National Labor Relations Board Update

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RECENT SIGNIFICANT NLRB DECISIONS

Confidentiality of HR Investigations

Boeing Co., 362 NLRB No. 195 (2015)

The Board panel held that the Employer violated Section 8(a)(1) by maintaining and routinely distributing prior to November 2012 a confidentiality notice to all employees involved in human resources investigations. That notice stated in relevant part: "you are directed not to discuss this case with any Boeing employee other than company employees who are investigating this issue or your union representative, if applicable." The notice went on to state that if any coworker or manager asked the employee to discuss the case, the employee should inform him or her that "you have been instructed not to discuss it" and refer the individual to the investigating HR representative. The panel noted that an employer may legitimately require confidentiality in appropriate circumstances when its need for confidentiality with respect to a specific investigation outweighs employees' statutory right to discuss among themselves their terms and conditions of employment. However, the Employer's generalized concern about protecting the integrity of all of its investigations was insufficient to justify its sweeping policy.

A panel majority also found unlawful the Employer's revised confidentiality notice routinely distributed to employee witnesses after November 2012. The revised notice substituted the language "we recommend that you refrain from discussing this case" for "you are directed not to discuss[,]" and advised employees that if any coworker or manager asked to discuss the case "we recommend that you inform him or her that Human Resources has requested that you not discuss the case[.]" The majority found that the revised confidentiality notice would reasonably tend to inhibit Section 7 activity, given the notice's clear communication of the Employer's desire for confidentiality, the Employer's routine requests that employees sign the notice, and the lack of any assurance in the notice that employees were free to disregard the Employer's recommendation.

Employee Discipline for PCA

Central States Southeast and Southwest Areas, Health & Welfare and Pension Funds, 362 NLRB No. 155 (2015)

The Board found that the Employer violated Section 8(a)(1) by threatening an employee with suspension unless he removed a written disciplinary letter that he had posted in his work area. The employee removed the letter. Citing *Philips Electronics*, 361 NLRB No. 16, slip op. at 2 (2014), the Board explained that an employer may not prohibit employees from discussing discipline unless the employer asserts a legitimate and substantial business justification that outweighs employees' exercise of Section 7 rights. The Board rejected the Employer's asserted business justification—that posting the letter was disruptive and insubordinate—because it had no "factual basis" and would effectively permit the Employer to pick and choose how its employees could communicate with each other regarding disciplinary matters.

Photography and Video Recordings

Whole Foods Market, Inc., 363 NLRB No. 87 (2015)

The panel majority held that the Employer's rules prohibiting recording of conversations, phone calls, images, or company meetings without prior management approval violated Section 8(a)(1). The majority found that photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present, citing *Rio All-Suites & Casino*, 362 NLRB No. 190, slip op. at 4 (Aug. 27, 2015). The majority referred to the same examples of protected concerted activity referenced in *Rio All-Suites & Casino*, and also cited case law where photography or recording, often covert, was an essential element in vindicating an underlying Section 7 right. Since the rules at issue unqualifiedly prohibited all workplace recording, the majority found the rules would reasonably chill employees in the exercise of Section 7 rights. Further, the majority found that the Employer's asserted interest in preserving privacy interests in certain circumstances and encouraging open communication failed to justify the rules' unqualified restrictions on Section 7 activity.

Social Media

Pier Sixty, LLC, 362 NLRB No. 59 (2015)

The Board majority determined that the Employer—a catering service company—violated Section 8(a)(3) by discharging an employee for his protected, concerted social media posting that included vulgar and obscene language. Employees began an organizing campaign in response to what they viewed as managers' hostile and degrading treatment. Two days prior to the election, while at work, the discriminatee became upset by several rude comments from a supervisor, which he viewed as being consistent with managers' history of hostile behavior. The discriminatee complained to a coworker, who advised him to take a break to calm down. The discriminatee posted on his personal Facebook page the following message: The supervisor is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

The discriminatee's post was visible to his Facebook "friends," which included some co-workers, and to others who visited his personal Facebook page. He deleted the post the day after the election but was terminated shortly thereafter for allegedly violating company policy. However, the Employer declined to provide any policy or explain its decision, and the evidence established that obscene language was routinely tolerated at the Employer's workplace, including managers regularly using racial slurs and epithets such as "motherfucker" and "asshole."

The Board first noted that the discriminatee's Facebook post constituted protected concerted activity and union activity, inasmuch as the comments were part of a sequence of employee actions designed to address what employees viewed as demeaning treatment from

management. Next, the Board concluded that the comments were not so egregious as to lose the protection of the Act.

Work Stoppages

***Sun Cab, Inc. d/b/a Nellis Cab Company*, 362 NLRB No. 185 (2015)**

The Board unanimously concluded that the Employer violated Section 8(a)(1) by suspending 17 employees who engaged in a concerted work stoppage (the "extended break") to protest a proposed regulatory action that could affect their pay. The Employer is a taxicab company that employs over 300 cab drivers. Drivers are required to take a 1-hour break during their shifts. Seventeen of the Employer's drivers took part in a mass protest in their taxicabs, the extended break, against a regulatory proposal supported by the Employer and other taxicab companies that would potentially reduce the drivers' earnings by increasing the number of taxicab medallions. The extended break lasted around 2-3 hours, but a majority of the drivers incorporated their hour-long break as part of the extended break. When the Employer asked the drivers to return to the yard after the extended break, all of them complied. The Employer interrogated the drivers about the motive behind the break and disciplined the drivers for their participation.

***Wal-Mart Stores, Inc.*, 364 NLRB No. 118 (2016)**

The panel majority, affirming the ALJ, found that the Employer unlawfully disciplined six employees unrepresented employees for engaging in a work stoppage in violation of Section 8(a)(1). The employees worked as temporary remodeling associates at a large Wal-Mart location. From the beginning of the remodeling project, the employees complained that their supervisor called them lazy, yelled at them and made offensive, racist comments. After engaging in a strike and submitting a written statement to the Employer concerning the supervisor and their lack of permanent positions, the employees planned a work stoppage with the assistance of OUR Wal-Mart and a union. On the day of the work stoppage, the employees stopped work early in the morning, prior to the store's scheduled opening time. For the next hour and a half, the employees engaged in a peaceful protest, mostly confined to a small customer service area near the main store entrance. Nonemployees joined the protest after the store opened and the group displayed a banner, wore matching T-shirts, held signs and took photographs. After the employees moved to an area close to the front store entrance, the Employer told the employees they should either return to the customer service area or leave the store because they were blocking customers. Three minutes later, the employees returned to the customer service area. Shortly after, uniformed police officers arrived. The six employees left the customer service area to clock out and the nonemployee protesters left the store. Following the protest, the Employer issued a second level discipline to five of the employees and a third level discipline to one employee who had an active prior infraction.

The majority, citing *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005), noted that work stoppages are protected by Section 7 and the Board seeks to accommodate employees' Section 7

rights and an employer's property rights by striking an appropriate balance between the two. The majority applied the *Quietflex* factors to analyze the work stoppage and found that nine out of 10 factors favored finding the work stoppage protected. Those factors included that the stoppage sought to resolve immediately pressing problems, was peaceful, lasted for a short duration, was largely confined to the customer service area of the Employer's store, resulted in little to no disruption of the Employer's ability to serve its customers, and employees had no adequate means to present a group grievance to management. As a result, the majority concluded that the work stoppage was protected and that the employer's discipline of the six employees violated Section 8(a)(1).

Striker Replacements

American Baptist Homes of the West, 364 NLRB No. 13 (2016)

A panel majority reversed the judge's finding that the Employer did not violate the Act by permanently replacing striking employees. The majority re-examined *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964), and held that, under existing Board law, the General Counsel is not required to demonstrate that an employer was motivated by an unlawful purpose extrinsic to the strike in order to find permanent replacement of striking employees unlawful. Rather, the General Counsel can demonstrate an employer's "independent unlawful purpose" by showing that the hiring of permanent replacements was motivated by a purpose prohibited by the Act, including the desire to punish the strikers.

Following expiration of the parties' collective-bargaining agreement, the Union, with several weeks' notice to the Employer, engaged in a 5-day strike to obtain concessions in contract negotiations, followed by an unconditional to return to work. The Employer hired temporary employees for a period of three days and then began permanently replacing the striking employees, ultimately replacing approximately a third of its workforce. The Employer admitted that it was motivated by a desire to avoid future strikes and "wanted to teach the strikers and the Union a lesson."

The Board in *Hot Shoppes* concluded that an employer's unlawful motivation could not be inferred merely based on hiring or planning to hire permanent replacements. In this case, the panel majority concluded that the Employer's admitted motivation to hire permanent replacements to "teach the strikers and the union a lesson" and to "avoid any future strikes" constituted independent unlawful purposes under *Hot Shoppes* because it revealed an intent to punish employees for engaging in protected conduct—a retaliatory motive barred by the Act—and a desire to interfere with employees' future protected activity. Thus, the majority held that the Employer's refusal to reinstate the strikers was unlawful.

Bargaining Unit Composition

Miller & Anderson, Inc., 364 NLRB No. 39 (2016)

The Board majority overruled *Oakwood Care Center*, 343 NLRB 659 (2004), and returned to the rule articulated in *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000), holding that a single bargaining unit can encompass both a company's own employees and employees jointly employed by the company and a supplying employer, without requiring employer consent. This decision follows the Board's significant joint employer holding in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), where it concluded that two or more statutory employers are joint employers of the same statutory employees if they "share or codetermine those matters governing the essential terms and conditions of employment."

Search for Work Expenses

King Soopers, 364 NLRB No. 93 (2016)

The Board majority adopted a new remedial policy of awarding search-for-work and interim employment expenses regardless of discriminatees' interim earnings. This policy replaces the Board's previous practice of treating discriminatees' search-for-work and interim employment expenses as an offset against interim earnings. The majority reasoned that its traditional approach has not only failed to make victims of unlawful conduct whole, but also may have discouraged discriminatees in their job search efforts. Under the old approach, discriminatees who were unable to find work would not receive any compensation for search-for-work expenses and those that found jobs where they made less than their expenses would not receive full compensation. According to the majority, the make-whole remedy should ensure that discriminatees are fully compensated for their losses and deter future violations.

Management Rights Clause

E.I. Du Pont de Nemours, 364 NLRB No. 113 (2016)

On remand from the Court of Appeals, the Board majority reaffirmed the Board's prior holding that the Employer violated Section 8(a)(5) by making unilateral changes to unit employees' benefit plans after expiration of two collective-bargaining agreements and that the Employer could not rely on management rights clauses that expired under those agreements.

On remand, the Board overruled the *Courier-Journal* cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004). The Board opted to return to the rule that unilateral, postexpiration discretionary changes are unlawful, notwithstanding an expired management rights clause or an ostensible past practice of discretionary changes based on the clause, as articulated in cases such as *Beverly Health & Rehab. Services*, 335 NLRB 635 (2001), *enforced in relevant part* 317 F.3d 316 (D.C. Cir. 2003), and *Register-Guard*, 339 NLRB 353 (2003). Otherwise, the Board reasoned, the expiration of a management rights clause would be meaningless and parties would

have little incentive to bargain and agree on proposals if the employer retained absolute discretion to make changes after the contract expires. The Board noted that its decision had no effect on an employer's ability to make unilateral postexpiration changes where the employer had an established past practice of changes according to fixed criterion. Applying the same discretionary changes on unit employees as non-unit employees, however—as was the case here—would not be considered a fixed criterion.

Pre-Imposition Bargaining over Discretionary Discipline

Total Security Management Illinois 1, LLC, 364 NLRB No. 106 (2016)

In view of the Supreme Court's decision in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014), the Board considered *de novo* whether an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees when a certified or lawfully recognized union has not yet entered into a collective-bargaining agreement with the employer, as considered in the Board's vacated Decision and Order in *Alan Ritchey, Inc.*, reported at 359 NLRB 396 (2012). The Board majority answered in the affirmative, essentially adopting the holding in *Alan Ritchey*, but with one significant change to the remedial portion: an employer who has failed to bargain over discretionary discipline that resulted in an employee's discharge may now raise as an affirmative defense that reinstatement and backpay may not be awarded because the discipline was "for cause" within the meaning of Section 10(c).

First, the majority held that pre-imposition bargaining only applies to serious discipline that has an immediate impact on an employee's tenure, status, or earnings. Discipline of individual employees alters their terms and conditions of employment and implicates the duty to bargain if it is not controlled by pre-existing, nondiscretionary employer policies or practices. Next, the Board held that it will require bargaining before discretionary discipline is imposed. Accordingly, an employer must maintain the fixed aspects of its disciplinary system and bargain with the Union over the discretionary aspects, if any, such as whether to impose discipline in a particular case or the type of the discipline to be imposed. The Board expressly overruled *Fresno Bee*, 337 NLRB 1161 (2002), in this regard. The majority also held, following the approach of *Alan Ritchey*, that an employer's obligation is simply to provide the union with sufficient notice and opportunity to bargain before discipline is imposed. Further, the employer is *not* required to bargain to agreement or impasse at this stage; rather, if the parties do not reach agreement, the employer may impose the disciplinary action and then continue bargaining to agreement or impasse. Finally, an employer may unilaterally impose discipline without advance notice to the union in a situation that presents exigent circumstances.

The Board also provided guidance that, in future cases, the Board's standard make-whole remedy for unlawful unilateral changes would be granted, including reinstatement and backpay as necessary. However, unlike *Alan Ritchey*, employers will now have the opportunity raise as an affirmative defense that reinstatement and backpay may not be awarded because the discipline was "for cause" within the meaning of Section 10(c).

T-Shirt Messages

***Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115 (2016)**

On remand from the Court of Appeals, the panel majority reaffirmed the Board's prior holding that the Employer, a mail order pharmacy and call center failed to establish special circumstances to justify requiring an employee to remove a T-shirt critical of a nonmonetary incentive program called the "WOW program," and violated Section 8(a)(1) by ordering the employee to remove the T-shirt and impliedly threatening him with discharge over his opposition to the program. An employee, who was a Union officer, wore a T-shirt with the Union logo that contained the slogan "I don't need a WOW to do my job." The majority also reaffirmed its prior holding that the Employer's dress code was unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

Review of Arbitrator's Decision/Racial Statements

***Cooper Tire & Rubber Co.*, 363 NLRB No. 194 (2016)**

The Board panel affirmed the ALJ's conclusion that an arbitrator's decision was "clearly repugnant" to the Act under *Speilberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), because the discriminatee's statements on the picket line were protected as they did not reasonably tend to coerce or intimidate employees in their rights under the Act or raise a reasonable likelihood of an imminent physical confrontation.

During a contract dispute, the Employer locked out bargaining-unit employees and replaced them with temporary replacement workers, most of whom were African-American. The Union set up picket lines and the Employer's security guards recorded employees' picketing activity. One evening, a van carrying replacement workers drove towards the main gate while picketers on both sides held up signs and yelled objections. After a van had passed, the discriminatee yelled towards the gate, "Hey, did you bring enough KFC for everyone?" A few moments later, facing the other picketers across the street, the discriminatee said, "Hey, anybody smell that? I smell fried chicken and watermelon." In response, picketers across the street laughed. There were no allegations of violence or physical intimidation on that evening or any time during the picketing. The Employer discharged the discriminatee based on these recorded statements, claiming that they violated the Employer's anti-harassment policy. The Union filed a grievance under the parties' collective-bargaining agreement and the dispute went before an arbitrator. The arbitrator found that the discriminatee was discharged for just cause because his statements were prohibited under the Employer's anti-harassment policy.

The ALJ reviewed the standard for evaluating employee conduct on the picket line under *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), *enforced* 765 F.2d 148 (9th Cir. 1985). Although serious acts of misconduct may disqualify an employee from the protection of the Act, the inquiry under *Clear Pine Mouldings* is whether statements may reasonably tend to coerce or intimidate employees in their rights protected under the Act or whether those statements raised a reasonable likelihood of an imminent physical confrontation. The ALJ found that the

discriminatee's statements, while "racist" and "offensive," were not violent in character. Rejecting the employer's arguments that "making racist comments is not protected activity," the ALJ observed that the discriminatee's statements cannot be evaluated in isolation or in the context of a normal workplace environment because the Board distinguishes between conduct occurring in the workplace and conduct occurring on the picket line, where the Board tolerates repulsive and offensive statements. Finding that the arbitrator's award was "not susceptible to an interpretation that is consistent with the Act," under *Olin Corp.*, 268 NLRB 573, 573–74 (1984), the ALJ concluded that deferral was inappropriate. The Board panel adopted the ALJ's findings and agreed that deferral was inappropriate.

Discharge for Testimony to State Legislature

***Oncor Electric Delivery Co.*, 364 NLRB No. 58 (2016)**

The Board panel found that the Employer violated Section 8(a)(3) by discharging an employee after he testified before a state legislature regarding safety hazards associated with the Employer's electric utility meters. The discriminatee was a long-term employee whose job responsibilities included responding to power outages at customers' homes. In 2012, while serving as the Union's chief negotiator for bargaining a successor collective-bargaining agreement, the discriminatee told the Employer that he would be testifying before the state legislature regarding the Employer's smart electric meters. The next day, while appearing as a representative of the Union, the discriminatee testified about safety hazards associated with smart meters. In particular, he spoke about his service calls involving smart meters "burning up and burning up the meter bases" and causing damage to customers' homes. The Employer discharged the discriminatee following his testimony.

The panel, citing *GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989), *enforced mem.* 924 F.2d 1055 (5th Cir. 1991), began by finding that the discriminatee's testimony was concerted because he testified on a matter of ongoing concern to the Union and in his capacity as a Union official. The panel then found that the discriminatee's testimony was for the purpose of "mutual aid and protection" within the meaning of Section 7 and had an "immediate relationship to employees' interests" as employees, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) because: 1) it was motivated by an attempt to gain leverage in negotiations; 2) the Employer had control over the installation of smart meters discussed in the testimony, and 3) the testimony related to an ongoing Union concern regarding the safety of bargaining-unit employees. Finally, the panel found that the testimony, which was based on the discriminatee's firsthand experience, did not lose the protection of the Act because the statements were not "maliciously untrue," citing *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), *enforced mem.* 358 Fed. Appx. 783 (9th Cir. 2009), and dismissed the Employer's "highly technical argument" to the contrary.

Fight for $15

EYM King of Missouri, LLC d/b/a Burger King, 365 NLRB No. 16 (2017)

The Board found that the Respondent violated Section 8(a)(1) by disciplining six employees for participating in a one-day strike affiliated with the nationwide "Fight for $15" campaign to increase wages and improve working conditions for fast food workers. The Board agreed with the judge that the one-day strike did not constitute unprotected intermittent strike activity, emphasizing that employees had engaged in only one strike against the Respondent at the time it issued the discipline.

In-N-Out Burger, Inc., 365 NLRB No. 36 (2017)

The Board adopted the Administrative Law Judge's conclusion that the Respondent, which operates burger facilities, violated Section 8(a)(1) by unlawfully maintaining a "no buttons" policy and by unlawfully enforcing that policy against one or more employees regarding the wearing of a "Fight for Fifteen" button. The Board agreed with the judge that the Respondent had not demonstrated that the wearing of such a button would unreasonably interfere with a public image that the Respondent had established sufficient to establish "special circumstances" that would justify an exception to the general rule that employees have a statutory right to wear union buttons or insignia at the workplace. The Board, however, reversed the judge's finding that the issue of whether a nationwide remedy should be imposed should be left to the compliance stage of the proceeding, and ordered a nationwide remedy. In doing so, the Board noted that the parties had stipulated that the Respondent's "dress and grooming" policy applied to all of the Respondent's facilities, and that the Respondent's brief made repeated references to the importance of the "consistency" of the customer experience from store to store.

Handbook Rules

Cellco Partnership d/b/a Verizon Wireless, 365 NLRB No. 38 (2017)

The Board found that the Respondent violated Section 8(a)(1) by maintaining a rule in its employee handbook stating that memberships in outside organizations or associations "can cause conflicts if they require decisions regarding Verizon Wireless or its products" and requiring employees who are members of an outside organization to "remove yourself from discussing or voting on any matter that involves the interests of Verizon Wireless or its competitors," "disclose this conflict to your outside organization without disclosing non-public company information," and "disclose any such potential conflict to the [Respondent's] VZ Compliance Guideline." The Board also unanimously affirmed the dismissal of the allegations that the Respondent violated Section 8(a)(1) by maintaining handbook rules requiring employees to "take appropriate steps to protect confidential personal employee information, including social security numbers, identification numbers, passwords, bank account information and medical information"; instructing employees that they "should never access or obtain, and may not disclose outside of

Verizon, another employee's personal information obtained from Verizon business records or systems unless you are acting for legitimate business purposes and in accordance with applicable laws, legal process and company policies, including obtaining any approvals necessary under those policies"; and informing employees that "unless permitted by written company policy, it is never appropriate to use Verizon Wireless machinery, switching equipment or vehicles for personal purposes, or any device or system to obtain unauthorized free or discount services."

The Board majority affirmed the judge's conclusion that the Respondent violated Section 8(a)(1) by maintaining the following rules in its employee handbook: prohibiting employees from using "company resources at any time (emails, fax machines, computers, telephones, etc.) to solicit or distribute"; requiring employees to "take appropriate steps to protect all personal employee information, including . . . residential telephone numbers and addresses"; instructing employees that they "should never access, obtain or disclose another employee's personal information to persons inside or outside of Verizon Wireless unless you are acting for legitimate business purposes and in accordance with applicable laws, legal process and company policies, including obtaining any approvals necessary under these policies"; prohibiting employees from using "company systems (such as e-mail, instant messaging, the Intranet or Internet) to engage in activities that . . . result in Verizon Wireless' . . . embarrassment;" prohibiting employees from using the company systems for "unauthorized mass distributions" and "communications primarily directed to a group of employees inside the company on behalf of an outside organization"; prohibiting employees from "theft or unauthorized access, use or disclosure of company, customer or employee records, data, funds, property or information (whether or not it is proprietary)" and "disparaging or misrepresenting the company's products or services or its employees."

Use of Employer Electronic Communications

***Purple Communications, Inc. (Purple II),* 365 NLRB No. 50 (2017)**

The Board panel adopted the Administrative Law Judge's Supplemental Decision finding, on remand from the Board, that the Respondent violated Section 8(a)(1) by maintaining an electronic communications policy that unlawfully restricts the employees' use of the Respondent's email system. In *Purple Communications, Inc.*, 361 NLRB No. 126 (2014) (*Purple I*), the Board partially overruled *Register Guard*, 351 NLRB 1110 (2007), and found that "employee use of email for statutorily protected communication on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." The Board also stated that an employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights. The Board remanded the proceeding to the judge to allow the parties to introduce evidence relevant to a determination of the lawfulness of the policy under the new standard. The Respondent chose not to introduce any additional evidence and notified the judge that it would not contend that special circumstances exist justifying its policy. Accordingly, the judge concluded that the Respondent's electronic communications policy violated Section 8(a)(1).

Retaliation for Filing a Lawsuit

MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino/HG Staffing,* 365 NLRB No. 76 *(2017)

The Board adopted the Administrative Law Judge's conclusion that the Respondent violated Section 8(a)(1) by denying a former employee access to a nightclub on its entertainment premises because she had filed a work-related class and collective action lawsuit against the Respondent. The majority agreed with the judge that, by singling out its former employee contrary to its practice of granting access to former employees as it would to the general public, the Respondent engaged in unlawful retaliation that would deter its employees from participating in a work-related lawsuit or in other protected concerted activity.

Conduct of Legal Counsel

***Deep Distributors of Greater NY d/b/a The Imperial Sales, Inc.,* 365 NLRB No. 95 (2017)**

The Board adopted the Administrative Law Judge's conclusions in this consolidated unfair labor practice and representation case. The Board found that the Respondent violated Section 8(a)(1) making varois threats and statements. The Board also found that the Respondent violated Section 8(a)(3) and (1) by terminating eight employees. The Board overruled the election objections and remanded the case to the Regional Director to open and count the ballots of four challenged employees and issue a revised tally of ballots.

Additionally, the Board found that Respondent's attorney engaged in a persistent pattern of aggravated misconduct during the course of the hearing and referred his alleged misconduct to the Investigating Officer pursuant to Section 102.117(e) of the Board's Rules. During the course of the hearing, Respondent's attorney allegedly engaged in a persistent pattern of aggravated misconduct that interfered with the judge's attempts to conduct the hearing. The judge put Respondent's attorney "on notice that this is an admonishment and a reprimand" on four separate occasions. Respondent's attorney's apparent misconduct included the following unjustified and repeated behavior: bullying and intimidating the General Counsel's witnesses, including by making threats to report them to immigration authorities; falsely accusing the Union's president of threatening Respondent's attorney's safety and referring to him as a "felon"; summoning federal marshals to the courtroom and insisting on a police presence throughout the hearing; accusing the General Counsel of misconduct; and questioning the trial judge's competence and authority after rulings had been made.

Facebook Criticism of Union

***Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors, Inc. and Various Other Employers),* 365 NLRB No. 28 (2017)**

The Board adopted the Administrative Law Judge's conclusion that the Respondent violated Section 8(b)(1)(A) by removing the Charging Party from its out-of-work referral list in response to his Facebook posts criticizing the Respondent and its business manager. Applying the balancing test set forth in *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000), the Board found that the Charging Party's Section 7 right to press the Union to change its policies, especially those policies affecting members' employment opportunities, outweighed the Respondent's vague claim that Charging Party's Facebook posts damaged both its reputation in general as well as the reputation of its business manager.

Union Resignation and Dues Deductions

Local 58, International Brotherhood of Electrical Workers (IBEW), AFL-CIO (Paramount Industries, Inc., 365 NLRB No. 30 (2017)

A Board majority reversed the Administrative Law Judge and found that the Respondent's newly-announced resignation and dues checkoff policy violated Section 8(b)(1)(A). The majority found that the Respondent's maintenance of this policy, which instructs members who wish to resign from membership and dues deduction to present written resignations with photo identification at the Respondent's hall or, if they feel that appearing in person presents an undue hardship, to make other arrangements to verify their identities, imposed a restriction on resignation like that found unlawful in *Machinists Local Lodge 1414 (Neufeld Porsche-Audi, Inc.)*, 270 NLRB 1330 (1984), and its progeny. Similarly, the majority found that the policy impermissibly restrained the revocation of dues checkoff authorizations, which also implicates the Section 7 right to refrain from union activity.

Jurisdiction over Charter Schools

***Voices for International Business and Education, Inc. d/b/a International High School of New Orleans, Case 15-RC-175505* (2017)**

The Board denied the Employer's request for review of the Regional Director's Decision and Direction of Election holding that the Employer's charter school is not exempt as a political subdivision under Section 2(2). The Board majority found that the Regional Director correctly applied the test in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971)("*Hawkins County*") and that her reasoning was consistent with the Board's recent decision in *Hyde Leadership Charter School*, 364 NLRB No. 88 (2016)("*Hyde Leadership*"). They also found no merit in the Employer's arguments that the Board should decline to assert jurisdiction over the charter school because of its limited impact on interstate

commerce, the legislative intent to treat charter schools as public schools, and the state's authority to regulate the labor relations of its public employees, noting that the Board rejected similar arguments in *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016)("*Pennsylvania Virtual*") and *Hyde Leadership*, supra.

Employee vs. Independent Contractor Status

***Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB No. 107 (2017)**

On review, the Board affirmed the Regional Director's finding that the petitioned-for lacrosse officials, who officiate in certain geographic districts of the Pennsylvania Interscholastic Athletic Association (PIAA), are employees covered under Section 2(3), rather than independent contractors. Applying the Board's analysis in *FedEx Home Delivery*, 361 NLRB No. 55 (2014), the majority found that the factors demonstrating employee status here outweighed other factors suggesting possible independent contractor status. In particular, the majority emphasized PIAA's control over the officials' work, the integral nature of their work to PIAA's regular business, PIAA's supervision of the officials, the method of payment, and the fact that officials do not render their officiating services as part of an independent business—similar in many ways to the musicians who were found to be statutory employees in *Lancaster Symphony Orchestra*, 357 NLRB 1761 (2011).

New Representation Case Rules

***RHCG Safety Corp.*, 365 NLRB No. 88 (2017)**

In this consolidated unfair labor practice and representation case, the Board unanimously adopted the judge's recommendation to set aside the election and direct a new election. The majority found three independent bases for setting aside the election: (1) approximately 90% percent of the addresses on the voter list were inaccurate; (2) the list omitted the names of at least 15 eligible voters; and (3) the Respondent did not provide phone numbers for any of its employees on the list. In joining his colleagues to set aside the election, Chairman Miscimarra relied only on the finding that about 90% of the addresses on the voter list were incorrect.