investigation may be among the most common. Additionally, as illustrated in *Fresh & Easy*, the actions of an individual seeking the support of coworkers for their mutual aid and protection constitutes concerted activity, even when the coworkers disagree or decline to join the cause.[3] On occasion, the alleged misconduct that is the focus of the investigation may involve an element of protected activity.

Because the concept of protected activity is complex and continuing to develop, when there is any question about whether the activity is protected, a thorough legal analysis may be necessary.

Legitimate Business Justification

The Board has recognized that employers have a legitimate business interest in investigating facially valid complaints and employee misconduct.[4] Where an investigation has potential to intrude on an employee's exercise of Section 7 rights, the Board balances the employer's asserted business justification with the effect on employee rights.[5]

Board cases analyzing this balance offer valuable takeaways for employers conducting investigations involving protected activity:

1. Adopt a company policy obligating the employer to investigate complaints and alleged misconduct, and follow the policy.[6]

2. Narrowly tailor the scope of the investigation based on the legitimate business reason for the investigation. Carefully contemplate how the investigation should be structured and how the information will be gathered to avoid encroaching on protected activity to the extent possible.[7]

3. In consideration of employees' protected right to discuss work-related complaints and investigations, prohibit employees from discussing investigation-related matters only where business reasons necessitate it, and narrowly tailor the restriction.[8]

Interviews

In some situations, the issues under investigation and an employee's protected activity may be so intertwined that questioning that employee about the activity is essential to a thorough and fair investigation. The Board has recognized that it may be legitimate for the employer to question employees about conduct that took place during the employee's exercise of Section 7 rights.[9]

In evaluating whether the totality of the circumstances indicates that the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the NLRA, the Board considers a number of factors.[10] Guidance elicited from case law applying the factors includes:

1. Strongly consider using a neutral, independent investigator rather than an employee of the company. Ensure the investigator questions the employee in a neutral manner and in a reasonably neutral environment.[11]

2. Communicate to the employee the business purpose for the questioning relating to his/her protected activity and explain the scope of the questions. Narrowly tailor the questions to avoid inquiries about protected activity not clearly relevant to the purpose of the investigation.[12]

3. Give the interviewee an express assurance against reprisal and document it.[13]

Surveillance

Under the NLRA it is unlawful for an employer to surveil employees engaged in protected activity by observing them in a way that is out of the ordinary and thereby coercive.[14] It is also unlawful for an employer to create even an impression of surveillance such that employees reasonably assume that their protected activities are under surveillance.[15]

Because standard investigative practices such as searches of email or video have the potential to create an impression of unlawful surveillance when protected activity is involved, employers should take steps to narrow the inquiry around a legitimate cause to search. To help avoid any appearance of surveillance, employers should conduct the search as discreetly as possible.[16]

Looking Ahead

In Fresh & Easy, the employer endured years of litigation over two allegedly unlawful investigation communications that ultimately were found to be lawful on very narrow grounds limited to the specific facts of the case. Employers should expect increased NLRB scrutiny of investigations, anticipate very fact-specific cases, and exercise the utmost caution in investigating conduct involving any form of protected activity.

Trish K. Murphy is an attorney with Northwest Workplace Law PLLC. Her practice focuses on independent workplace investigations and management-side labor and employment law. She can be reached at trish@nwworkplacelaw.com.

1 *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014).

2 NLRA Section 8(a)(1).

3 *Fresh & Easy*, Slip op. at 3 (citations omitted).

4 *Id*. at 8 (citations omitted).

5 *Caesar's Palace*, 336 NLRB 271 (2001).

6 *See*, *e.g.*, *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528–29 (2007).

7 *Fresh & Easy*, Slip op. at 9; *Bridgestone*, 350 NLRB at 528–29.

8 *Fresh & Easy*, Slip op. at 8–9; *Phoenix Transit System*, 337 NLRB 510, 513 (2002); *Caesar's Palace*, 336 NLRB at 272.

9 *Fresh & Easy*, Slip op. at 8; *Bridgestone*, 350 NLRB at 528–29.

10 *Bourne Co. v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Fresh & Easy*, Slip op. at 9; *Rossmore House*, 269 NLRB 1176, 1178 (1984). Factors from the cases include: (a) the background and history with the employer; (b) the nature of the information sought; (c) the identity of the questioner; (d) the place and method of the interrogation; (e) the truthfulness of the reply; (f) whether a valid purpose for the interrogation was communicated to the employee; and (g) whether the employee was given assurances against reprisals.

11 *Rossmore House*, 269 NLRB at 1178.

12 *Bridgestone*, 350 NLRB at 528–29.

13 *Fresh & Easy*, Slip op. at 9 (citing *Bourne Co.*).

14 *Alladin Gaming LLC*, 345 NLRB 585 (2005).

15 *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998), *enf*'d., 8 F. Appx. 180 (4th Cir. 2001).

16 *See*, *e.g.*, *Bellagio, LLC*, 2014 NLRB LEXIS 208 (2014).