

Employer's Asking Employee "How Things Are Going?," Prelude to Unlawful Solicitation of Grievances, Board Majority Rules

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We are on the verge of the Board majority changing for the first time in approximately a decade. The President's two appointees, if confirmed, will bring the Board up to a full five members. After the new members are seated we likely will see big changes to the law. In the meantime, the Board continues to issue decisions although it seems to have slowed down a bit in recent weeks.

Many of the Board decisions have to do with statements made by employers to employees which can be considered coercive. In the last several years, the Board has carried its scrutiny of employer statements to the extreme as it has evaluated written handbooks, often finding violations of various passages despite the lack of evidence that the policy was ever enforced or even that the employee was aware of it. As we previously noted, it is [highly likely](#) the Board's current standard for evaluating written policies will change in the coming months.

In *Mek Arden, LLC dba Arden Post Acute Rehab*, 365 NLRB No. 110 (July 25, 2017) the Board evaluated the interesting allegation of unlawful conduct known as "solicitation of grievances." Solicitation of grievances is one of the lesser known violations of the Act, and stands for the proposition that an employer violates the Act if, during union organizing, a supervisor attempts to find out what is driving the organizing and then, implicitly or explicitly, promises to remedy the problems.

Background

The employer ran a long-term care and rehabilitation facility in Sacramento, California. The Certified Nursing Assistants (CNAs) working at the facility were the subject of an organizing drive which resulted in the union losing the representation election. The union filed charges and asserted objections to the election.

"How are things going?"

Of the many allegations contained in the complaint, the one of most interest was the solicitation of grievances. In mid-June of 2015 a CNA complained to an administrator about the new director of nursing. The administrator relayed the complaints to the employer's Chief Operations Officer

(COO). During a visit to the facility, the COO spoke to employees often asking them “how things are going?” This question was asked of all employees encountered by the COO whether or not they were part of the employee group organizing. The COO sought out the CNA who complained about the director of nursing because he had been told about the complaint. The CNA was asked how things were going. The CNA responded about some complaints in the workplace. The COO then specifically asked about the director of nursing. The CNA repeated her previous complaint and the COO stated he would “follow up and look into her concerns.” Later that day, the employees, led by the CNA, presented the union’s election petition to facility management.

The union alleged the COO’s conversation with the CNA was an unlawful solicitation of grievances. The NLRB Region issued complaint on this claim and others.

Administrative Law Judge Dismisses Claim

The Administrative Law Judge evaluated the statement and noted that the COO asking the CNA how things were going was something that the COO “routinely” asked employees and that, under the circumstances, it was not unlawful because:

I find [the COO’s] reaction (to [the CNA’s] complaint) was a natural human response—with the alternative being to remain in an unnatural and bizarre stone silence in the face of such personally-conveyed complaint. To rule otherwise in these circumstances would raise the specter of employees easily baiting or goading employers into committing automatic, ready-made unfair labor practices by raising unsolicited complaints and then claiming that the employers impliedly promised to resolve their grievances when they respond by stating they would ‘look’ into them. Such is not the intent or purpose behind Section 8(a)(1) of the Act, which is to proscribe truly coercive conduct.

The General Counsel appealed this finding.

Board Majority – It’s Solicitation

In analyzing this allegation the Board found the judge’s analysis to be “flawed in several respects.” The Board quoted the standard for evaluating a solicitation of grievance allegation set forth in *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000):

Absent a previous practice of doing so. . .the solicitation of grievances during an organizational campaign accompanied by a promise, express or implied, to remedy such grievances violates the Act. . . [I]t is the promise, express or implied, to remedy the grievance that constitutes the essence of the violation. . . [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. . . [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one.

The Board noted that if the solicitation is made the employer can rebut the inference by establishing

that it had a “past practice” of soliciting grievances in a like manner prior to the critical period. The critical period is the period between the petition and election.

The Board found that the COO’s actions constituted solicitation because he sought out the CNA, and that after hearing her complaints told her he would follow up and look into her concerns. The Board found it significant that there was no evidence the COO had visited the facility and asked employees “how are things going” prior to his visit.

Chairman Dissents

Chairman Miscimarra dissented, noting that the employee previously, and in an unsolicited manner, raised the complaint against the director of nursing. Thus, it was hardly something that could be “solicited.” Miscimarra agreed with the Judge’s analysis, finding the question “how are things going?” was not solicitation but “a familiar, commonplace greeting.” Even if the question could be deemed a solicitation, Miscimarra concluded that the COO’s response that he would look into the complaint was a “natural human response” and not an implied promise to remedy a problem thereby conveying that unionization was unnecessary.

Takeaways

This is another example of an [incremental expansion](#) of the law. The Board seems to be saying that even though the employee raised the issue voluntarily in a previous conversation that it would be unlawful to go talk to the employee about the complaint. It is a natural, and good, business practice to relay complaints of employees to those in management who have the authority to address the issues.

The CNA clearly was not shy and had raised her complaints on her own to administrators. It’s difficult to see the coercion. It is especially hard to understand how this could be coercive when the CNA led the effort to publicly present the union’s petition to represent the employees shortly *after* her conversation with the COO. If the conversation was so problematic it certainly did nothing to deter the CNA and her efforts to bring in the union. Of course, the Board looks at employer statements objectively and does not consider whether the statement had its intended effect, which makes a certain amount of sense. However, this practice tends to isolate the statements as if they occurred in a vacuum and it can lead to situations like this where the statement demonstrably did not deter the employee yet is still deemed “coercive.” Indeed, as the Administrative Law Judge predicted, a non-coercive conversation is something that could be held onto and used to force a new election if the union did not prevail. We have seen before how the Board does not hesitate to overturn election losses based on little evidence of actual coercion.

This kind of thing can be avoided entirely, of course, by the establishment of well-defined programs to find out what is on employee’s minds, and to make a commitment to look into any problems. That way, if and when organizing occurs, the employer can easily rebut a claim of solicitation of grievances.

It is not always natural for managers to ask “how are things going?” but it should be.

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