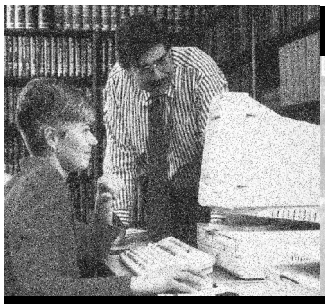

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management May 2006

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In this issue …

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

Union Rat Balloons, Mock Funeral Processions and "Shame on You" Banners May Violate Labor Law

Over the years, labor unions have developed some unique – and often disruptive – ways of showing their displeasure with certain non-union employers. Perhaps the most notorious of these tactics involves a union placing a giant inflatable rat in front of the employer's place of business. Often, the rat balloon is accompanied by several union-affiliated individuals either carrying placards or handing out leaflets explaining why they – and the rat – are there. However, several recent cases before the courts and the National Labor Relations Board (NLRB) have called into question whether these tactics are permissible under the law.

Secondary Boycott Statute

The National Labor Relations Act (NLRA) specifically prohibits a labor union from attempting to prevent a neutral employer from doing business with the union's real target (referred to as the "primary employer") by making threats, or through coercion or other forms of unlawful restraint. This is known as the "secondary boycott statute." NLRA, Section 8(b)(4)(ii). The most common form of this unlawful behavior is picketing a secondary employer. However, both the courts and the NLRB have begun to apply this statute to some of the unions' other more novel tactics.

The bottom line is ...

Mock funeral processions by union representatives in front of a neutral employer's facility will likely be a violation of the Secondary Boycott Statute. We should learn soon from the NLRB whether rat balloons and banners will be as well.

Mock Funerals

In *Sheet Metal Workers Local 15*, 346 NLRB No. 22 (2006), a union held a mock funeral procession in front of a neutral employer's facility, in this case, a hospital. The procession, accompanied by leafleting, involved members of the union patrolling on the public sidewalk in front of the hospital while carrying a faux casket and accompanied by a member dressed as the Grim Reaper. This display was intended to pressure the hospital to stop doing business with a non-union contractor. The NLRB held that the union unlawfully "...engaged in picketing at the neutral secondary site...." The Board went on to say that:

> We agree ... as to the reasons why this conduct was picketing. However, to the extent that she implies that picketing requires a physical or symbolic barrier, we do not necessarily agree. Since the funeral procession was such a barrier, we need not pass on whether such a barrier is a *sine qua non* of picketing. It may be that other conduct, short of a barrier, can be "conduct" that is picketing or at least "restraint or coercion" within the meaning of Section 8(b)(4)(ii)(B).

The federal Court of Appeals for the Eleventh Circuit reached the same conclusion in another case which resulted from this incident. *Kentov v. Sheet Metal Workers Local 15*, 418 F.3d 1259 (11th Cir. 2005). In this case, the Court upheld an earlier court injunction granted to the hospital directing the union to stop its "funeral procession" activities. The Court noted:

> Although the Union did not carry traditional picket signs, it is well-settled that the existence of placards on sticks is not a prerequisite to a finding that a union engaged in picketing.... In-

Continued on next page

Union Rat Balloons, Mock Funeral Processions and "Shame on You" Banners May Violate Labor Law (cont'd)

> stead, "[t]he important feature of picketing appears to be posting by a labor organization ... of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."..... During the procession, the Union played somber funereal music from large speakers. This activity could reasonably be expected to discourage persons from approaching the hospital, to the same degree, if not more, as would five union agents carrying picket signs. Like traditional secondary picketing, the Union's procession was a "mixture of conduct and communication" intended to "provide the most persuasive deterrent to third persons about to enter" the hospital.

Thus, if a union conducts a mock funeral in front of a neutral employer's facility with the intent of preventing them from doing business with the union's primary target is a violation of the Secondary Boycott Statute.

Rat Balloons

The union in the *Sheet Metal Workers* case also inflated a giant rat balloon in front of the hospital's main entrance. While the NLRB found it unnecessary to decide whether this conduct was unlawful (because it already found that the funeral procession activity violated the law), the lower-level administrative law judge (ALJ) who initially decided the case found that the rat-balloon tactic also violated the law. Perhaps more importantly, the Eleventh Circuit relied on the ALJ's decision in this regard as its basis for finding that the union had a "track record" of engaging in unlawful secondary boycott practices.

In the NLRB's latest decision involving this issue, an ALJ again found that placing giant inflatable rats at three different jobsites to pressure neutral employers amounted to picketing in violation of the law. *Laborers Organizing Fund*, 346 NLRB No. 105 (2006). However, when the case came before the NLRB for review, it again avoided answering the direct question of whether the rat tactic was a form of picketing or other unlawful coercive activity. Instead, the Board concluded that:

> the [union] agents patrolled the area in front of the jobsite entrances, and in so doing, they marked their territory, creating a barrier.... The [union] has not attempted to dispute this description, or to contend that it occurred only when a handbiller was approaching an intended recipient of a handbill. In the absence of any evidence that the movement by the [union] agents could reasonably be described as something other than what it appeared to be, i.e., patrolling, we find that the ...agents' back and forth movements at each of these locations effectively formed a barrier at the entrance to the sites that could be viewed as a form of picketing.

Therefore, while there is some precedent indicating that a union's use of rat balloons with neutral employers is a violation of the Secondary Boycott law, it is unclear at this time whether the NLRB would find such a violation in the absence of "patrolling" union representatives.

"Shame on You" Banners

Apart from rat balloons and mock funerals, another common tactic used to pressure neutral employers is displaying a large banner in front of the employer's facility which contains a confrontational message, such as "Shame on You". Unlike the mock funeral procession and rat balloon scenarios described above, the banners are usually placed or held in a stationary position. There is no "patrolling" in front of the facility.

The question of whether bannering is akin to picketing (or some other unlawful "coercive" behavior) or whether it is a form of protected free speech, has been addressed in several cases decided by ALJs. Unfortunately, those decisions have produced inconsistent results. The ALJs who consider bannering to be a form of free speech have focused on the fact that the individuals holding the banners remain stationary without walking back and forth in front of the neutral employer's facility. They also note that the union representatives do not engage in assertive or aggressive behavior toward people entering the facility. However, those arguments were rejected by an ALJ in *In re Local Union No. 1827, United Broth. of Carpenters and Joiners of America*, 2003 WL 21206515. In this decision (which is now pending before the NLRB), the ALJ held that the mere fact that the banner was stationary and not used in patrolling did not change the fact that it constituted conspicuous notice to employees and customers that the union had a labor dispute with the neutral employer. It was also noted that neither "patrolling" nor "assertive and aggressive behavior" have ever been essential to a finding of picketing; rather, the essential feature of picketing is the placement of individuals at workplace entrances.

Accordingly, we should learn from the NLRB within the next several months whether banners – and, perhaps, stationary rat balloons without patrolling union representatives – are indeed the equivalent of picketing against neutral employers in violation of the Secondary Boycott Statute.

Evaluating Employee Termination Decisions

Supervisors generally say that the termination of an employee is the worst managerial task they are asked to perform. Many "intangibles" come into play during the termination process which, if allowed to get out of control, can have serious legal consequences. Once a decision to terminate an employee is made, the manager must implement it with forthrightness and confidence, making sure not only to protect the interests of the organization, but to recognize the dignity of the employee.

The first step, therefore, is taking at least a brief "time-out" to be sure that separation of employment is the right step to take. Have you considered the aftermath of the discharge on your organization - the cost of hiring and training a new employee, the difficulty in replacing the specialized knowledge of the discharged employee, the impact the discharge decision may have with regard to customers or vendors who no longer have the opportunity to work with the employee? Will the discharge decision have a negative impact on the morale of remaining employees?

Is the employee really to blame for the discharge incident? Is the "performance deficiency" you have spotted in fact a reflection of improper training, inadequate tools or other support, the workplace environment, or some other factor beyond the employee's control? Are there alternatives to discharge which should be sought (transfers, counseling, disciplinary suspension)? ***The point is, that before a decision to discharge is made, you must be certain you can articulate why the separation is necessary, and why it is the best alternative.***

Unemployment Benefits Disqualification for Violating Company Driver's License Policy

Most employers are aware that New York State Labor Law disqualifies applicants for unemployment insurance benefits if they lose their employment due to their own "misconduct." However, many of those same employers are surprised to learn that their definition of "misconduct" is often radically different from that of the Unemployment Insurance (UI) Division of the State Department of Labor. Typically, the UI Division's Appeal Board will not disqualify an applicant for benefits unless the misconduct was of an extreme or egregious nature (for example, violence, theft and other criminal acts). However, in a recent decision, the New York State Appellate Division, Third Department, affirmed a somewhat uncharacteristic UI Appeal Board ruling which disqualified a television news reporter from receiving benefits after she was terminated for driving with her driver's license suspended in violation of her employer's policy. *Matter of Kaplan,* __ N.Y.S.2d __, 2006 WL 1096758 (N.Y.A.D. 3 Dep't.).

This case involved a reporter who worked for a television station for 14 years. One of her job responsibilities involved driving to and from "live locations" to report on various news stories. For liability reasons, the television station maintained a policy that required employees needing to drive as part of their employment to notify the employer of any license revocations or suspensions. The policy forbid any employee from driving if the employee's license had been revoked or suspended.

The news reporter received two traffic tickets, but failed to respond or appear in court. As a result, the New York State Department of Motor Vehicles suspended her license. The reporter testified that she was not aware that the license had been suspended; however, she acknowledged having received Department of Motor Vehicle Notices sent to her in the mail. She claimed that she erroneously assumed that the DMV Notices pertained to "another matter."

The Third Department ruled that given these facts, the Board was presented with a credibility issue which it resolved in favor of the employer. Accordingly, the Board's finding that the reporter had been terminated for misconduct disqualifying her from receiving benefits was supported by substantial evidence, and therefore was affirmed. ***Perhaps the UI Appeals Board definition of "misconduct" is beginning to change.***

Clearing Up Confusing Doctor's Notes For FMLA Purposes

Employers are required by law to determine whether an employee's absence is covered by the Family and Medical Leave Act (FMLA). However, when they ask employees for medical documentation to aid in making such determinations, employees often supply confusing and/or extremely vague doctor's notes which are of little or no assistance. To avoid this problem, the U.S. Department of Labor provides a form which is designed to simplify this process for employers, employees and health care providers. This form, known as a "Certification of Health Care Provider" can be obtained — and even completed — online at www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf.

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Employees With Working Hours Spread Across More Than 10 Hours in a Day NOT Entitled to Additional Pay, Federal District Court NOW Rules

As we reported in March, a federal district court recently ruled that employees whose working hours spread across more than 10 hours in a single day are entitled to additional compensation beyond regular wages and overtime, based on an obscure New York Labor Law regulation (i.e., 12 N.Y.C.R.R. §142-2.4). *See Yang v. ACBL, Inc.* However, a different judge **at the same court** has now rejected the *Yang* decision. *See Chan v. Triple 8 Palace*, 03 Civ. 6048 (S.D.N.Y. March 31, 2006).

Section 142-2.4 states that "an employee shall receive one hour's pay at the basic minimum hourly wage … for any day in which … the spread of hours exceeds 10 hours …." The phrase "spread of hours" is defined as "the interval between the beginning and end of an employee's workday." In other words, when an employee works more than 10 hours in a day, the employee is entitled to additional compensation (over and above the employee's regular wages or overtime) in the amount of $6.75 (i.e., the equivalent of one hour at the current minimum wage rate). However, the New York State Department of Labor (NYSDOL) has long advised employers that if the weekly wages actually paid to an employee equal or exceed the total of: (i) 40 hours paid at the basic minimum wage rate; (ii) overtime paid at the particular employee's overtime rate; and (iii) one hour's basic minimum wage rate for each day the employee worked in excess of 10 hours, then no additional compensation is due. As a result of this interpretation, most employers were never required to pay such employees any additional compensation because their wages were far enough above the minimum wage.

In *Yang*, the Court rejected the NYSDOL guidance stating, in essence, that the plain language of the law does not "carve out" such an exception. In *Chan* on the other hand, another judge at the same court noted that:

> In [the first judge's] view, nothing in the regulations dictated such an exception. This Court respectfully disagrees. The plain text of §142.4 ensures an additional wage only "in addition to the *minimum* wage" required under New York law (emphasis added). It is therefore to be expected that the provision will not affect workers whose total weekly compensation is already sufficiently above the minimum rate.

Since Yang and Chan present conflicting decisions, it is unclear at this point how other courts in New York would handle similar cases. Until there is a decision resolving this conflict, we are advising our clients to abide by the NYSDOL Guidance discussed above.

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