At the same time that the current National Labor Relations Board is giving employees what seems like the unfettered ability to engage in disparagement, profane outbursts, and racist comments that accompany protected union or other concerted activity, employers are having to become ever more careful about what they say. Even truthful and seemingly innocuous statements made during an organizing campaign can be viewed, in hindsight, as having an unlawful “chilling effect” that discourages employees from exercising their rights to support a union. A recent decision from a federal appeals court in Chicago provides a cautionary tale for employers who find out about organizing activity and want to keep their workplace union-free.

On September 4, the United States Court of Appeals for the Seventh Circuit (covering Illinois, Indiana and Wisconsin) upheld the Board’s determination that an Illinois auto dealership illegally discouraged workers from supporting a union and illegally terminated a worker after learning he failed to disclose the suspensions of driver’s license following a DUI charge. The court noted that the employer learned union activity was “afoot” after receiving an anonymous voicemail from a woman who called “on behalf of the spouse of one of your employees.” The anonymous caller said that a particular employee was trying to “stir up” the unionization effort and stated that he did not have a valid license, which the dealership required, because of his DUI. After receiving this voicemail, the employer interviewed the employee, who admitted his license was invalid, and then suspended and later terminated him.

Meanwhile, the dealership’s general manager and other top managers met with workers to discuss the union organizing effort. One of the employees present secretly recorded the meeting. During the meeting, the managers said that any bargaining with the union would “start from scratch,” warned (truthfully) that its Orlando dealership had not had any bargaining negotiations even though its workers elected a union nearly three years ago, advised that pay raises were “absolutely possible” in the event employees rejected the union as it considered pay adjustments every year, responded that they “don’t know” if some employees would be demoted under union rules, and suggested that support for the union could “follow” them when they seek other employment because other employers might be hesitant to hire them.

The Board determined that the managers’ statements all had a “tendency” to discourage employees from organizing, and were therefore illegal under federal labor law. The managers’ statements were unlawful in four respects: (1) they “threatened” that it would be “futile” for workers to organize by suggesting that bargaining would start from scratch and bringing up the Orlando dealership as an example of potential negative consequences; (2) they implied “promises” of wage increases by suggesting that employees might receive pay raises if they reject the union; (3) they “threatened” workers with demotions by saying they didn’t know what would happen under the union’s rules; and (4) they “threatened” blacklisting by suggesting that employees’ support for the union would follow them.
The Seventh Circuit upheld all of the Board’s findings, although it did not review the Board’s decision from scratch but rather decided only whether there was “substantial evidence” to support the decision. The most obvious violation to the appellate court was the threat of blacklisting. The court found the other statements could reasonably be interpreted as unlawfully discouraging employees from unionizing. For example, the managers told the truth about the failure of negotiations at the Orlando dealership, but bringing this up in the context of the other statements could have been viewed by the workers as a threat that it would be futile for them to elect the union. And the managers were not off the hook when they spoke in hypotheticals or said that they were unaware of what would happen – answering “maybe” when asked about future pay increases was still an illegal promise of benefit and saying “I don’t know” if workers will be demoted under union rules was still a threat.

As to the employee who was suspended (and later terminated) after the employer found out his license was suspended, the Board found that his termination was illegal because it was motivated, at least in part, by his support for the union. The court again upheld this finding, stressing that the employee’s support for the union did not need to be the sole or even primary reason for his termination – it only needed to be a “motivating factor.” Here, there was enough evidence to show an unlawful motivation because the caller who left a voicemail singled out the employee for his union activity and the employer had shown “hostility” toward the union during its meeting with employees.

The lesson from this case is that employers need to be very careful about what they tell employees during a union organizing campaign. Even one statement that crosses the line can put everything else that was said in a worse light and ultimately get the employer in trouble. The case shows that employers should not make the following statements:

- Bargaining will start from scratch (viewed as a threat that workers will lose their current pay and/or benefits).
- You will receive a pay increase and/or other benefits even without a union (viewed as a promise that workers will receive benefits if they reject the union).
- We are going to bargain hard if you elect a union, so do not expect things to change (viewed as a threat that supporting a union would be futile).

Perhaps you are wondering, what can employers say? Here are some examples of permissible statements:

- We oppose the union and urge you to do the same.
- You enjoy good pay, benefits, and job security without a union.
- You have a right to refuse to sign an authorization card or speak to union representatives, and may vote against the union in an election even if you previously signed a card.
- If there is an economic strike, we may permanently replace all striking workers.
- The union cannot guarantee better wages, benefits, and working conditions (as long as there is no threat that workers risk losing what they currently have by supporting the union).

In short, employers can express their opposition to the union and discuss the pros and cons of union membership, such as having to pay union dues (in non-right to work states). Employers can also provide factual information about the law, the union (dues, fees, rules, officials’ salaries, etc.), and how unionized companies compare against non-unionized companies in terms of wages and benefits, competitiveness, etc. in the industry.

It is often hard to tell when an employer’s statement opposing a union might cross the line and be viewed as unlawfully discouraging workers from exercising their rights. Even true statements can be viewed as illegally tending to discourage union activity. To stay in the clear, employers should obtain legal advice before speaking in opposition to a union organizing campaign.

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