

Employer Leaves Lasting Impression...of Unlawful Surveillance

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The NLRB rang in the New Year by examining what constitutes an impression of unlawful surveillance. In [*Dignity Health d/b/a Mercy Gilbert Medical Center*, 370 NLRB No. 67 \(January 6, 2021\)](#), the Board reaffirmed helpful guidance for employers regarding the dos and don'ts in the context of union organizing campaigns.

Specifically, the Board held that a supervisor violated Section 8(a)(1) of the Act by creating the impression of unlawful surveillance when she told an employee that she was aware of his union involvement, but otherwise failed to provide context as to where or how the information was obtained. The Board also found that persistent questioning of an employee pertaining to the union by high-level management constituted unlawful interrogation under the Act.

Background

In July 2018, the employer – a hospital and healthcare facility operator – began receiving reports of union activity by employees, and commenced a responsive information campaign regarding why it believed unionization was inappropriate for its employees.

At an employer-held meeting on the issue of organizing, a supervisor “outed” an employee as having been contacted by the union and being involved in the organizing. To that point, the employee’s union activity was largely unknown. The employer learned of the activity through video supplied by another employee, but did not reveal that to the employee who was outed.

One month later, the employer approached that same employee at his workstation and repeatedly asked him about his union involvement. When the employee denied his union affiliation, the employer began repeatedly asking him to confirm his name – noting each time that the same name had been flagged as the culprit of the union organizing efforts. Following this incident, the employee sent a group email accusing the employer of unlawfully inquiring into his organizing efforts.

The union then filed an unfair labor practice charge. The ALJ ruled that the employer violated the Act by giving the unlawful impression of surveillance and by interrogation.

Board Held the Employer's Failure to Identify Its Source of Knowledge Provided Reasonable Grounds to Support Impression of Surveillance

The NLRB General Counsel asserted that the employer's conduct unlawfully created the impression that the employee's protected activity was being unlawfully monitored. In response, the employer argued its conduct was merely a vague gesture that could not reasonably create the impression of unlawful surveillance.

The Board disagreed. Drawing on a 2007 Board decision, the Board explained that, "[w]hen an employer tells employees that it is unaware of their protected activities, but fails to identify the source of this information, an unlawful impression of surveillance is created because employees could reasonably surmise that employer monitoring has occurred." [*Conley Trucking*](#), 349, NLRB 308, 315 (2007).

The Board concluded that it was reasonable for the employee to conclude that the employer's knowledge had come from surveillance, since the supervisor failed to otherwise identify the source of her knowledge after singling out the employee during the pre-shift meeting.

The Board Also Found That Repeated Questioning by Management Constituted Unlawful Interrogation

The complaint also alleged that senior management violated the Act because it unlawfully interrogated the employee, by asking him repeatedly if he had heard about the Union, and if he was the individual who was flagged as the union organizer.

The Board agreed, finding that, based on the totality of the circumstances, the employer's conduct was reasonably likely to restrain, coerce, or interfere with the employee's right to engage in protected, concerted activity. In so deciding, the Board noted that while the questioning took place in a public area – the employee's workstation – it remained unduly coercive due to the nature of the repetitive questioning, the insistence that the employee admit his affiliation or guilt, and the power imbalance between the parties involved.

Takeaways

This decision provides important guidance to employers as to when their conduct may tend to interfere with employees' exercise of protected, concerted activities – which is particularly apt during a union organizing campaign.

First, the allegation of “impression of surveillance” is one of the more nuanced unfair labor practices. Under such an allegation, the employer is attempting to provoke a reaction by letting the employee know about his or her union activities. When addressing an employee's union affiliation or organizing activities, the employer should not withhold the source of the information, as doing so likely will create the impression that the employee's activities are being monitored and the employee is being subjected to unlawful surveillance.

Second, unlawful interrogation by employers – which also violates the Act – need not be confined to “closed door” conversations in formal settings. Rather, the test for interrogation is based on the totality of the circumstances, taking into consideration the power imbalance between the parties, the repetitiveness of the questioning, and the length of time over which the questioning took place. Employers should thus avoid persistent questioning of employees with regard to their protected, concerted activities.

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