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Employers May Limit A Union’s Presence in Public Areas of Their Property

On June 14, 2019, the National Labor Relations Board (“NLRB” or “Board”) issued a 3-1 decision providing that the University of Pittsburgh Medical Center Presbyterian Shadyside (“UPMC”) did not commit an unfair labor practice when it ejected two union representatives from the hospital’s cafeteria despite the fact that the cafeteria is open to the public. The decision overturned almost forty years of precedent that had permitted nonemployee union representatives to access so-called “public areas” of an employer’s premises.

Background

On February 21, 2013, two nonemployee union representatives entered UPMC’s cafeteria and met with a group of employees. The union representatives sat with several employees at two tables, ate lunch, and discussed union organizational campaign matters. Union flyers and pins were displayed on the two occupied tables, and an off-duty hospital employee passed out flyers to employees in the cafeteria.

Shortly thereafter, a hospital security official received two complaints that nonemployees were soliciting employees in the cafeteria and that union flyers were being distributed. As a result, the security official reported to the cafeteria and asked the union representatives why they were present. The union representatives responded that they were discussing the union with some employees. The security official told the union representatives to leave because the cafeteria was only for the use of patients, their families and visitors, and hospital employees. After the union representatives refused to leave, the security official called 911 and six police officers escorted them out.

NLRB Decision

In determining that UPMC did not commit an unfair labor practice when it removed the two union representatives from the hospital's public cafeteria, the Board reviewed the United States Supreme Court's 1956 decision in *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956), which permitted an employer to deny nonemployee union organizers access to its premises unless the premises were inaccessible or if the employer permitted other non-employees access to the property. For instance, an employer's private property rights would have to yield to the union if the union had no other reasonable means of communicating its message to employees or if the employer discriminates against the union. The Board noted that the Supreme Court intended for both exceptions to be narrowly construed given the importance of private property rights.

Despite applying the principles of *Babcock*, the Board acknowledged that over the years it had created an additional exception, the "public space" exception, which requires employers to permit nonemployees to engage in promotional or organizational activity in public cafeterias or restaurants as long as they are not disruptive. In the case at bar, the Board overruled the "public space" exception on the basis that it has been soundly rejected by multiple circuit courts and is inconsistent with the principles established in *Babcock*. The Board further stated the fact that a cafeteria located on the employer's private property is open to the public does not mean that an employer must allow any nonemployee access for any purpose as long as the employer does not discriminate between nonemployee union representatives and other nonemployees.

Applying the *Babcock* standard, the Board determined that UPMC's employees were not inaccessible and that UPMC did not discriminate against nonemployee union representatives because UPMC prohibited all solicitation or promotional activity in its cafeteria by all nonemployees. UPMC demonstrated specific instances in which the hospital removed nonemployees who engaged in solicitation or promotion of their organizations in the cafeteria.

Regarding the unlawful surveillance issue, the Board held that the security officer did not engage in unlawful surveillance since he was alerted of the promotional activity by other hospital personnel and did not stay in close proximity to the employees in the cafeteria. Moreover, the NLRB has recognized that "management officials may observe public union activity, particularly where such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary."

Takeaway for Employers

Employers with areas of their facilities open to the public, such as cafeterias, may now ban any nonemployee, including union representatives, from engaging in promotional and organizational activity in these public spaces. **However, if an employer bans nonemployee union representatives from organizing in its public cafeteria, the employer must also ban all other nonemployees from engaging in similar activities in the cafeteria to avoid engaging in discrimination.** Employers must be cognizant that they are treating all nonemployees equally with respect to their use of such public spaces.

If you have any questions regarding the Board's decision in UPMC, please do not hesitate to contact us.

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