LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Employer Lessons From 7th Circ. Ruling On Labor Violations

By **Andrew Goldberg and Christina Wernick** (August 17, 2021, 4:26 PM EDT)

Andrew Goldberg

Christina Wernick

On July 21, a panel of three judges in the U.S. Court of Appeals for the Seventh Circuit affirmed a National Labor Relations Board finding that Mondelez Global LLC, a manufacturer of baked goods, including Ritz crackers and Oreo cookies, unlawfully discharged union officials, made unilateral changes to various terms of employment, and failed to timely and completely respond to a union's request for information.[1]

The court's ruling, and the underlying NLRB decisions, provide:

- Important guidance for employers contemplating taking adverse employment action against those who have engaged in protected, concerted activity, and even other activity protected outside the National Labor Relations Act;

- Instruction on bargaining obligations when an employer claims to have made only minor changes to established terms and conditions of employment, especially after a collectively bargained agreement has expired; and

- A lesson about what happens when an employer delays responding to a union's request for information.

Unlawful Discharge of Union Officials

The fact pattern presented in Mondelez Global v. NLRB is one that demonstrates the difficulty in overcoming any, let alone multiple missteps when an employer takes adverse action against protected employees.

According to the facts identified in the opinion, the company initiated an investigation in May 2016 related to overtime practices it found suspicious.

Of the 59 employees investigated, only five were targeted for follow-up — three of whom were union officials.

The three union officials were visible and vocal advocates of the union. In early 2016, the three union

officials at issue protested a short-term disability leave change, challenged the company's use of subcontractors to perform overtime work, participated in collective bargaining agreement negotiations and spoke at union rallies.

The company discharged the three officials and ended the investigation into the overtime concerns.

The court applied the two-part burden-shifting framework outlined by Wright Line Inc. [2] to examine the company's claimed motivation in discharging the union officials.

The company argued that the company labor relations director that ultimately terminated the union officials was unaware of their activities, and further that the timing of the discharges was not sufficiently proximate to infer anti-union motivation.

The court noted that decisions at the company were not made in a vacuum — management testified before the board that when discharging an employee, they must align on decisions.

Management testimony further evidenced that two of the individuals who were pivotal in analyzing the overtime study advised the labor relations director and recommended the union officials' termination.

Essentially channeling the "cat's paw" line of cases to note that even if the labor relations director had no knowledge, the recommendations underlying the decision to discharge would taint the decision. Under the cat's paw theory, a defendant typically cannot successfully argue that a decision maker had no unlawful motivation because they simply adopted or were ultimately motivated by an unlawful actor's motivation.

The court rejected the company's argument that the six-month gap between the protected activity and the discharge prevented a finding of no temporal proximity.

In doing so, the court found that the timing of the study was of no moment, because the study and the investigation themselves were discriminatorily applied and appeared to be a sham.

For example, the company completely and abruptly abandoned the study after terminating the union officials; it previously required employees to remove and return company-issued shirts with pro-union logo and slogans on them; and supervisors had made overtly hostile remarks regarding the same officials.

In addition, the company suspended and ultimately terminated three union officials, while taking no employment action against other employees who had even more egregious violations of the overtime rules.

Based on the aforementioned bad facts, the court agreed with the NLRB that union animus was a motivating factor in the company's decision to terminate the union officials.

Unlawful Unilateral Changes

In addition to the discharges recounted above, the company also unilaterally revised its short-term disability policy, changed its past practice of permitting union officials to meet with new hires during their orientation, and changed shift start and end times of some bargaining unit employees, all without prior notice to or bargaining with the union.

Mondelez defended its actions by claiming that the changes were all immaterial.

The court found that the resulting loss of wages ranging from as low as two days to as high as seven days of wages was, in fact, material.

Thus, employers should note that perhaps any loss of wages would be deemed material and require bargaining with a union.

The court further found that because the company had a regular and long-standing practice of allowing the union access to newly hired employees, that this activity was covered by Section 8(a)(5) of the NLRA[3] and that union access to employees was a mandatory subject of bargaining, even though it was not an express provision of the parties' collective bargaining agreement.

The board was not persuaded by the company's argument that this change was also not material, finding that the new limitations undermined union-related discussions.

The court also noted that immateriality was irrelevant given that the collectively bargained agreement had expired, which meant any changes to terms and conditions of employment had to be negotiated.

Lastly, the court was not persuaded by Mondelez's argument that the expired CBA, which provided that it should keep employees starting time as uniform as possible, gave it the right to unilaterally change start and stop times merely to align all employees' shift schedules.

Given that the CBA was expired, employee work schedules became mandatory subjects of bargaining.

As a result, the court ruled that Mondelez violated the NLRA by failing to bargain over the schedule change.

Failure to Fully and Timely Respond to Union Information Request

During the course of the investigation that ultimately led to the dismissal of the three union officials, the union requested information relating to the operating function of the turnstiles and ID badges at issue in order to investigate whether their malfunction was a contributing factor to the concerns the company claimed to have about the data.

The company did not respond at all to the request, nor did they request additional time to respond, for seven months.

The company argued that the union information requests were impermissible prehearing discovery related to the unfair labor practice charges.

Timing proved problematic for Mondelez with respect to this argument as well.

The union requested the information in May 2016 to investigate its pending grievance filed in March 2016. The union did not file the unfair labor practice charges with the NLRB until June 2016.

The court found that the company failed to substantially comply with the union's request by delaying over seven months in providing the information.

The union later requested the names of all new hires from June 2015 forward in order to arrange for its own new hire orientation after the company prohibited the union from participating in the company's orientation.

The company initially failed to respond to this request as well, and later provided only a partially responsive list approximately three months after the union's initial request.

The court affirmed the company's requirement to produce this information, and found their delay and lack of responsiveness violative of the NLRA.

Important Employer Takeaways From Mondelez

The Mondelez decision reinforces the necessity of thoughtful and informed decision-making, lest a company run afoul of labor and employment laws.

Timing

Timing matters when making employment decisions. The farther removed a termination is from a potential unfair labor practice, the better; however, temporal distance alone will not be sufficient to overcome a protected employee's termination based on a pretextual investigation.

Investigations

Once a company decides to investigate matters concerning employment, it should conduct them meaningfully — following them through to their logical conclusion, and applying any consequences uniformly among all similarly situated employees.

Obligations

Absent explicit contractual language indicating otherwise, a company may be obligated to maintain the status quo and abide by expired contractual terms and past practices with respect to certain terms and conditions of employment.

Unilateral Changes

Be mindful that regular, consistent practices relating to mandatory subjects of bargaining (i.e., terms and conditions of employment) may require decisional and/or effects bargaining prior to implementation of any changes.

One of Mondelez's violative unilateral changes involved the company's change to an established past practice that was not even a written, contractual obligation.

Conclusion

Finally, the subject of unilateral changes has become an important one as many companies consider mandatory vaccination and other COVID-19-related policies.

Absent clear contractual management rights language or an established past practice regarding similar

actions, companies will need to negotiate the underlying decision to require vaccinations with their employees' bargaining representatives.

Furthermore, even if a company is not required to bargain over the decision to mandate vaccines, they will most likely be obligated to bargain over the effects that decision has on its union-represented employees before implementation of any mandates.

Andrew S. Goldberg is a managing partner and Christina K. Wernick is of counsel at Laner Muchin Ltd.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] NLRB v. Mondelez Global LLC, 7th U.S. Circuit Court of Appeals, No. 20-1701. https://www.govinfo.gov/content/pkg/USCOURTS-ca7-20-01616/pdf/USCOURTS-ca7-20-01616-0.pdf.

[2] 251 N.L.R.B. 1083 (1980).

[3] 29 U.S.C. §158(a)(5).