# EMPLOYMENT LAW MEETS LABOR LAW – A QUIET WEDDING

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## PERCEPTION

Employers in America today are generally aware of federal and state protections afforded workers regarding hiring, dismissals, and other employment decisions. Regardless of whether an employer is familiar with a specific employment law, there is a general familiarity with the notion that employment law restricts how an employer treats individual employees or job applicants. Managers realize, for example, that it is usually illegal to discriminate against a specific individual based on the individual's age, sex, or race. "Employment law" is the label generally used to identify the laws regulating individual employee rights.[1]

Ask most employers or employees about the National Labor Relations Act (NLRA) and the answer is often the same. The NLRA does not apply unless the workers have organized a union or are in the process of organizing a union. "Labor law" is the label primarily used for issues involving labor and management relations under the NLRA.

The importance of the NLRA is often minimized. Union membership only covers approximately 13.5% of the US workforce, including only nine percent of the private sector workforce.[2] While employment laws such as the Civil Rights Act of 1964 cover nearly all employees in the US marketplace, union employees are relatively small in number and are concentrated in certain sectors of the economy and in certain geographic regions.

## REALITY

The above labor law/employment law dichotomy may be the general perception in the marketplace, but the reality is different. The National Labor Relations Act is a law that protects both union and nonunion employees. That is, an employee is not required to belong to a union or to be engaged in union organizing to receive protection under the

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[1] A partial list of laws protecting individual employees/applicants includes the following: the Equal Pay Act, 29 U.S.C. 206(d) (2002); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e through 2000e-15 (2002); the Age Discrimination in Employment Act, 29 U.S.C. 621-633a (2002); the Occupational Safety and Health Act, 29 U.S.C. 651-678 (2002); the Employee Retirement Income Security Act, 29 U.S.C. 1001-1461 (2002); the Pregnancy Discrimination Act, 42 U.S.C. 2000e (k) (2002); the Americans with Disabilities Act of 1990, 42 U.S.C. 1201 et seq. (2002); the Civil Rights Act of 1991, 42 U.S.C. 1981a and scattered sections of Title VII (2002); and the Family and Medical Leave Act of 1993, 29 U.S.C. 2601-2617, 2651, & 2652 (2002).

[2] Union Members Decline to 16.3 Million as Share of Employed Slips to 13.5%, Daily Lab. Rep. (BNA) No. 13 (Jan. 19, 2001).

NLRA.[3] The protected rights of employees are listed in Section 7 of the Act.[4] Cases under the NLRA involve either unfair labor practices under Section 8 of the Act[5] or union representation actions under Section 9 of the Act.[6] Actions under Section 9, by definition, involve union settings. However, there is no requirement that a union be involved for an employee to bring an unfair labor practices lawsuit. Thus, under the NLRA, nonunion employees have the right to strike. Firing employees for "walking off the job" may constitute an unfair labor practice. Nonunion employees' complaints about pay, employment benefits, supervisory personnel, or other working conditions may be protected "concerted activities" under Section 7 of the Act. The focus of this article will be on the reality, often unknown to many employers and employees, of the NLRA as it relates to the nonunion employee.

**A COLD DAY**

January 5, 1959, was an extraordinarily cold day for Baltimore. The winds were strong and biting on a day with a low temperature of 11 degrees. Machinists working at the Washington Aluminum Company fabrication plant in Baltimore were accustomed to working in cold conditions. The aluminum fabrication facility where they worked was not insulated and lacked proper heating equipment. The employees had previously complained about this problem, without success.

On the morning of January 5, however, it was abnormally cold at work. The primary source of heat at the fabrication facility, an oil furnace, had broken down during the previous night. As the machinists arrived for work on the 5th, they discovered bitterly- cold working conditions. One of the machinists, Mr. Caron, told his fellow workers, "I am going home; it is too damned cold to work." Caron asked the other machinists what they were going to do and, after some discussion among themselves, most decided to leave with him. The belief was that by acting together and leaving, the machinists would be able to exert pressure on Washington Aluminum Company to provide proper heat at the fabrication facility. The company's immediate response was to fire the seven employees that left work.

The discharged employees later brought suit against Washington Aluminum. The surprising legal result: The conduct of the workers was a "concerted activity" to protest the company's inadequate heating of the machine shop. Though the workers were not unionized, their conduct was protected under Section 7 of the National Labor Relations Act. The discharge of the seven workers by the company amounted to an unfair labor practice under Section 8(a)(1) of the Act. The National Labor Relations Board (NLRB) ordered the reinstatement of the workers, with restitution for all losses, and the Supreme Court upheld this action.[7]

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[3] *See e.g.*, Vencare Ancillary Services, Inc. v. N.L.R.B, 352 F.3d 318, 322 (6th Cir. 2003).
[4] 29 U.S.C. §157.
[5] *Id.* at §158.
[6] *Id.* at §159.
[7] NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

A puzzling fact about the opinion in *Washington Aluminum* is that, though the decision is over forty years old, the result is not widely known in the business community. That anonymity may be changing. In a recent case, *Epilepsy Foundation of Northeast Ohio v. National Labor Relations Board*,[8] a federal court of appeals affirmed application of the National Labor Relations Act in a nonunion setting. The court in *Epilepsy* upheld a National Labor Relations Board decision allowing a nonunion employee request that a co-worker be present at an investigatory workplace interview that the employee reasonably believed could result in disciplinary action. This right to have a representative join an employee in attendance at an investigatory meeting with management personnel, commonly called the *Weingarten* rule, was established for union employees in a 1975 Supreme Court decision.[9] The Epilepsy decision extending the right to nonunion employees generates additional publicity and interest in application of the National Labor Relations Act in nonunion settings.[10]

## THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act was passed and enacted into law in 1935.[11] The purpose of the NLRA is summarized in the following language from Section 1 of the Act:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[12]

Section 2 of the Act broadly defines commerce.[13] The United States Supreme Court has repeatedly held that Congress intended to grant the NLRB "…the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause.[14] Section 2 does provide some restrictions on the jurisdiction of the NLRB by exempting from the term "employer" the United States, state and local governments, any Federal Reserve Bank, certain railroads, wholly owned government corporations, and labor unions and

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[8] Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001), cert. denied, 122 S.Ct. 2356 (2002).
[9] NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).
[10] *See, e.g.,* William R. Corbett, Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again, 23 Berkeley J. Emp. & Lab. L. 259 (2002); G. Roger King, Who let the Weingarten Rights Out? The National Labor Relations Board compounds Earlier Error by the Supreme Court, 2002 L. Rev. Mich. St. U. Det. C.L. 149 (2002); Sarah C. Flannery, Extending Weingarten to the Nonunion Setting: A history of Oscillation, 49 Clev. St. L. Rev. 163 (2001).
[11] The Act is found in 29 U.S.C. §§151-169 (2003).
[12] 29 U.S.C. §151 (2003).
[13] *Id*. at §152(6) and (7).
[14] N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224,226, 83 S. Ct. 312, 313, 9 L.Ed. 2d 279,281 (1963) citing several other cases.

their agents (except when they are acting as employers).[15] Section 14 of the Act provides that the NLRB may chose to decline jurisdiction in some situations.[16] The NLRB has established jurisdictional standards under Section 14. These standards were first announced in a case and press release in 1950.[17] The NLRB has updated the standards over time. The standards provide that the NLRB will base its jurisdiction over an employer on the employer's annual level of commercial activity. The standards do not, however, require union activity before the NLRB will exercise jurisdiction over an unfair labor practices case.

Employee rights under Section 7 of the Act include the following rights:

- to self-organization, to form, join, or assist labor organizations,
- to bargain collectively through representatives of their own choosing, and
- to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ..[18]

Section 8 of the Act designates as an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[19]

## THE NLRA & NONUNION EMPLOYEES

As illustrated by the preceding Supreme Court decision in *Washington Aluminum*, the NLRA applies to union and nonunion settings. Concerted activities, *for the purpose of collective bargaining or other mutual aid or protection*, are protected under Section 7 of the Act, even in the absence of nascent union organizing. Employer retaliation or discrimination against an employee engaging in protected concerted activity may subject the employer to liability under NLRA Section 8(a)(3) for an unfair labor practice.

## CONCERTED ACTIVITY FOR MUTUAL AID

In *Washington Aluminum*, concerted activity for mutual aid was clearly evidenced as seven employees banded together to protest cold working conditions. This was true despite the fact that the employees involved were not unionized nor were they seeking to form a union. Generally, two or more employees acting together to address workplace concerns or improve workplace conditions are acting in a concerted manner. Even one employee acting alone, however, may satisfy the concerted requirement. When only one employee is involved in some manner of employment activity, the employee must

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[15] 29 U.S.C. §152(3).
[16] *Id.* at §164(c)(1).
[17] Hollow Tree Lumber Co., 91 N.L.R.B. 635,636 and 26 LRR Man. 50. *See*, Gauss v. Utah Labor Relations Board, 353 U.S. 1, 77 S.Ct. 598, 1 L.Ed. 2d 601 (1957) for insight into the creation of the NLRB's declination standards.
[18] 29 U.S.C. §157.
[19] *Id*. at §158(a)(1).

establish that his behavior reflects more than a personal complaint. The employee must be acting beyond personal self-interest, attempting to improve other employees' working conditions.[20]

**CASE EXAMPLE – NATIONAL LABOR RELATIONS BOARD V. CAVAL TOOL DIVISION**[21]

Diane Baldessari worked as a computer programmer for Caval Tool Division, Chromalloy Gas Turbine Corporation (Caval). Caval was not unionized. During August 1998, Caval held a series of informational meetings for its employees, all of which were conducted by Caval's president, Paul Pace. At one meeting attended by Baldessari, Pace expressed his dissatisfaction with worker productivity, production downtime, and the fact that employees were often seen lingering around the company's vending machines. Pace then announced a change in the company's break policy. Under the new policy, employees would receive shorter breaks than under the old policy, and employees were required to spend more time in their work areas.

In response to Pace's statements, Baldessari stated her opinion that the company's productivity problems were caused by management scheduling problems. The new break policy was designed to punish workers when the workers had no control over the production problems. Baldessari expressed her opinion that Caval promulgated unfair workplace policies. In response, Pace expressed his displeasure regarding the nature of Baldessari's statements. That afternoon, Baldessari was escorted out of work and was placed on suspension without pay for an indefinite period of time. She later received permission to return to work on probationary status.

Baldessari filed a complaint with the National Labor Relations Board. Ultimately, the Board ruled in favor of Baldessari. The Board found that Baldessari statements at the informational meeting were protected concerted activities under the NLRA, even though she was acting alone. Her statements were intended to induce group action in response to the company's new break policy and therefore constituted concerted activity.[22] Further, the NLRB found that Baldessari was punished for engaging in protected activities (the statement of her opinion), thus violating the NLRA.[23] The NLRB findings were upheld by the court.

A key fact from the case is that Baldessari's criticism of company management about workplace conditions that affected Baldessari *and other employees* was concerted activity for mutual aid or protection under the NLRA. This criticism, then, changed Baldessari's status in the case from an unprotected employee-at-will to an employee engaged in protected behavior under the NLRA.

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[20] Robert A. Gorman & Matthew W. Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U.Pa.L.Rev. 286, 290-93 (1981).
[21] N.L.R.B. v. Caval Tool Div., 262 F.3d 184 (2nd Cir. 2001).
[22] *Id*. at 188.
[23] *Id*. at 191.

**CASE EXAMPLE – NATIONAL LABOR RELATIONS BOARD V. MAIN STREET TERRACE CARE CENTER**[24]

Main Street Terrace Care Center (Main Street) operates a nursing home for the elderly in Lancaster, Ohio. Main Street is not unionized. In 1996, Mary Catherine Craig was hired as a dietary aid. After she was hired, Craig was told "that [employees] were not allowed to discuss [their] paychecks with anyone" at Main Street.[25] On several occasions after she was hired, Craig did discuss wages and other workplace issues with several different Main Street employees. Craig was fired in December 1997.

Craig filed an unfair labor practice claim with the NLRB. After an investigation and hearing, the NLRB found that Main Street had violated the NLRA by discharging Craig based on Craig's discussion of employee wages. The Court of Appeals upheld the NLRB. The following factors were discussed by the court:

- An individual employee may be engaged in concerted activity when he acts alone, if the employee's actions were designed to benefit other employees, in addition to benefiting the employee involved in the contested activities.[26]
- It was not relevant that the prohibition against discussing wages was not written policy and was not uniformly applied. The employee involved could reasonably believe that the oral policy could be applied, thus presenting a coercive situation for the employee.[27]
- A rule prohibiting employees from communicating with one another regarding wages, a key objective of organizational activity, undoubtedly tends to interfere with the employees' right to engage in protected concerted activity under Section 7 of the NLRA, absent a substantial and legitimate business justification.[28]

**CASE EXAMPLE – ARROW ELECTRIC COMPANY, INC., V. NATIONAL LABOR RELATIONS BOARD**[29]

Robert Franklin, Kathleen Jackson, Kevin Simms, and Evan Grider were fired by Arrow Electric Company on February 27, 1996. In the weeks preceding their termination, these four employees had significant problems with one of their immediate supervisors, Sonny Collins. The problems centered on Collins' belligerent and disrespectful attitude toward his subordinates, and his lack of concern about employee safety issues. After complaints to Collins' supervisor, Donald Jeffries, Collins apologized for his conduct. Jeffries told the employees to come to him if there were any more problems with Collins.

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[24] NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531 (6th Cir. 2000).
[25] *Id*. at 535.
[26] *Id*. at 539.
[27] *Id*. at 538, 539.
[28] *Id.* at 537-38. *See also* N.L.R.B. v. Fleetwood Trailer Co., Inc., 389 U.S. 375, 378 (1967); Jeannette Corp. v. N.L.R.B., 532 F.2d 916, 918 (3rd Cir. 1976).
[29] Arrow Elec. Co., Inc. v. N.L.R.B., 155 F.3d 762 (6th Cir. 1998).

The problems resurfaced the week following the apology. The employees decided to contact Jeffries based on his statement that they should come to him with future problems. After unsuccessful attempts to reach him by radio and phone, the employees left the work site and drove to the company shop. Ultimately, the four employees were fired for leaving "leaving the jobsite without notice."[30]

According to the court, the actions of the four employees in leaving the worksite were protected under §7 of the NLRA. The employee walkout was designed to remedy the negative impact of Collins' behavior on the working conditions and productivity of the employees. Arrow Electric could not establish that it would have discharged the employees had they not left the worksite. The employees were thus discharged due to their exercise of rights under the NLRA, violating §8(a)(1) of the Act.[31]

**LIMITATIONS ON EMPLOYEE BEHAVIOR**

The courts have been consistent and clear. Nonunion employees are protected by the NLRA. Section 8(a) of the Act protects employees' Section 7 rights from unfair labor practices by employers.[32] "Employees' activities are protected by Section 7 if they might reasonably be expected to affect terms or conditions of employment."[33] The action must involve both a protected right under Section 7 of the Act and involve a concerted activity by the employee or employees. Thus, under the Act, not all employee conduct will be protected as concerted activities for mutual aid or protection. For example, behavior that is unlawful, too disloyal to the employer, or in breach of contract may not be protected.[34]

Employers may discipline employees when the employees' actions are not both concerted and protected. Disciplinary actions may include discharge of the employees. Employees have been properly discharged for actions inside the workplace that were not aimed at a protected Section 7 right. For example, an employee who posted cartoons insulting the company president had not engaged in concerted, protected activities.[35] Employees who engage in concerted activities outside the workplace that are detrimental to their employer may be discharged for cause. Employees of a television broadcasting company did not engage in concerted, protected activities when they distributed handbills to the public attacking the quality of their employer's broadcasts.[36] The handbills in question made no mention of an employment dispute; they simply alleged that the broadcasting company was unwilling to provide the local consumer with quality

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[30] *Id*. at 764.
[31] For other court opinions holding walkouts by employees to protest job conditions to be protected activities, s*ee, e.g.,* Vic Tanny Int'l, Inc. v. NLRB, 622 F.2d 237 (6th Cir.1980) (unlawful discharge of health spa employees due in part to walkout over changed terms of employment); NLRB v. C.J. Krehbiel Co., 593 F.2d 262 (6th Cir.1979) (print shop employees unlawfully discharged due to walkout over unfair treatment in job assignments).
[32] 29 U.S.C. 158(a).
[33] Brown & Root, Inc. v. NLRB, 634 F.2d 816,818 (5th Cir. 1981).
[34] *See, e.g.,* Corbett, *supra* note 10, at 279; Charles J. Morris, NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct, 137 U. PA. L. REV. 1673, 1707 (1989).
[35] Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967).
[36] NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953).

programming.[37] Similarly, an employee of Boeing Airplane Company could not simultaneously serve as an employee and as an employment agent who attempted to secure jobs for Boeing engineers with competing companies.[38]

On the other hand, when it has been established that the employer's disciplinary conduct adversely affects employees' protected rights under the NLRA, the burden falls on the employer to demonstrate legitimate and substantial business justifications for its conduct.[39]

## CONCLUSION

No lawyer can master all areas of law. For the sake of time, many lawyers specialize out of certain areas of legal practice. For example, many lawyers choose to ignore securities law, taxation issues, or trusts and estates. Labor law is found on many lawyers' lists of excluded legal topics, due to the small number of unionized employees in many areas of the United States economy. Ignoring labor law, however, is not an option as the courts have consistently applied these laws to all employees, union and nonunion. It is incumbent on the teaching or practicing lawyer to remain abreast of labor law concepts and trends. Failure to do so may result in faulty advice being delivered to students and/or legal clients.

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[37] *Id.* at 468.
[38] Boeing Airplane Co. v. NLRB, 238 F.2d 188 (9th Cir. 1956).
[39] *See, e.g.*, Jeannette Corp., *supra* note 30, at 918.