Zinsergram a/k/a Legal Update

By L. Michael Zinser
The Zinser Law Firm, P.C.

The National Labor Relations Board is out of control! In its decision-making processes, it is issuing decisions restricted Employer free speech, expanding employee rights of speech to the detriment of the Employer and working overtime to create new rights due to the widespread use of social media.

1. ***Cost Co. Wholesale Corporation*** **–** On September 7, 2012, the NLRB, overturning the decision of an ALJ, ruled that the following workplace policy was unlawful:

> Statements posted electronically . . . that damage the company, defame any individual or damage any person's reputation, or violate the policies outlined in the Cost Co. Employee Agreement may be subject to discipline, up to and including the termination of employment.

Note that this policy requires that some harm actually occur before a violation will be found. The NLRB ruled that the policy was overly broad and that employees would likely construe the rule as prohibiting them from protesting the Company's treatment of its employees. This is just nuts! This is just another instance of the NLRB trying to make something protected because it applies to online activities.

NLRB Member Hayes dissented in the case.

2. ***Carl Knauz BMW*** – In this case, the National Labor Relations Board ruled that the following "Courtesy" rule was unlawful:

> Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the dealership.

Adopting an extreme interpretation of the policy, the NLRB ruled that employees would reasonably construe the prohibition against "disrespectful" conduct and "language which injures the image and reputation of the dealership" to prohibit employees' statements that object to their working conditions.

Members Hayes dissented in this case, as well. Member Hayes stated the following:

> Reasonably construed and read as a whole, the rule is nothing more than a common sense behavioral guideline for employees . . . Nothing in the rule suggests a restriction on the content of conversations (such as a prohibition against discussion of wages); rather the rule concerns the tenor of any conversation. In short, by its "Courtesy" rule, the respondent sought to **promote civility and decorum** in the workplace and prevent conduct that injures the dealership's reputation—purposes that would have been blatantly obvious to respondent's employees, who depend on a dealership's image for their livelihoods. (emphasis added)

3. **Fresenius USA Manufacturing –** In this case, there was a pending NLRB election where employees were seeking to decertify the union. A pro-union employee scribbled vulgar, offensive and threatening statements on several union newsletters left in a break room. The notes included, "Dear pussies, please read!" and, "Warehouse workers, R.I.P."

   Female employees complained about the statements. Management then conducted an investigation about the statements. The investigation included questioning the employee who scribbled the offensive utterances. During that investigation, he lied about making the statements. Later, the Company confirmed the employee's identity and authorship; he was fired for making the statements and lying about writing them.

   The NLRB found the discharge to be unlawful. The NLRB said that the offensive comments encouraged employees to support the union in the decertification election. The NLRB ruled, "We therefore conclude that, in writing them, Grosso was engaged in protected union activity . . . Fresenius discharged Grosso for writing those comments.

   What about the dishonesty involved? He lied to his Employer during that investigation. Unbelievably, the NLRB ruled that Grosso had a right to be dishonest:

   > Fresenius' discharge letter to Grosso also cited his false denial of responsibility for the comments, but Fresenius could not lawfully discipline him on that ground . . . Fresenius' questioning of Grosso put him in the position of having to reveal his protected activity, which Board precedent holds an employee may not be required to do where, as here, the inquiry is unrelated to the employee's job performance or the employer's ability to operate its business. . . . As a result, although Fresenius had a legitimate interest in questioning Grosso and lawfully

> did so, *Grosso had a Section 7 right not to respond truthfully.* (emphasis added)

Bottom line, the NLRB ruled that an Employer's investigation of complaints of sexual harassment (a potential violation of Title 7) is "unrelated to the employee's job performance or the employer's ability to operate its business." This is unbelievable. NLRB Member Hayes dissented in this case, as well:

> Not withstanding their disavowals, my colleagues thereby impermissibly fetter the ability of employers to comply with the requirements of other labor laws and to maintain civility and order in their workplace by maintaining and enforcing rules non-discriminatorily prohibiting abusive and profane language, sexual harassment, and verbal, mental and physical abuse.

4. **Analysis –** All of these cases decided by the NLRB are focused on paving the way for union organizers to organize the unorganized. During union organizing campaigns, the union often trains an employee to be extremely provocative in the workplace in order to demonstrate the influence and power of a union. The activities of this employee often cross the line into unprotected conduct, subjecting the employee to discharge. "Civility and order" in the workplace is the enemy of the provocative union organizer. The current NLRB majority has no shame: it will do anything to breathe life into organized labor, which represents less than 7% of the private sector workforce.