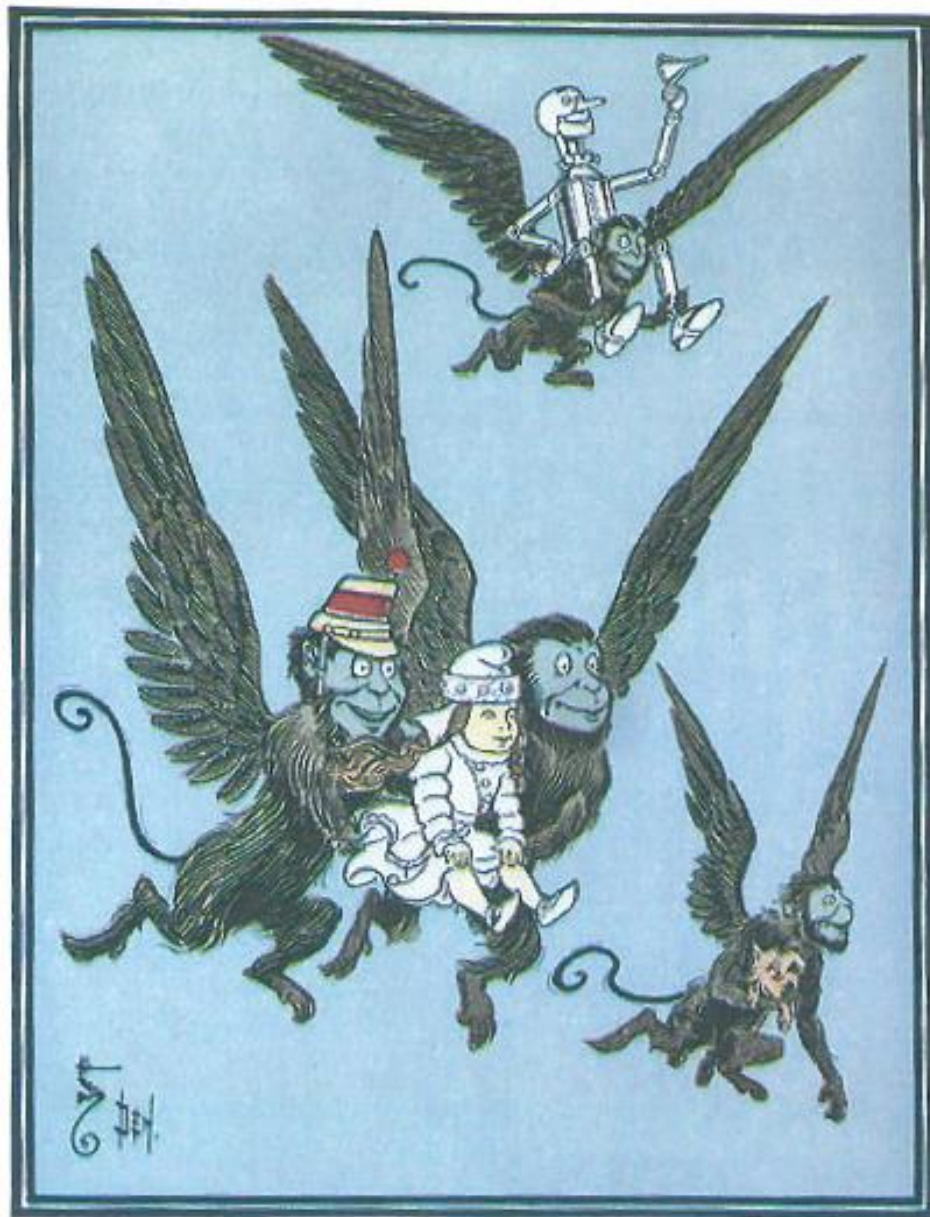


THE NLRB ON STEROIDS WATCH OUT!!

**BY
CELIA J. COLLINS**



SINCE 1897
**JOHNSTONE
ADAMS**

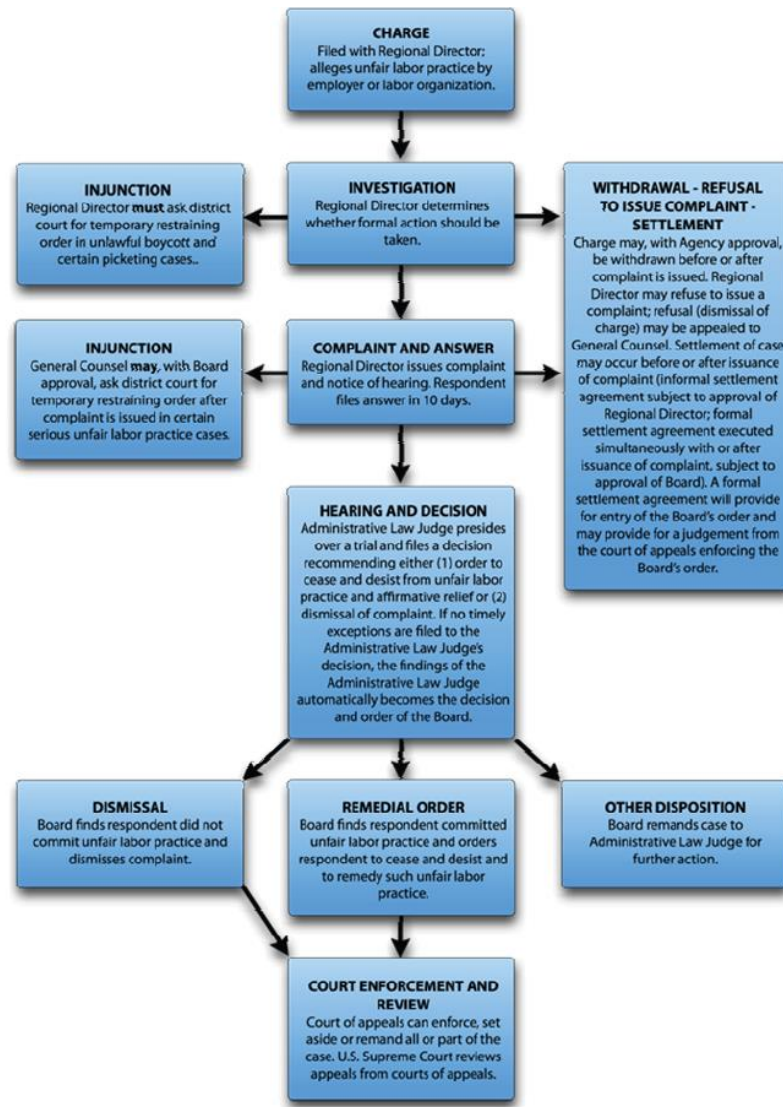
I'M NON-UNION, WHY SHOULD I CARE

- NLRA governs all private employers with activity in interstate commerce, which exceeds a minimum level, whether unionized or not.
- NLRB can force you to defend unfair Labor Practice Charges.
- NLRB can order back pay awards.
- NLRB can order reinstatement of an employee it deems wrongfully terminated in violation of the NLRA.
- Non-monetary adverse findings in an Unfair Labor Practice Charge can be used against you by union campaigners.

HYPERACTIVE NLRB UNDER OBAMA

- Pro-Union Composition of current Board
- Flexing muscle and aggressively targeting non-union employers
- When mandatory poster blocked by federal court, NLRB launched concerted activity website
- Plaintiff's bar filing ULP's with NLRB simultaneously with EEOC charges
 - o 2 bites out of the apple
 - o Create double expense for employer to pressure for settlement

Unfair Labor Practice Process Chart



NATIONAL LABOR RELATIONS ACT

Section 7

Employees shall have the right to...engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8

It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7.

CONCERTED ACTIVITY

- Action by 2 or more employees
- Action by 1 employee on behalf of others
- Action that is outgrowth of group activity

[www.nlrb.gov/concerted activity](http://www.nlrb.gov/concerted%20activity)

TERMS AND CONDITIONS OF EMPLOYMENT

- Wages
- Benefits
- Safety Issues
- Work Conditions
- Work Rules
- Policies
- Supervisors

NLRB ANALYSIS OF EMPLOYER POLICIES

- Does policy explicitly restrict Section 7 activities
- or
- Could employees reasonably construe language to prohibit Section 7 activity
- or
- Was policy promulgated in response to union activity to restrict Section 7 rights
- or
- Has policy been applied to restrict the exercise of Section 7 rights

EMPLOYMENT AT WILL POLICIES

Illegal – Could be interpreted to restrict Section 7 activities

- *I further agree that the at-will relationship cannot be amended, modified or altered in any way.*
- *I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will status except for a written statement signed by me and either [company VP/COO] or [company president].*

LEGAL

- *No representative of the company has authority to enter into any agreement contrary to the foregoing “employment at-will” relationship.*
- *No manager, supervisor or employee of [company] has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the company has the authority to make any such agreement and then only in writing.*

INTERNAL INVESTIGATION

CONFIDENTIALITY

Banner Health System

Employer requests employees to refrain from discussing the matter with co-workers during harassment investigation.

- ALJ – Lawful instruction for the purpose of “protecting the integrity of the investigation”
- NLRB – Unfair Labor Practice
Generalized concern with protecting integrity of investigation insufficient to outweigh Section 7 rights

Employer must have reason to require confidentiality:
witness protection, danger of evidence destruction, fabrication or cover-up

EEOC agrees – gag orders could deny employees the right to oppose Title VII violations

WHAT TO DO

- Eliminate blanket confidentiality language. Tell witnesses why confidentiality is needed (i.e., protect reputation of accused and accuser).

LYING TO EMPLOYER CAN BE PROTECTED ACTIVITY

Fresenius United States Mfg.

- Union newsletters found in break room with handwritten threats and vulgarities
- During investigation employee denies writing statements but later accidentally calls employer instead of union rep and admits he did it
- Terminated for harassing comments and lying during investigation
- NLRB's Decision – unlawful termination
Since harassing conduct was meant to encourage union activity, it was protected
 - **Employees can lie to cover up protected activity**



REPORT OF THE ACTING GENERAL COUNSEL
CONCERNING SOCIAL MEDIA CASES,
AUGUST 19, 2011, MEMORANDUM OM 11-74

<http://mynlrb.nlr.gov/link/document.aspx/9031d458056e743>

Focus: Protected Concerted Activity

1. Engaged in commentary with or on authority of other employees not solely on behalf of himself
2. Commentary to initiate or induce group action
3. Commentary designed to bring group complaints to management attention

DOES NOT PROTECT INDIVIDUAL GRIPES

REPORT OF THE ACTING GENERAL COUNSEL
CONCERNING SOCIAL MEDIA CASES,
MEMORANDUM OM 12-31 (JANUARY 24, 2012)

<http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>

**Focus: Broad Policy Language That Could
Have a Chilling Effect on Section 7 Rights**

- “Disparaging” comments
- “Confidential information”
- “Offensive, demeaning or inappropriate remarks”

REPORT OF THE ACTING GENERAL COUNSEL
CONCERNING SOCIAL MEDIA CASES,
MEMORANDUM OM 12-59 (MAY 30, 2012)

<http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd>

**Focus: Provide Guidance on Lawful Policy Language
(includes sample policy)**

- Rules that are ambiguous as to application to protected Section 7 activity without limiting language or clarifying context are unlawful
- Rules that clarify and restrict their scope with examples of clearly illegal or unprotected conduct so they could not reasonably be interpreted to include protected activity are not unlawful

SAMPLES OF LAWFUL POLICY LANGUAGE

Provide examples of prohibited conduct

“inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.”

Define prohibitions

“Confidential information and trade secrets includes information regarding the development of systems, processes, products, know-how and technology.”
Do not post internal reports, policies, procedures or other internal business-related communications.

ECHOSTAR TECHNOLOGIES, LLC

(SEPTEMBER 2012)

- Broad policy prohibiting employees from making defamatory comments about employer, employees and its products was unlawful
- Policy requiring authorization to communicate with media unlawful
- Savings clause that “no policy would be given effect if it were inconsistent with applicable law” was insufficient

COSTCO WHOLESALE CORP.,

SEPT. 7, 2012

NLRB found policies to be unlawful which prohibited

unauthorized posting, distribution, removal or alteration of any material on company property

discussing “private matters” of other employees, including specified health and absence related topics

disseminating sensitive information such as payroll, confidential financial, etc.

sharing employee contact information

posting statements that damage the company or defame any individual or damage any person’s reputation

KNAUZ BMW, SEPT. 28, 2012

“Courtesy” Policy unlawful

Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers as well as to their fellow employees.

...

No one should be disrespectful or use profanity or other language which injure the image or reputation of the Dealership.

NLRB Ruled:

Courtesy rule could be construed to encompass Section 7 activity and apply to “disrespectful” comments and language in the course of protected concerted activity

but

Employee discharged for posting and mocking a customer’s minor accident during a test drive was lawful – Not Protected Activity

COX COMMUNICATIONS, INC.,

OCT. 19, 2012

Advice Memorandum from General Counsel's office

Relevant Policies

Nothing in Cox's social media policy is designed to interfere with, restrain or prevent communications regarding wages, hours or other terms and conditions of employment. Cox employees have the right to engage in or refrain from such activities.

Do not make comments . . . about customers, co-workers, the company, or Cox vendors or suppliers in a manner that is vulgar, obscene, threatening, intimidating, harassing, libelous or discriminatory. Those communications are disrespectful and unprofessional and will not be tolerated by the company.

After encounter with irate customer, employee posts the following on his google+ account

"Just because you are having problems with your TV services doesn't mean you should call me a faggot!! Fxxx you!"

When post reported to management, employee suspended and issue investigated. Other posts discovered that disparaged customers and employee fired.

NLRB Associate General Counsel found

1. Employer's policy lawful and
2. Employee not wrongfully discharged because his communications were not protected.
 - Detail in company's policy provided context outside of Section 7 activity
 - Savings clause ensured employees would not interpret to restrict Section 7 activity

WHAT'S AN EMPLOYER TO DO?

Review policies to ensure compliance.

- Does policy explicitly restrict Section 7 activities?
- Could employees reasonably construe language to prohibit Section 7 activity?
- Was policy promulgated in response to union activity to restrict Section 7 rights?
- Has policy been applied to restrict the exercise of Section 7 rights?

WHAT'S AN EMPLOYER TO DO?

- Revise policies to cure overbroad language and ambiguities
- Include NLRA Section 7 disclaimer in your policy

Nothing herein is intended to limit your rights under any Federal, State, or Local law, including any rights granted by the National Labor Relations Act

- Train employees on what is prohibited comment/conduct under policies
- Use caution when disciplining or terminating employee for violating social media or other conduct policy
 - o Could their actions be deemed Section 7 conduct
 - o Investigate and document
 - o Seek legal advice if in doubt
- Consider separate code of conduct policy for supervisors and above

