

Participation in Premature Picketing Does Not Forfeit “Employee” Status

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The National Labor Relations Act’s special protections for health care institutions recently suffered a blow. Employers who terminate non-union employees for picketing a health care institution risk violating the Act even when the institution is not provided advance notice required by the NLRA.

Correctional Medical Services, Inc. terminated five of its employees who worked at an Albany, New York clinic when those employees picketed without providing any prior notice. The picketing was orchestrated by the Civil Service Employees Association, Local 1000 after CMS rejected its request for recognition as the employees collective bargaining agent. Twenty individuals, including five off-duty clinic employees, peacefully picketed the facility seeking union recognition.

Under Section 8(g) of the NLRA, a union must give at least ten days’ notice before engaging in any strike, picketing or other concerted refusal to work at any health care institution.

In response to the picketing, CMS filed unfair labor practice charges with the National Labor Relations Board (NLRB), claiming the union’s picketing had violated Section 8(g). After the NLRB began administrative proceedings against the union, all five picketing employees were fired for engaging in an “illegal picket” without providing required prior notice under the NLRA. The union then filed charges with the NLRB claiming the employees’ discharge violated the NLRA.

Section 7 of the NLRA gives employees the right to form and join unions and to engage in other concerted activity for collective bargaining or other mutual aid or protection. Employee picketing is protected under this provision. Therefore, the employees’ picketing was protected under the NLRA, unless it was made unlawful under a specific section of that law. CMS argued that the failure of the employees to provide ten days advance notice as required by section 8(g) of the NLRA made their picket illegal.

The NLRB found the discharges to have been lawful because the prior notice was not given. However, on June 19, 2009, the U.S. Court of Appeals for the Second Circuit closely parsed several provisions of the NLRA to find the employees' discharge was unlawful. It held that Section 8(g) was inapplicable to picketing by non-union employees. According to the court, Section 8(g) only prohibits union picketing commenced without proper notice. It does not provide that an employee who pickets without notice violates the NLRA. Since the picketing by the non-union employees was lawful, CMS violated the NLRA when it terminated the employees.

Under another provision of the NLRA, Section 8(d), an employee who engages in a strike without giving ten days' notice, loses the protections of Section 7 of the NLRA. Under Section 8(d), however, there is no comparable provision about employees who participate in picketing conducted by unions in violation of Section 8(g).

Thus, the picketing employees fell within a "dead zone" where the prohibitions of the NLRA did not apply. Even though the union's peaceful picketing was unlawful, the employees' participation was lawful. The court of appeals found the terminations violated the NLRA.

This case demonstrates that while Section 8(g) requires unions to give notice of picketing, at least one court of appeals holds that non-union employee participation in premature picketing does not violate the NLRA. It also confirms the importance of non-union health care entities knowing the provisions of the NLRA in case they become targets for union organizing efforts.

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