

to restrain, coerce, or interfere with rights guaranteed employees by the Act.

### Meaning for Management

As can be seen from this case, Board decisions on whether the employer committed an unfair labor practice can turn on subtle definitions, such that many remarks supervisors or managers might naturally make may be unlawful. It is virtually impossible for untrained supervisors to avoid committing unwitting violations of the Act.

Considering the hefty fines for unfair labor practices that are anticipated with the eventual passage of some version of the Employee Free Choice Act, supervisory training *before* organizing activity commences is an imperative. ■

### EFCA Watch

## ***Making the Case That EFCA Is Remedy for Hard Times***

You might think that today's economic hard times are not a good climate to make the radical changes in labor law that would occur if any version of the proposed Employee Free Choice Act were enacted.

That is not how the measure's most ardent supporters see it. Blogging for the Drum Major Institute for Public Policy, a progressive think tank, Amy Traub argues that current conditions make it clearer than ever why the EFCA is needed. Hers are arguments we are likely to hear from other supporters when the U.S. Congress gets back to consideration of the measure.

Traub observes that businesses are finding that one place they squeeze out a little extra profit in these difficult economic times is by reducing labor costs. In some cases, wages have been cut or planned increases withheld. Many workers are also being saddled with increases in their contributions for health insurance, as employers switch to high-deductible or other plans that require higher employee payments.

Another method of belt tightening at the expense of workers that is being widely employed, Traub says, is to reduce the payroll by reducing staff, and then demanding that the remaining workers work harder and for longer hours, which they will do to avoid losing their own jobs and having to look for another in this dismal job market.

All this means working people are bearing the brunt of the economic downturn, Traub argues. The remedy, she claims, is "to give workers more power in the workplace, enough to push back and stop making America's working families the single easiest target for every negative economic development. The Employee Free Choice Act was a good idea before the recession, when middle-class Americans weren't sharing the benefits of economic good times, but it's absolutely essential now that working people are bearing the disproportionate brunt of the economic hard times," Traub says.

One important fact unmentioned in this pro-EFCA spin is that unions have been unable to protect their members from layoffs and terminations during this recession. ■

### Protected Conduct

## ***NLRB Orders Starbucks to Reinstate Two Workers, But Not a Third***

The NLRB has ordered Starbucks to reinstate with back pay two former employees who were fired for supporting a union. In a partial victory for the company, the Board declined to order reinstatement for a third worker whose behavior was not protected (*Starbucks Corp. d/b/a Starbucks Coffee Co.*, 352 NLRB No. 99 (2009)).

In March 2006, Starbucks had settled various charges filed by the union and entered into an agreement approved by an NLRB regional director that recognized the right of employees to wear "reasonably-sized-and-placed buttons or pins that identify a particular labor organization or a partner's support for that organization."

Starbucks officials interpreted the settlement to limit employees to wearing a single union button and told employees they could wear only one pin. The Board, however, agreed with the administrative law judge (ALJ) that the company could not convincingly support its assertion that there was a compelling business reason to restrict employees to one pronoun pin.

The Board adopted the ALJ's findings that Starbucks discriminated against certain employees by prohibiting them from using a company bulletin board and from talking about unions and working conditions, by

disparately enforcing its dress code, and by preventing certain employees from working shifts at other Starbucks locations.

The company had offered business justifications for several of its actions, but the judge found the arguments were undermined by evidence that rules were used to limit union-related conduct and were not consistently enforced against other forms of employee activity.

### **Deliberate Intimidation Not Protected**

In a partial victory for the company, the Board reversed the ALJ's finding that Starbucks' discharge of employee Iris Saenz was a violation. After a union meeting, Saenz pursued a Starbucks regional vice president for nearly two city blocks shouting threats, taunts, and profane comments at him. Starbucks discharged Saenz for her conduct "due to the fact that she was not following our guiding principle of treating people with respect and dignity."

The Board considered whether the NLRA protected Saenz's conduct because she had been at a union rally prior to the event. "Employees are permitted some leeway for impulsive behavior when engaged in concerted activity," the Board said, but added that "this leeway is balanced against an employer's right to maintain order and respect."

The Board applies four factors to analyze conduct that occurs in connection with otherwise protected activity: the place of the discussion, the subject matter, the nature of the employee's outburst, and whether the outburst was provoked by an employer's unfair labor practice. The Board found that when Saenz engaged in deliberate intimidation, she lost the act's protection. Of the four factors, the Board said only the subject matter weighs in favor of protection of Saenz under the act. ■

## **Campaign Workshop**

### ***Sample Letter After Card Signing***

Dear Employee,

**A BIG MISTAKE HAS BEEN MADE.**

I have been informed that employees have signed cards saying they wanted a union here.

First, I want you to know that I do not care whether or not you signed a card. There will be no consequences to you if you did or did not sign the card.

However, I am concerned with making sure you understand what a **BIG MISTAKE** this is. I want to outline below some information that perhaps you're not aware of regarding unions and the false pretense under which many of you may have signed these cards.

I believe you are being taken advantage of. Have you looked into unions in general, and in particular this union??? Unions survive by adding members who pay dues, who pay their salaries. The union trying to get the right to charge you dues, Local 210, has lost **MORE THAN HALF OF ITS MEMBERS IN THE PAST FEW YEARS ALONE!** Why would members leave the union unless the union was **NOT** delivering on promises they offered? **ALSO**—if the union gets in, your paycheck will be drastically **REDUCED!** You will each spend hundreds and hundreds of dollars each year on union dues—so you can pay the people that run this union hundreds of thousands of dollars a year taken from hard-working people like you.

**THEY NEED YOU TO CONTINUE TO SUPPORT THEIR SALARIES. WHOSE BEST INTEREST DO YOU REALLY THINK THEY HAVE IN MIND—THEIRS OR YOURS?**

I have been told that many of you were tricked into signing these union cards. You either did not know what you were signing or you signed under the false pretense that your supervisors Joe and Miguel signed the cards. They did not sign—and do not want to unionize. Some of your co-employees here have had bad experiences in unions before and absolutely **DO NOT** want to unionize, because all a union does is take money out of your own pocket.

Understand that the union did not create your job. We did. The union did not hire you. We did. The union did not provide you with the highest yearly pay you have ever earned. We did. The union did not give you job security. We did. The union did not make our product. We did.

You should know that this is the **WORST** time to even think about unions: unemployment is the highest it has been in our country for a long time, many companies are going out of business or laying off employees, we have not made a profit in months, and my partners and I have stopped taking a paycheck from the company so that we can keep the company going. Even with the bad times we have experienced, our company, **YOUR** company, made many improvements.

We gave you raises, health insurance, and dental; added air conditioning; started Pizza Fridays, built a more comfortable workplace; and have attempted to save our company and give you job security. We have

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