Employer's Careful Drafting of Warning Document Causes Court of Appeals to Overturn NLRB Violation Finding

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The United States Court of Appeals for the District of Columbia Circuit has refused to enforce a National Labor Relations Board order that a company violated the National Labor Relations Act by warning a union steward not to make "frivolous" information requests in the future. *Dover Energy, Inc. v. NLRB*, No. 14-1197 (D.C. Cir. Mar. 22, 2016). The Court grounded its decision on the language of the disciplinary document, highlighting the importance of meticulous drafting of disciplinary documents where the NLRA may be in play.

Background

Tom Kaanta was a long-time employee of the company and a union steward. The company and the union were involved in bargaining negotiations. Kaanta was not part of the union bargaining committee. Kaanta suspected that members of the union bargaining committee had conflicts of interest that could compromise their ability to represent the union members in contract negotiations. In order to investigate his suspicions, Kaanta began submitting (handwritten) information requests to the company's Director of Human Resources, John Kaminski. Kaanta sought information regarding financial relationships, outside of employment, between the company and union members.

After receiving the first request, Kaminski contacted union president Dennis Raymond and inquired as to whether the union had authorized Kaanta's information request. Raymond told Kaminski the request was not authorized and was outside the scope of Kaanta's role as union steward. Kaminski denied the request.

Approximately two months later, Kaanta issued another (handwritten) request, this time seeking wage information for employees, stating that he believed the company was manipulating wage information to influence ratification votes. Kaminski again contacted Raymond and asked if Kaanta was authorized to make the request. Raymond again told Kaminski that the union had not authorized the request and told Kaminski he should not honor it.

In response to the second request, Kaminski issued Kaanta a "verbal warning" in written form. Kaminski wrote that Kaanta was failing to work within the bounds set by the bargaining committee, and that the information requests were "frivolous" and were "interfering with the operation of the business." The warning also stated, "[s]imilar requests such as this will result in further discipline up to and including discharge."

Kaanta filed an unfair labor practice charge based on the warning. The NLRB's General Counsel issued a complaint alleging the warning violated the NLRA by interfering with Kaanta's right to engage in protected concerted activity.

After a hearing, an NLRB Administrative Law Judge found that the company did not violate the NLRA. The ALJ found that Kaanta's requests did not constitute union or protected concerted activity and, instead, burdened the company, potentially intruding upon the privacy of bargaining unit members and interfering with contract negotiations.

The General Counsel excepted to the ALJ's ruling. The General Counsel argued to the Board that, even if the issuance of the warning did not violate the NLRA with regard to the requests Kaanta already had made, the company's threat of discipline for similar requests in the future constituted an independent violation.

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In a 2-to-1 decision, the NLRB agreed with the General Counsel. The Board held that the case turned on whether Kaanta would have reasonably understood the warning threatened discipline for future information requests that were within the scope of his duties, and thus, activity protected under Section 7 of the NLRA. The Board found that because the warning related to a request for information regarding employee hours and pay, it could reasonably be read to apply to future protected requests, such as if Kaanta were to seek information about hours and pay of an employee for the purpose of investigating a potential grievance. Thus, the Board concluded, the company violated the NLRA by threatening discipline if Kaanta made "similar requests." (For more on the NLRB decision, see our blog post, Employer's Warning Violates NLRA, Board Rules.)

Appeals Court Decision

The Court of Appeals disagreed. It concluded the Board's decision was not supported by substantial evidence. The Court held the Board did not adequately consider the entirety of the language in the warning or the circumstances of its issuance. The Court noted that the warning's reference to information requests could implicate only the two information requests Kaanta made in connection with contract negotiations and that, reading the entire warning, the term "frivolous" was "plain as shorthand" for requests not authorized by the union. Thus, the Court concluded, the only reasonable interpretation of the warning was that it proscribed similar unauthorized requests outside the scope of Kaanta's duties as Union Steward.

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Section 7 of the NLRA gives employees the right to engage in union activity or other "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus, employers should proceed with extreme caution whenever they seek to regulate workplace conduct that could arguably implicate Section 7. Often, as in this case, there is a fine line between protected and unprotected conduct and unprotected misconduct frequently is intertwined with protected activity.

Disciplinary documents must be carefully drafted and specific both as to the conduct resulting in discipline and the conduct that could subject the employee to further discipline in the future. With respect to either, broad statements that could reasonably be construed as proscribing protected activity could constitute independent violations of the NLRA.