

In This Issue:

August 2011

The NLRB ruled that an employer can lawfully discipline an employee pursuant to an overbroad work rule, if the employee's conduct leading to discipline is not protected by Section 7 of the NLRA or is not similar to conduct protected by the Act.

NLRB Upholds Disciplinary Action Despite Unlawfully Overbroad Work Rule

By Laurent Badoux and Jennifer Mora

On August 11, 2011, the National Labor Relations Board (NLRB or the "Board") issued a new decision regarding the extent to which an employer violates the National Labor Relations Act (NLRA or the "Act") by disciplining an employee who violates a work rule that is unlawfully overbroad, where the conduct resulting in the discipline is wholly outside the protections of Section 7 of the Act. In *Continental Group, Inc.*, 357 NLRB No. 39, the Board clarified long-standing precedent and held that discipline imposed pursuant to an unlawfully overbroad rule is unlawful in those situations in which an employee violated the rule by engaging in protected conduct or conduct that otherwise implicates the concerns underlying Section 7. Such activities would include conduct involving employees' rights to organize, collectively bargain, engage in other concerted activities, and to refrain from such actions. Importantly for employers, however, the Board also held that an employer can lawfully discipline an employee pursuant to an overbroad rule if the employee's conduct is not protected by Section 7 or is not similar to conduct protected by the Act.

The Rule and the Discipline

At issue were front-desk employees at one of the condominiums that the employer managed. The applicable employee handbook contained the following rule:

Employees are only permitted to be on property while on duty unless you are picking up a paycheck or otherwise advised by the property manager or the Front Desk Coordinator. . . . Employees who violate this policy are subject to disciplinary action.

A front-desk employee, Phillip Gonzalez, was granted time off to handle a personal domestic matter for approximately two weeks. During that time, the employee visited the condominiums to talk with residents and coworkers about his situation. He also was "loitering," and slept on the premises because he could not find a place to stay while resolving his domestic dispute. The front desk supervisor told the employee that he could not visit the condominium during his leave of absence, should not be loitering, and should not be discussing his personal matters with residents.

Despite these warnings, the employee continued to visit the property and discuss his personal situation with the residents. Upon returning from his leave of absence approximately two weeks later, the employer issued the employee two separate written warnings: one for loitering on the condominium's property and another for giving false information to residents and continuing to talk with them about his personal affairs. The employee ultimately resigned from employment after the employer attempted to transfer him to a different location and assign him different duties. Following his resignation, the union that was attempting to organize Continental's employees filed unfair labor practice charges.

The NLRB Clarifies the Lawfulness of Discipline Imposed for Violating an Overbroad Company Rule

In the NLRB's two-member 2008 decision in *The Continental Group*, 353 NLRB 348 (2008), then-Chairman Schaumber and then-Member Liebman agreed with the Administrative Law Judge's (ALJ) conclusion that the no-access rule was unlawfully overbroad both as written and as applied to the employee. The ALJ had restated the long-standing principle that a no-access rule concerning off-duty employees is valid only if it: (1) limits access solely with respect to the interior of the facility and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the facility for any purpose and not just to those employees engaging in union activity. Except where justified by business reasons, a rule that denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid under the NLRA. In *Continental*, the employer's rule did not exclude off-duty employees solely from the interior and other working areas of the premises. Thus, the Board and the ALJ agreed that the rule violated Section 8(a)(1) of the NLRA.

The Board, however, disagreed with the ALJ's finding that the employer further violated Section 8(a)(1) by disciplining the employee for violating the overbroad no-access rule. In the decision, the Board distinguished its holding in *Double Eagle*, 341 NLRB 112 (2004), where the employer disciplined three employees for violating an overbroad rule that prohibited employees from discussing their wages and other terms and conditions of employment. The Board then concluded that the discipline issued to the Continental employee did not violate the Act because "the activities for which [he] was disciplined were not protected."

After the U.S. Court of Appeals for the D.C. Circuit remanded the decision back to the NLRB for further proceedings under *New Process Steel, L.P. v. NLRB* (which requires three members for a valid Board decision), Chairman Liebman and Members Becker and Hayes continued to agree with the ALJ that Continental's no-access rule was overbroad and therefore unlawful. However, the Board expanded the analysis in its earlier 2008 two-member decision and clarified application of the *Double Eagle* rule to discipline imposed on an employee for violating an unlawfully overbroad employment handbook rule.

The Board identified two main goals for the *Double Eagle* rule. First, the Board stated that the mere maintenance of an overbroad rule tends to "inhibit employees who are considering engaging in legally protected activities by convincing them to refrain from doing so rather than risk discipline." Second, the Board held that, in the absence of a *valid* employer rule prohibiting the employee conduct at issue, "the conduct maintains its protected status." The Board, however, recognized that those goals did not require that the *Double Eagle* rule be absolute.

In clarifying application of the *Double Eagle* rule, the Board first discussed a hypothetical situation where the conduct for which the employee is disciplined under an overbroad rule falls within the scope of Section 7. In that instance, even though the employer lawfully could have prohibited the conduct by promulgating a narrowly tailored rule, both justifications for the *Double Eagle* rule exist and, therefore, the Board will find that the discipline violates the Act. The Board, however, clarified that in this circumstance, an employer may be able to avoid liability if it can prove that the conduct at issue "actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline." By placing the burden of proof on the employer in this regard, the Board seeks to discourage "post-hoc rationalization of disciplinary decisions, and minimizes the likelihood of a chilling effect on employees' Section 7 rights."

The Board further considered situations, like that in *Continental*, where "the conduct for which an employee is disciplined is wholly distinct from activity that falls within the ambit of Section 7." In these cases, the second justification for the *Double Eagle* rule does not apply (*i.e.*, that employee conduct maintains its protected character in the absence of a valid employer rule). Although it is true that disciplining

an employee for such conduct in reliance upon an overbroad rule might result in *some* chilling effect merely by relying on the overbroad rule, the Board concluded that the “chilling effect is much less significant than it would be if the employee’s conduct were not wholly unprotected.” Thus, if Section 7 does not protect the employee’s conduct, the *Double Eagle* rule does not apply. As a result, it is not unlawful for an employer to discipline an employee in these circumstances pursuant to the overbroad rule.

Applying this clarified framework to the facts in *Continental*, the Board reversed the ALJ’s decision and concluded that the dispute did not violate the NLRA, because the *Double Eagle* rule was not implicated. Indeed, according to the Board, “[t]he conduct for which Gonzalez was disciplined – sleeping on the Respondent’s premises and living out of his car in the Respondent’s parking lot – was not protected concerted activity.” Rather, the employee’s conduct was “wholly distinct from activity that falls within the ambit of Section 7.”

What the Clarified *Double Eagle* Rule Means for Employers

While the Board’s clarification of the *Double Eagle* rule may seem a victory to employers, in reality, it underscores the importance of implementing and maintaining employee rules that are narrowly tailored and do not interfere with or restrain employees in the exercise of their Section 7 rights. Indeed, the Board’s decision in *Continental* serves as another reminder to employers of the potential problems of implementing and maintaining overbroad rules, including no-access rules. The Board in recent years has issued several decisions striking down no-access and other handbook policies that could reasonably be construed to infringe on and chill an employee’s right to engage in protected Section 7 activity.

In *Martin Luther Memorial Home d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004), the Board articulated a standard for determining whether an employer’s handbook or work rule violates the NLRA. According to the Board, if the rule explicitly restricts protected activity, it is unlawful. Further, even if the rule does not explicitly restrict protected activity, it is still unlawful if: (1) employees would reasonably construe the language of the rule to prohibit protected activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of rights guaranteed by the NLRA.

Since *Lutheran*, the NLRB has heard several other cases challenging handbook policies and work rules, including *Claremont Resort and Spa*, 344 NLRB No. 105 (2005) (employees would reasonably read employer’s rule prohibiting “negative conversations” about their managers as an unlawful prohibition on voicing complaints) and *Longs Drug Stores Cal., Inc.*, 347 NLRB No. 45 (2006) (work rules against disclosure of confidential information deemed unlawful because employees would reasonably believe such work rules prohibit disclosure of employee wage rates). Most recently, in *Jurys Boston Hotel*, 356 NLRB No. 114 (2011), the Board expanded its view regarding objectionable handbook rules and held that an employer’s mere maintenance of an overbroad rule in its employee handbook was sufficient to warrant setting aside the election results in a decertification election. In that case, the handbook contained unlawfully overbroad policies prohibiting solicitation, distribution, loitering, and the wearing of buttons or other insignia.

The *Continental* decision indicates that, under the right circumstances, there is a narrow defense to a termination pursuant to an overly broad work rule, but prevailing on that defense can be difficult. In short, despite the positive result in *Continental*, employers should recognize from this and other NLRB decisions the benefits of conducting a review of their handbooks and other workplace policies to modify rules that could be construed as limiting employees’ rights under Section 7. This review process is most likely less expensive than protracted litigation.

.....
 Laurent Badoux is a Shareholder in Littler Mendelson’s Phoenix office, and Jennifer Mora is an Associate in the Los Angeles office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Badoux at lbadoux@littler.com, or Ms. Mora at jmora@littler.com.