Federal Labor Laws

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Revised, July 2011

XIII. Discriminatory Actions to Encourage or Discourage Union Activity

A. General Considerations

1. Section 8(a)(3) of the National Labor Relations Act[1] makes it unlawful for an employer to encourage or discourage union activity by discrimination in regard to terms and conditions of employment, except to the extent that legal union security agreements are enforced. Under § 8(b)(2),[2] it is unlawful for a union to cause or attempt to cause an employer to violate § 8(a)(3).

2. Section 8(a)(3) is similar to § 8(a)(1) except that three additional elements are required:

    a. Under § 8(a)(3), some form of discriminatory treatment must be involved, while under § 8(a)(1), an employer may passively violate the law. Not all discriminatory treatment is objectionable under § 8(a)(3).[3]

    b. Section 8(a)(3) applies only to union-related activity, while § 8(a)(1) applies to the broader concept of protected, concerted activity.[4]

    c. There is also a question of motive under § 8(a)(3). It is necessary to prove that the action of the employer was taken for purposes of encouraging or discouraging union activity.[5]

3. While a high percentage of cases in which a violation of § 8(a)(3) is alleged involves disciplinary matters, prohibited discriminatory treatment is not limited to cases involving discipline.

    a. In addition to disciplinary action, discriminatory treatment may involve actions as basic as the refusal to consider a job application because of the applicant's union membership,

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[1] 29 U.S.C. § 158(a)(3).

[2] 29 U.S.C. § 158(b)(2).

[3] *E.g.*, the first proviso of §8(a)(3) permits union shop agreements (unless the union covers employees in a "right-to-work" state) under certain conditions.

[4] *Radio Officers v. NLRB (A.H. Bull Steamship Co.),* 347 U.S. 17 (1954).

[5] *E.g., Retail Clerks Local 770*, 208 NLRB 356 (1974).

through discriminatory job assignments, to plant closings motivated by the anti-union sentiments of the employer.

b. Establishing discriminatory treatment often involves a direct comparison of similarly situated employees, to determine whether it appears that the disparate treatment was taken for discriminatory purposes.[6]

B. Proof of Motive

1. Because an employer will rarely admit that the reason for some discriminatory treatment was hostility toward the union, there are substantial problems of proof in § 8(a)(3) cases. It is necessary in § 8(a)(3) cases to look beyond the stated reason for an action to determine whether that reason is a pretext for an unlawful discriminatory treatment.[7]

2. Proof of motive does not require evidence of the employer's specific intent to encourage or discourage union activity. Proof of an unlawful motive may be established through circumstantial evidence. The employer is presumed to intentionally bring about the natural consequences of its actions.[8]

3. Problems of proof are compounded by § 10(c), which makes it clear that the employer retains the right to discipline a worker for cause.[9]

4. There are three broad categories of cases in which the motive of the employer in taking action directly affects the outcome of an unfair labor practice case under § 8(a)(3). In "garden variety" cases, the action of the employer is taken specifically as a result of an unlawful, anti-union motive.[10] In dual motive cases, the employer takes action against an employee for two distinct reasons, one that would constitute just cause and another based in unlawful, anti-union motives.

5. In dual motive cases, the employer defends a charge on the basis that even though an illegal motive was involved in the decision to take action against a worker, the action would have been taken

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[6] *E.g., Register Guard*, 344 NLRB 1143 (2005)(probationary employees).

[7] *Laidlaw Corp*., 171 NLRB 1366 (1968).

[8] *Radio Officers v. NLRB*, *supra* at note 4.

[9] *E.g., Associated Press*, 301 U.S. 103 (1937).

[10] *E.g., St. Joseph's Hospital*, 337 NLRB 94 (2001)(employee warned for displaying pro-union message on computer screen saver, while other employees are permitted to display personal, non-work related messages).

irrespective of the unlawful motive because of the legitimate cause for action.[11]

6. In mixed motive, pretext cases, the employer attempts to establish a legitimate basis for discriminatory action but the role of the Board is to determine whether the stated reason for the action is a pretext for an unlawful motive. Under current Board law, the General Counsel has the burden of proving that the anti-union motive was the principle motivating force behind an alleged discriminatory action.[12] In earlier mixed motive cases the Board would accept a showing that the anti-union motive was a substantial factor leading to the employer's action.

    a. Under the *Wright Line* rules, the General Counsel has a burden of showing that the unlawful reason for action was a principle motivating factor in the disciplinary action. If this test is satisfied, the employer may then show that the person would have been disciplined even in the absence of the unlawful motive.[13] The effect of this decision is that the Board will accept almost any plausible justification for the discriminatory treatment.[14]

    b. If the employer successfully establishes that the employee would have been disciplined even in the absence of the unlawful motive, the burden shifts back to the General Counsel. In order to establish a violation, the General Counsel must then show that the stated reason for the employer's action is a pretext for unlawful action.

    c. The Supreme Court has upheld the *Wright Line* rule.[15]

7. To prove an illegal, anti-union motive, some of the issues which need investigation are:

    a. The employer's general attitude toward unionization,

    b. Whether the worker actually did what the employer alleges,

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[11] *Holo-Krome Company v. NLRB*, 954 F.2d 108 (2d Cir. 1992).

[12] *Wright Line*, 251 NLRB 1083 (1980), *enforced, NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981).

[13] The employer essentially raises the issue of the legitimate reason for taking action as an affirmative defense. S*ee e.g.*, *Gold Coast Restaurant Corp. d/b/a Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991).

[14] *E.g., GSX Corporation of Missouri*, 918 F2d 1351 (8th Cir. 1990).

[15] *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

c. Whether the action directed against this worker is consistent with the treatment afforded other workers accused of the same offense,[16]

d. Whether the employer was aware that the worker was engaged in union activity,[17] and

e. Whether the treatment of this worker changed after the employer became aware of the worker's involvement in union activity.

8. In some cases, the impact of the employer's action is so "inherently destructive" of workers' § 7 rights that no specific proof of unlawful motive is necessary. In such cases, the action of the employer is sufficient to prove the illegal motive. For example, an employer who grants superseniority to strikebreakers is guilty of a § 8(a)(3) violation irrespective of any claimed legitimate business justification for the action.[18] In *Estmark Inc. v. NLRB*,[19] two types of inherently destructive acts were defined by the Seventh Circuit, (1) Actions which distinguish among workers based on their participation (or lack of) in a particular concerted action (e.g., a strike), and (2) Actions that discourage collective bargaining, the result being a sense of futility on the employee's part.

C. Anti-union discrimination in the hiring process

1. While it has been established for years that the protection of employees against discriminatory treatment because of their union activity extends to applicants as well as current employees,[20] a number of cases decided since the 1990s have led to a unique set of standards applicable to cases involving allegations that an employer has either refused to consider job applications or refused to hire applicants because of the applicants' union activities.

2. In 1995, the Supreme Court upheld the principle that "salts" do not lose their status as employees or applicants. The practice of salting is one in which a union sends paid organizers to apply for open positions with non-union employers with the specific objective of

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[16] *Richmond Refining Co.*, 212 NLRB 16 (1974).

[17] *Leyendecker Paving, Inc.*, 247 NLRB 28 (1980).

[18] *NLRB v. Erie Resistor Corp*., 373 U.S. 221 (1963). Other activities that have been found to be inherently destructive are the transfer of bargaining unit work, *Centra, Inc.,* 954 F2d 366 (6th Cir. 1992) and terminations due to union affiliation, *Catalytic Industrial Maintenance Co.,* 301 NLRB 342 (1991).

[19] 887 F2d 739 (7th Cir. 1989).

[20] *Phelps Dodge Corp. v. NLRB*, 317 NLRB 177 (1941)(statutory prohibition against "discrimination in regard to hire . . ."clearly indicates that statutory definition of "employee" must include job applicants).

attempting to organize the employees of the employer. Under its *Town & Country Electric*[21] decision, the Supreme Court ruled that as long as the individual is prepared to work for the employer as an employee, the salt does not lose protection of the law simply because he or she is also a paid union organizer.

3. Around the time of the *Town & Country* decision, the Board and several Courts of Appeals took differing positions concerning the standards of proof and remedial questions involved in refusal to consider and refusal to hire cases.

   a. The Board initially took the position that proof of unlawful refusal to consider job applicants was sufficient to establish an unlawful refusal to hire. Under this approach, an order requiring the employer to instate applicants to positions for which they applied was the basic remedy for an unlawful refusal to consider. The question of whether appropriate job openings existed was deferred to the compliance phase in which back pay for specific applicants would be considered.[22] This approach was rejected by the Sixth Circuit Court of Appeals. Under the court's interpretation, the existence of actual job openings is an element of proof of a violation. If there is no job opening, there can be no unlawful refusal to hire.[23]

   b. The Fourth Circuit Court of Appeals took a different approach to reconciling the proof of unlawful refusal to consider and remedial questions concerning an unlawful refusal to hire. Under the approach of the Fourth Circuit, an instatement and back pay remedy had to be tied directly to the number of job openings available to applicants. In the case under consideration, the employer unlawfully refused to consider 66 job applicants, but the court refused to order an instatement remedy because of lack of evidence concerning the number of job openings.[24] On remand, the Board determined that instatement and back pay would be available only to those applicants that would have been hired but for the unlawful refusal to consider, a question to be determined in the compliance phase of the unfair labor practice procedures.[25]

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[21] *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995).

[22] *Fluor Daniel, Inc.,* 311 NLRB 498 (1998).

[23] *NLRB v. Fluor Daniel, Inc.,* 161 F.3d 953 (6th Cir. 1998).

[24] *Ultrasystems Western Constructors v. NLRB*, 18 F.3d 251 (4th Cir. 1994), denying enforcement of *Ultrasystems Western Constructors*, 310 NLRB 545 (1993).

[25] *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995).

c. The Seventh Circuit Court of Appeals followed a third line of reasoning. Under that court's approach, the existence of at least some job openings, and therefore some evidence of a refusal to hire, is an essential element of proof of an unlawful refusal to consider. In the absence of a job opening, the employer would not have hired anyone, irrespective of the presence of an unlawful refusal to consider. However, if there is evidence of at least one refusal to hire, the determination of how many applicants could be entitled to an instatement and back pay order could be left to the compliance phase of the proceedings.[26]

4. The Board considered the various approaches to questions of proof and remedial issues in refusal to consider and refusal to hire cases in 2000.[27] The Board adopted an approach similar to that of the *Wright Line*[28] analysis applicable to mixed motive disciplinary cases. Under *FES*, refusal to consider job applicant cases can be decided with or without proof of an unlawful refusal to hire. In both types of cases, a shifting burden of proof applies.

   a. In refusal to hire cases, the initial burden of establishing a violation falls to the General Counsel. For a prima facie case of a violation to be established, the General Counsel must prove that (1) the employer was hiring or had concrete plans to hire at the time of the unlawful conduct, (2) that the job applicants had experience and training relevant to the announced or generally known requirements for the position, and (3) that anti-union animus contributed to the decision not to hire the applicants. To establish the second standard, the General Counsel could rely on evidence that the stated requirements were pretextual or applied in a pretextual manner with the specific intent to exclude union applicants.

   b. If the General Counsel is successful in establishing such a prima facie case, the burden shifts to the employer. The employer is given the opportunity to prove that the specific applicants would not have been hired even in the absence of the unlawful refusal to consider.

   c. Under this approach, the availability of an instatement and back pay remedy is resolved in the compliance phase. If four applicants are qualified for two open positions, the employer may be determined to be guilty of an unlawful refusal to hire, but only two of the applicants may be entitled to the instatement and back pay remedy.

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[26] *Starcom, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999).

[27] *FES*, 331 NLRB 9 (2000).

[28] *Wright Line*, *supra* at note 12.

d. Similar standards apply under *FES* to refusal to consider cases. If the General Counsel can establish that (1) the employer excluded applicants from the hiring process and (2) anti-union animus contributed to the exclusion of applicants from consideration, the employer may be guilty of an unlawful refusal to consider. However, the remedy, in the absence of specific job openings, is a cease and desist order and a preferential right to apply and be considered for future job openings. The same remedy would apply to those applicants in a refusal to hire case for which specific job openings did not exist.

5. Two important 2007 decisions of the Board further eroded the standing of salts to pursue unfair labor practice charges based on an employer's refusal to consider and refusal to hire job applicants. One decision altered the procedures for determining the appropriate remedy available to salts in refusal to hire cases and the second altered the basic concept of standing to initiate a charge based on a refusal to consider job applications.

   a. In refusal to hire cases, the Board has traditionally applied a rebuttable presumption of employment of indefinite duration. Under such a presumption, back pay is ordered for an indefinite period of time. To cut off eligibility for back pay, the burden is on the employer to rebut the presumption, showing that at some point, the individual would have ceased working for that employer. Until 2007, this presumption applied to salts as well as other job applicants.[29] In its 2007 decision in Oil Capitol Sheet Metal,[30] the Board developed a new standard for the determination of eligibility of salts to back pay in refusal to hire cases. The Board ruled that the rebuttable presumption of indefinite employment does not apply to salts. In salting cases, the burden of proof falls on the General Counsel to establish that a specific back pay order is reasonable. In essence, the General Counsel must establish how long a salt would have worked for the employer instead of requiring that the employer prove when the salt would have terminated the employment relationship.

   b. In *Toering Electric Co*.,[31] the Board changed the rules concerning standing to initiate a refusal to consider unfair labor practice when applied to salts. Traditionally, the focus of the Board in refusal to hire cases has been on the motive of the employer to determine whether the employer has improperly refused to consider or refused to hire job applicants on the basis of union activity. It was historically

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[29] *See, e.g., Ferguson Electric Co*., 330 NLRB 514 (2000)(back pay to a salt continued until the salt began full-time employment as the business manager of the local union).

[30] 349 NLRB No. 118 (2007).

[31] 351 NLRB No. 18 (2007).

presumed that an applicant for a job was interested in obtaining the job. *Toering Electric* shifted that burden in salting cases to focus on the motivation of the applicant. Under *Toering*, the General Counsel must establish, as an essential element of a refusal to consider or refusal to hire case, that the individual job applicants had a genuine interest in securing employment with the particular employer.

D. Protection of Union Officers and Stewards

1. There is a two-sided problem involved in the protection of stewards and other union officers under § 8(a)(3).

    a. Stewards must be given the freedom to represent workers aggressively without fear of unlawful retribution by the employer, but

    b. Too much contractual protection for union activists may constitute unlawful encouragement of union activity.[32]

2. Stewards and other union representatives must be given considerable latitude in the exercise of their rights to represent the membership. As a result, actions by a steward receive broader protection than similar activities done by other workers.

    a. In the representation of workers, the steward is exempt from the normal standards determining whether a worker is guilty of insubordination.

    b. As long as the steward remains within the realm of the contractual representative,[33] and does not exceed common sense notions of the limits of aggressive representation, he or she is protected from discriminatory discipline by the employer.

3. Preferential seniority and other contractual benefits extended to stewards and other representatives are subject to limitations, based on the statutory prohibition against discrimination to encourage union activity.

    a. For a union representative to be given preferential seniority against lay-off, the representative must have specific obligations under the collective bargaining agreement. Superseniority for purposes other than protection against layoffs and recall is presumably illegal.[34] It is unlawful to

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[32] *Dairylea Cooperative*, 219 NLRB 656 (1975).

[33] *See e.g., Wilson Freight Co.,* 604 F2d 712 (1st Cir. 1979).

[34] *Supra*, note 32.

extend preferential seniority to officers who have no contractual duties.[35]

b. The number of representatives protected against lay-off must be reasonable. There must be someone left to represent if there is to be a representative protected.

c. Contractual provisions allowing the handling of grievances and other contractual matters on company time are acceptable.

d. Company paid wage premiums for being a steward are unlawful.[36]

D. Plant Closings

1. A major area of concern under § 8(a)(3) is the legality of plant closings which are motivated by anti-union animus or which have the effect of discouraging union activity. Whether a plant closing is illegal under § 8(a)(3) was the issue in the Supreme Court case, *Textile Workers Union v. Darlington Manufacturing Co*.[37]

2. The *Darlington Manufacturing* case involved an organizing drive during which the employer threatened to close its plant if the union won a Board election. The union won the election and the company closed the newly unionized plant. Several important points were addressed in the Supreme Court decision:

   a. A company has the absolute right to go completely out of business for any reason, including anti-union reasons.

   b. A company may not close part of its plant if that closing is designed and intended to discourage union membership at other plants which remain open.

   c. The right to go completely out of business and the limitation on anti-union partial shutdowns or runaways exist apart from any duty of the employer to bargain with the union about the decision to close or the effects of the closing.

   d. As an historical footnote, the *Darlington Manufacturing* case is significant for what is probably a record for the length of time it takes to settle all back pay obligations. In 1982, the final settlement of the *Darlington Manufacturing* case was announced, twenty-two years after the unlawful closing.

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[35] *Gulton Electro-Voice*, 266 NLRB 403 (1983), *enforced sub nom*, *IUE Local 900 v. NLRB*, 727 F2d 1184 (D.C. Cir. 1984); *Joy Technologies*, 306 NLRB 1 (1992).

[36] *E.g., Teamsters Local 293 (R.L. Lipton Distributing Co.),* 311 NLRB 538 (1993).

[37] 380 U.S. 263 (1965).

3. The motivation behind a decision to close a plant is also relevant for purposes of determining the extent to which a company must negotiate the decision to close or the effects of that decision.

E. Other Violations

1. While employer discrimination on the basis of race or gender is not automatically a violation of § 8(a)(3), such discrimination may trigger a § 8(a)(3) case if there is a direct connection between the discriminatory practices and employee action consistent with the exercise of § 7 rights.[38]

2. Taking more stringent disciplinary action against stewards who participate in a wildcat strike, as compared with other strikers, is probably unlawful unless the steward is an instigator of the wildcat or has an affirmative obligation under the collective bargaining agreement to attempt to end wildcat strikes.[39]

3. The union parallel to § 8(a)(3) is § 8(b)(2) which makes it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against a worker in violation of § 8(a)(3).

    a. Enforcement of a union security agreement in a more rigid manner than is permitted under law would be a common example of a § 8(b)(2) violation.[40]

    b. Similarly, efforts to cause an employer to retaliate against a member because of that member's internal union politics would be in violation of § 8(b)(2).[41]

F. Remedies

1. The NLRB has broad discretionary power in determining the appropriate remedy for unfair labor practices. The standard remedy for unlawful discharge or other disciplinary actions is to make the victim whole through a cease and desist order and other appropriate relief.

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[38] *Jubilee Mfg. Co*., 202 NLRB 272 (1973).

[39] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Precision Castings Co*., 233 NLRB 183 (1977).

[40] *IBEW Local 99 (Electrical Maintenance & Control, Inc.),* 312 NLRB 613 (1993).

[41] *See, e.g*., *Carpenters Local 1016 (Bertram Const. Co.),* 272 NLRB 539 (1984).

a. The make whole remedy includes reinstatement of the victim to the previous position with restoration of back pay and benefits.[42]

b. Back pay obligations are computed on a quarterly basis, with the individual entitled to the wages which would have been paid, less any interim earnings.

2. In addition to reinstatement and back pay, extraordinary remedies may be available depending on the nature of the violation. An illegal, anti-union partial shutdown may result in an order granting relocation rights and expenses, posting of notices in remaining facilities, and in exceptional cases, reopening the closed facility.[43]

G. Case XIII-A: Anti-Union Discrimination:

1. This case is a classic example of the limits of the employer's right to discipline a worker for cause. Although the individual engaged in a long pattern of conduct which would have justified discharge, the company chose not to take action against Weigand. The timing of the discharge made it clear that despite the pattern of behavior, the real reason for the discharge was that Weigand changed his loyalties. He was discharged in violation of § 8(3) (now, § 8(a)(3), this case was decided before the Taft-Hartley amendments).[44]

2. This case is based on the *Wright Line* decision in which the standards of proof in § 8(a)(3) cases were at issue. The stated reason for the discharge was seen as a pretext, that but for the illegal motive the worker would not have been fired.[45]

3. A substantial number of cases deal with the right of an employer to discipline a steward who participates in an unlawful wildcat strike. This case is based on *South Central Bell Telephone Company*.[46] In this case, there is no evidence that the steward instigated the "sick out" or that the collective bargaining agreement imposed an affirmative obligation on the steward to try to end the wildcat. Therefore, the length of the suspension is unlawfully discriminatory.

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[42] If both the employer and the union are culpable of discriminatory actions*, see, Pinkerton's National Detective Agency, Inc.,* 90 NLRB 205 (1950). If only the union is guilty of a §8(b)(2) violation, *see, Sheet Metal Workers Union, Local 355 (Zinsco Electrical Products)*, 254 NLRB 773 (1981) for remedy and rational.

[43] *E.g., Woodline Motor Freight v. NLRB*, 843 F.2d 285 (1988).

[44] Based on *Edward C. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3rd Cir. 1943)

[45] *Wright Line*, S*upra* at note 12.

[46] 254 NLRB 315 (1981), *enforced in NLRB v. South Central Bell Telephone Company*, 688 F.2d 345 (5th Cir. 1982).

Case XIII-A: Anti-Union Discrimination

In each of the following cases, determine whether the action of the employer constitutes discrimination in terms or conditions of employment for the purposes of encouraging or discouraging union activity, in violation of § 8(a)(3):

1. Walter Weigand was under the influence of alcohol while on duty. He came to work when he pleased and left whenever he wanted. He brought a woman to the rear of the plant yard and introduced some of the other employees to her. He took another worker to visit her and when the worker got too drunk to go home, Weigand punched his time card for him and put him in the Independent Union's representative's room to sleep off his intoxication. Weigand's supervisors repeatedly requested his discharge but were denied because he was a representative for the Independent Union. The company had increased his pay four times when no general wage increase was granted. Weigand was ultimately discharged for "cumulative" problems. At about the time of the discharge, it became known to the Independent Union and the company that Weigand had joined and was soliciting support for the Extrusion Workers Union.

2. The company recently fired Jane Robertson for falsification of records. The company has a clearly worded rule in its employee handbook listing falsification of records as a dischargeable offense, but there is no evidence that any worker has been fired for falsification of the type of records involved in this case. Jane is accused of doctoring a set of inspection records. These records are relatively minor, are routinely filed but rarely used for any identifiable purposes. The company knew that Jane was an active and aggressive solicitor for the Extrusion Workers Union.

3. The Extrusion Workers have recently negotiated a first agreement with Megalomania Industries. The agreement includes a no-strike clause, but makes no mention of the obligation of the union to take affirmative steps to end any illegal work stoppages. In a dispute in the warehouse at Megalomania, about half of the dockworkers call in sick on the same day. The company disciplines all participants in the "sick out" by giving suspensions of one week. However, the warehouse steward is given a thirty-day suspension for his participation in the wildcat and his failure to try to get workers to abandon the plan.