Fifth Circuit Upholds Micro-Bargaining Unit at Retailer, But Dissent Finds Labor Board's Legal Standard Wanting

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The U.S. Court of Appeals for the Fifth Circuit has denied, 9-6, a retailer's request for a rehearing of the decision of a three-judge panel of the Court upholding the National Labor Relations Board's decision that the retailer must bargain with a unit limited to employees in its cosmetic and fragrance department. *Macy's, Inc. v. National Labor Relations Board,* No. 15-60022 (Nov. 18, 2016).

The six judges who voted in favor of rehearing joined in a scathing 14-page dissent, calling the NLRB's decision "another example of the current National Labor Relations Board's ... determination to disregard established principles of labor law."

Union Files Petition

In 2012, the United Food and Commercial Workers Union filed a petition seeking to represent a departmental unit of cosmetics and fragrances employees employed by Macy's in Saugus, Massachusetts. The retailer countered that the smallest appropriate unit had to include all employees at the Saugus store or, in the alternative, all selling employees at the store. On November 8, 2012, the NLRB Acting Regional Director for Region One decided the petitioned-for unit was appropriate under the Board's 2011 decision in *Specialty Healthcare & Rehabilitation Center of Mobile,* 357 NLRB No. 83.

Appeal to NLRB

Macy's appealed the Acting Regional Director's decision to the NLRB in Washington, D.C. The NLRB, pursuant to *Specialty Healthcare,* held that because the employees in the unit constituted a "readily identifiable group who shared a community of interest, and [Macy's] had not met its burden of demonstrating that the other selling and non-selling employees it [sought] to include share[d] an overwhelming community of interest with the petitioned-for employees so as to require their inclusion in the unit," the petitioned-for unit was an appropriate unit.

Appeal to Fifth Circuit

To appeal the case to the Circuit Court of Appeals, Macy's had to refuse to bargain with the union, which it did. In response, the union filed an unfair labor practice charge. The NLRB found the retailer's refusal to bargain violated the National Labor Relations Act. Macy's appealed that decision to the Fifth Circuit. In its appeal, Macy's alleged that it had no obligation to bargain because the NLRB had applied an incorrect legal standard in *Specialty Healthcare* in determining whether the unit it proposed should be adopted, rather than the union's petitioned-for unit.

Request for Rehearing; Scathing Dissent

In June 2016, a three-judge panel of the Fifth Circuit rejected Macy's appeal. Macy's then requested a rehearing by the full Fifth Circuit. Macy's request was denied.

However, the six dissenting judges issued perhaps the most scathing rebuke of the Board's application of its *Specialty Healthcare* standard to date. The dissent noted that NLRB precedent has long held that, in the retail industry, storewide units of salesforce employees, such as that requested by Macy's, are the presumptively appropriate collective bargaining unit. The dissent also observed that "the NLRB has only authorized smaller units where a petitioned-for unit of employees has a 'mutuality of interests' not shared by all other selling employees ... and are 'sufficiently different' from the other selling employees so as to justify representation on a separate basis." The dissenters pointed out that cases finding smaller units are rare for the obvious reason that "all salesforce workers have the same basic employment, skills, interests, function, and working conditions." There was nothing in the circumstances of this case, the dissent found, that distinguished the cosmetics and fragrances employees from the rest of the salesforce employees.

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Labor Relations

The dissenting judges explained that the NLRB applies a two-step test in determining whether the appropriate unit contains more employees than those in the petitioned-for unit. In the first step, the NLRB decides whether the petitioned-for unit is prima facie appropriate by determining if the employees in the petitioned-for unit are "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)" and by determining whether "the employees in the group share a community of interest."

If the NLRB finds that a petitioned-for unit is "readily identifiable as a group" and "that the employees in the group share a community of interest...," the NLRB proceeds to the second step. In that step, the burden shifts to the employer to show that "employees in [a] larger unit share an overwhelming community of interest with those in the petitioned-for unit. The burden on the employer is satisfied if it shows that there 'is no legitimate basis upon which to exclude certain employees from it'" so that the community of interest "factors 'overlap almost completely.'" If an employer cannot satisfy its burden regarding the second factor, the NLRB "will find the petitioned-for unit to be an appropriate unit."

The dissenters took issue with how the NLRB analyzed the community of interest factors in the first step. They observed that "the NLRB must compare and contrast the employees in the group with each other *and with employees outside of the group*." They continued, "If [the NLRB] does not compare employees in the petitioned-for group with excluded employees in the first step or if it only identifies 'meager differences' between these employees, the NLRB 'conduct[s] a deficient community-of-interest analysis' that 'fails to guard against arbitrary exclusions' and creates an 'apparent union gerrymander.'"

The dissent argued that the NLRB conducted a "deficient analysis" of whether the petitioned-for unit of cosmetics and fragrances employees was prima facie appropriate — that is, the NLRB incorrectly phrased the first step of the *Specialty Healthcare* analysis as concerned only with "whether employees in a proposed unit share a community of interest." The NLRB discussed similarities between employees within the petitioned-for group, but it did not discuss similarities between the included employees and the excluded employees and decided only one distinction between cosmetics and fragrances employees and Macy's other selling employees existed. Only cosmetics and fragrances employees sell fragrance and cosmetic products to customers, a distinction which the dissenters determined was "hollow and just plain meaningless."

The dissent accused the Board of ratifying the smaller unit sought by the union because it believed the unit "reflects the apex of the union's organizational strength." It noted that the union had failed in efforts to organize larger bargaining units at the store and was successful only when it sought the "micro-unit of cosmetics and fragrances employees that evidently reflected its greatest strength." The dissent asserted, "Moreover, and crucially, this case is a picture-perfect example of the NLRB violating the NLRA by approving a bargaining unit defined by the limited success of a union's organizational efforts in the larger and appropriate unit. "

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Although the Circuit Court did not reverse the NLRB's decision applying *Specialty Healthcare,* the extensive dissent expressed employers' frustration over the NLRB's aggressive and expanding interpretation of the NLRA.

The five-member NLRB has two vacancies likely to be filled by President-elect Donald Trump. The possibility exists that a newly constituted NLRB will revert to a more employer-friendly legal standard, described by the dissent, when determining the appropriate bargaining unit in representation cases.

Please contact Jackson Lewis with any questions about this case and other workplace developments.