Employees Unlawfully Disciplined for In-Store Protest, Labor Board Decides

By Philip B. Rosen

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Six employees who stopped work and engaged in an in-store protest over their alleged mistreatment by a supervisor and to secure permanent jobs for temporary employees were unlawfully disciplined, the National Labor Relations Board has determined. *Wal-Mart Stores, Inc.*, 364 NLRB No. 118 (Aug. 27, 2016). The Board termed the protest a "relatively small, brief, peaceful and confined work stoppage" that did not lose the protection of the National Labor Relations Act under its 10-factor test set forth in *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005).

Background

On October 17, 2012, six Walmart store employees submitted a written complaint to the employer about their supervisor's use of "racist remarks and threats of physical violence towards associates." The complaint requested the employer to remove the supervisor, to offer temporary employees permanent positions at the store, and to meet with members of an organization called OUR Walmart ("Organization United for Respect at Walmart") to discuss these issues.

November 2 Strike

On November 2, two managers arrived at the store shortly after 3:00 a.m. to interview the employees about their complaints, but the employees refused to meet with them. The six employees stopped working prior to the 6:00 a.m. store opening and walked to the customer service area. They refused the managers' requests to return to work.

When the store opened, four non-employee protesters entered and joined the employees in the customer service area. The group held an 8' x 10' banner reading, "Stand up, Live Better, ForRespect.org, OUR Walmart" in front of the customer service area for about five minutes when no customers were present, before moving the banner behind the customer service desk, leaving the desk unobstructed for customers. No customers who entered the store during the protests sought assistance at the service desk and no employees were impeded.

After 6:15 a.m., additional non-employee protesters joined the six employees in the customer service area, taking photographs, wearing OUR Walmart T-shirts, and holding signs. One manager told them they should leave the store, but they did not do so. At its largest, the group in the customer service area numbered 15-to-19 protesters, including the six employees.

At 6:29 a.m., the six employees moved to "Action Alley," an aisle close to the store entrance, where they were joined by two non-employee protesters. The employees wore OUR Walmart T-shirts and one held a 3' x 2' sign reading "ULP Strike." After managers said they were blocking customers, they returned to the customer service area. At 6:38 a.m., the six employees clocked out and left the store. The non-employee protesters also left the store.

Pursuant to the store's disciplinary policy, the six employees received "disciplinary coachings" or warnings for engaging in the work stoppage. Among others, the coaching documents stated the reasons for coaching included "inappropriate conduct, unauthorized use of company time," and "abandoned work immediately before grand opening event and refused to return to work after being told to do so."

OUR Walmart filed an unfair labor practice charge on behalf of the employees at the local NLRB office. (OUR Walmart also filed other ULP charges regarding other alleged unlawful conduct by the employer.) An NLRB Administrative Law Judge decided the employees' protest was protected by the Act. The company appealed that decision to the NLRB in Washington, D.C.

NLRB Decision

Deciding it must strike "an appropriate balance between the employees' Section 7 rights and the company's property rights," the NLRB held the discipline given to the six employees was unlawful under

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Quietflex Mfg. Co. In *Quietflex,* the Board set out a 10-factor test meant to balance employees' protected right to engage in work stoppages with an employer's property rights. The individual factors either would favor or disfavor a finding that the employees were engaged in protected conduct, or be neutral.

The Board found more factors weighed in favor of protecting the work stoppage:

1. *The reason the employees have stopped working* – In favor – the stoppage was protected concerted activity because the employees had stated clearly they were engaged in a collective protest over alleged abusive treatment by a supervisor and permanent positions for the temporary staff.
2. *Whether the work stoppage was peaceful* – In favor – the stoppage was peaceful; there was no violence or confrontational activity.
3. *Whether the work stoppage interfered with production, or deprived the employer access to its property* – In favor – the stoppage did not interfere with servicing customers or prevent the company from accessing its property. The Board noted, "[I]t is not considered interference of [sic] production where the employees do no more than withhold their own services." Instead, the relevant inquiry is whether the striking employees interfered with or prevented non-striking employees from performing their work, which it concluded they did not. Further, no customer complained about a disruption or was in any way impeded in their ability to shop.
4. *Whether employees had adequate opportunity to present grievances to management* – "Arguably neutral" – the company's offer to meet with employees on an *individual* basis pursuant to its open-door policy was found insufficient to satisfy this factor.
5. *Whether employees were given any warning that they must leave the premises or face discharge* – In favor – the employees had not been warned during the work stoppage that they would face discipline for failing to leave the premises. The Board found the two managers had sent "mixed messages" by telling the employees to leave the store and to return to the customer service area.
6. *The duration of the work stoppage* – In favor – the stoppage was short and the store had been open for less than an hour when it ended.
7. *Whether employees were represented or had an established grievance procedure* – In favor – "it is undisputed that the employees were not represented for collective bargaining purposes and enjoyed no procedure for group grievances."
8. *Whether employees remained on the premises beyond their shift* – In favor – the employees left the premises after their shift.
9. *Whether employees attempted to seize the employer's property* – In favor – there was no evidence employees seized or impeded access to the store during the work stoppage. The six protesting employees confined themselves to a "small section of a very large store for less than an hour."
10. *The reason for which the employees were ultimately discharged or disciplined* – In favor – the disciplinary coachings given to the six employees were for reasons directly related to work, such as abandoning work and refusing to return to work, and unauthorized use of company time.

Dissenting Opinion

Member Philip Miscimarra dissented, disagreeing that *Quietflex* was applicable. Instead, he observed, the Board has acknowledged that retail establishments are governed by special rules permitting employers to prohibit actions that disrupt or interfere with an establishment's operations in the presence of customers inside the store. He noted that in *Restaurant Horikowa,* 260 NLRB 197 (1982), the Board found an employee's conduct unprotected by the Act when the employee and some non-employees entered a restaurant and "paraded boisterously... during the dinner hour for 10 to 15 minutes." There, he noted, the Board recognized that, in retail settings, "creating a pleasant in-store environment is a foundational component of production. This is the primary means by which retail stores encourage customers to make purchases, to stay longer and to return again."

Applying the "disruption or interference" standard to this case, he decided "it is clear that the employee actions here were unprotected — the employees conducted their work stoppage inside the store, in the presence of customers, occupying the physical space in the customer service area, all with the obvious objective of disrupting the stores operations on the day of the stores grand reopening."

Miscimarra also found that, assuming *Quietflex* was applicable, he would conclude that factors 3, 5, 6, and 9 weighed against a finding that the employees were protected by the NLRA; factors 2, 4, 7, and 8 weighed in favor of protection; and factors 1 and 10 were neutral. Miscimarra also argued that factor 3 must be accorded substantial weight because the work stoppage/protest took place on a retail sales floor in the presence of customers.

Lessons

The decision is instructive on the Board's current thinking, which leads to the conclusion that (among other things) employers should:

- Promulgate and publicize strong and effective problem-resolution procedures.
- Train and evaluate supervisors, managers, and human resources on the importance of treating employees fairly and timely resolving issues.
- Train supervisors, managers, and human resources on what to do in the event of an on-premises strike or protest, including what to say to protesters/strikers.
- Train supervisors, managers, and human resources on how to properly write disciplinary notices.

The company has appealed to the U.S. Court of Appeals for the D.C. Circuit. We will continue to monitor developments.

Employers should consult with labor counsel to determine whether and how their particular situations are affected by the decision.