Wimberly, Lawson, Steckel, Schneider & Stine, P.C.
Suite 400, Lenox Towers, 3400 Peachtree Road, N.E., Atlanta, Georgia 30326
E-MAIL:Lawyers@wimlaw.com
(404) 365-0900 FAX (404) 261-3707

# EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



VOLUME XXXXI, Issue 6 JUNE 2023

## WHAT HAPPENS WHEN AN EMPLOYEE ENGAGES IN ABUSIVE CONDUCT IN THE COURSE OF UNION OR CONCERTED ACTIVITY?

For many years, the National Labor Relations Board (NLRB) has been dealing - and struggling - with the above issue. As an example, racial epithets have been hurled at non-strikers crossing the picket line, the term "whore" has been directed to persons signing up for overtime, and a company executive has been called a "f- idiot," and similar cases. These cases are somewhat different than a typical case because they deal with words or actions during the course of activity that would otherwise be considered concerted and/or protected. The issue is whether an employee has lost the protection of the Act under these circumstances.

During the Trump Administration, the NLRB rejected the concept of setting specific standards in which each type of activity was subject to different legal concepts on the basis that such different standards yielded "unpredictable" results. Instead, the NLRB under the prior Administration adopted a single standard dealing with cases involving "abusive conduct" in the course of Section 7 activity, that it was not the nature of the employee's conduct, but rather the motive of the employer in taking adverse action against the employee, that determined whether the action was lawful or not. Thus, if the employer's action was motivated by a legitimate business reason, it was lawful, even if they were related to actions during the course of otherwise legitimate union or concerted activity.

In the May 1, 2023 ruling in *Lion Elastomers*, 2023 NLRB Lexis 202, the Board overrules the prior NLRB standards in *General Motors*, 369 NLRB No. 127 (2020), and returns to what it characterized as prior NLRB law. The earlier Board mentioned in the ruling the earlier case rationale of *Atlantic Steel*, 245 NLRB 814 (1979): In determining whether an employee's conduct during such concerted activity loses the protection of the Act, the NLRB considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

Editor's Note - This writer notes in almost every newsletter that the current NLRB has been vastly expanding the rights of organized labor and employees at the expense of management rights, and this case is another example. The case will have ramifications to employer policies as well, including written policies in handbooks and otherwise, social media postings, and other such activities. The NLRB will in the near future issue rulings on its current interpretation of employer handbook and other such policies, which will not be welcomed by the management community. It should be remembered that these more recent NLRB rulings need not relate to any type of union activity, as any "concerted activity for mutual aid or protection," i.e., the promotion of employee rights, is protected from discipline under the same concepts.

A particular application of the new concepts occurred in an earlier case called *Cooper Tire & Rubber Co.*, in which the NLRB required reinstatement of a striker who had directed racial taunts at a van carrying replacement workers that had

just crossed the picket line. Employers properly wonder whether the employer's inability to discipline in such situations creates a hostile work environment, thus creating potential Title VII liability and an obligation to discipline or fire the striker. The NLRB in the current case addresses that issue in Footnote 39. It states that: "In the case of any discrimination claims raised under state or local laws (also invoked by the *General Motors* Board), the doctrine of federal pre-emption would very likely apply, resulting in a dismissal of such claims as being exclusively subject to the jurisdiction of the NLRB." One wonders whether unintended consequences can be created under this concept. Similar issues that are more complicated arise concerning federal discrimination laws.

## LITIGATION OVER CIVIL RIGHTS OR PATRIOTIC-RELATED PARAPHERNALIA AT WORK CONTINUES

Cases continue to arise dealing with the wearing of social/political/patriotic shirts and decals at work. In a January ruling, Whole Foods won summary judgment supporting the enforcement of its neutral dress code against visible slogans, messages, logos or advertising when complainants were suspended for wearing Black Lives Matter masks to work. *Frith v. Whole Foods Market, Inc.* (D.Mass. 1/23/23). DThe legitimate business explanation of enforcing a neutral dress code was found to be a legitimate and non-discriminatory ground for enforcing the prohibition of the wearing of Black Lives Matter masks. Similar cases are pending before the National Labor Relations Board, and the NLRB General Counsel is arguing that even neutral and consistently enforced dress codes may not be enough to prohibit the alleged protected concerted activity of wearing Black Lives Matter and other similar slogans. Binding final rulings have not yet been issued from the NLRB itself on these controversial issues.

Articles in this newsletter have repeatedly raised the issue and concerns about counter-protests arising in the workplace. In a recent case, an employee sent an email saying that certain opinions in support of the Black Lives Matter movement were inappropriate, and making statements including "It should be all lives matter." Do we now support "Killing Cops" and similar statements. The employee argued his "All Lives Matter" statement was protected activity in the same way opposition to a hostile work environment is protected activity. A federal court in Michigan ruled against him, stating that Title VII's protection of employees who complain about harassment doesn't "make protected activity out of every reply-all to a politically charged email." *Golash v. Trinity Health Corp.*, No. 21-cv-12333 (E.D. Mich. 2/15/23).

In another case, a white heterosexual employee claimed that displaying the Pride Flag and providing Black Lives Matter buttons to workers while requiring him to remove "patriotic decals" from his work space was job bias. *Leffler v. Ann & Robert H. Lurie Children's Hosp. of Chi.*, 2023 B.L. 71811 (N.D. Ill. 3/6/23). The plaintiff was directed to remove a Betsy Ross flag decal from his work cubicle after an anonymous complaint reported it was offensive and associated with slavery. He was directed to remove other decals because they were believed to be associated with militia groups and white supremacy, and then directed him to remove more general patriotic images that he put up that included the slogan "Don't Tread on Me" and a patch referring to the Second Amendment. He was thereafter fired, even though the hospital displayed a rainbow LGBT Pride flag and had a basket of BLM buttons that employees could take and wear.

The employer's actions concerning the decals were determined by the federal district court judge not to be adverse employment actions, in that the plaintiff's job conditions were not materially altered. The court also ruled that the plaintiff failed to link any adverse action to intentional bias. Some of the decals displayed by the plaintiff were political ideology and not related to a person's racial identity. The court stated that a reasonable person would not necessarily perceive the availability of BLM buttons and display of the Pride Flag as favoring one race or sexual orientation and thus did not constitute harassment.

Editor's Note - Both cases indicate sensitive issues associated with displaying paraphernalia in the workplace that might be associated with one's sexual or racial identity. The advice of counsel is critically necessary in addressing these issues.

## GOVERNMENT ASSISTANCE BETTER THAN WORK FOR MANY

Many wonder why at least 3 million fewer Americans are at work today than there were in 2019. Economic rationality is one reason. In some states today, unemployment benefits are the equivalent of a $100,000 job when direct payments and the value of other benefits are included. Families earning as much as $500,000 annually are eligible for ObamaCare subsidies. These two benefits - unemployment and Obamacare -- are unusual in the sense that they are not limited to low-income people. Unemployment benefits are limited to six months in most states, but workers may move in and out of the unemployment system and thus work enough months until they again qualify for benefits.

Some would argue that programs that discourage work benefit the families receiving welfare. Work usually is associated with more financial security over time, and a higher level of health, happiness, and even life expectancy. Further, the success of societies is heavily influenced by the proportion of the population working. The fewer working, the less taxes are raised to support those not working. In addition, the loss of productivity from those not working harms the economic success of society as a whole.

Individuals can't be blamed for making rational economic choices that are in their own self-interest. But government policies that reward passivity and penalize industry will not promote a healthy society in the long run. The Welfare Reform Act of 1996 was designed to promote self-sufficiency by removing barriers to employment. It would be good for our lawmakers to consider whether other programs should be reviewed to do the same.

## THE COVID-19 EMERGENCY IS OVER-NOW WHAT?

Now that the Biden administration has implemented its plan to officially end both the national emergency and public health emergency on May 11, private employers are contemplating what to do with existing COVID-19 policies and protocols. Employers who are not subject to a federal vaccine mandate or state or local laws restricting mandatory vaccination can still require COVID-19 vaccination as a condition of employment. Any employer who requires vaccination must provide reasonable accommodations for employees who are unvaccinated because of a disability or sincerely held religious belief, practice or observance. Whether an employer should voluntarily continue to mandate vaccination as a condition of employment is an entirely different - and much more complex - question that requires weighing legal and business considerations. The end of the COVID-19 emergencies may also prompt employers to rethink other COVID-19-related policies still in place, such as mandatory masking, social distancing, contact tracing and pre-visit questionnaires.

The end of the national emergency and public health emergency will also affect the extension of enrollment deadlines for health and welfare plans and mandatory employer coverage of COVID-19 testing and services without cost sharing to employees. As the emergencies expire, however, employers will no longer be required to pay for COVID-19 testing, and COVID-19 vaccines will be treated like other preventive services such as cholesterol and blood pressure screenings, annual physicals and routine eye exams, which are only covered when delivered by an in-network provider.

A special enrollment provision in place during the pandemic gave employees extended time, up to a year, to enroll or update enrollment in health care plans due to life events such as losing coverage, getting married or having children. However, the special enrollment provision is set to end July 10, along with a similar pandemic-era rule giving employees additional time to pay Consolidated Omnibus Budget Reconciliation Act premiums and decide whether to use COBRA coverage.

## Considerations for Employers

Employers should review their current COVID-19 policies, protocols and benefits and determine what, if any, changes need to be made. One of the top things employers may consider is whether they will continue covering the full cost of COVID-19 testing and vaccines for employees, limit or restrict coverage in some way, such as limiting covered testing to in-network providers, or stop paying for testing and out-of-network vaccines altogether. Employers making changes to covered COVID-19 benefits or policies will also want to consider and decide when to implement these changes. Employers may implement changes immediately upon the official end of the public health emergency or wait until Jan. 1 or the start of their plan year.

Outside of testing and vaccinations, employers should also consider planning for the end of special provisions allowing employees more time to enroll in health plans and pay COBRA premiums. Employers above all should consider actively communicating with employees about any anticipated changes to existing policies and benefits in connection with the end of the emergencies, and how such changes may affect them.

In a related development, the U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) announced on May 4, 2023 that employers would have thirty (30) days to reach compliance for Form I-9 requirements after the COVID-19 Flexibility sunset on July 31, 2023. This means that all required physical inspection of identity and employment eligibility documents should be completed by August 30, 2023. If an employer has not been using an in-person review of such documents for completion of the I-9 form, they are required to go back and do an in-person verification of those documents and thereafter make a notation on the I-9 form indicating "Documents Physically Examined" and the date.

***Be sure to visit our website at http://www.wimlaw.com often for the latest legal updates, Alerts, and Firm biographical information!***

**WIMBERLY, LAWSON, STECKEL,**
**SCHNEIDER & STINE, P.C.**
**Suite 400, Lenox Towers**
**3400 Peachtree Road, N.E.**
**Atlanta, GA 30326-1107**
***ADDRESS SERVICE REQUESTED***