CLIENT ALERT: NLRB Majority Holds that Preemptive Discharge Violates the National Labor Relations Act

In a decision that the dissenting Board member described as "unprecedented," the National Labor Relations Board (the "Board"), by a 2 to 1 vote, held that an employer violated Section 8(a)(1) of the Act by terminating an employee in order to prevent that employee from engaging in activity protected by the Act. *Parexel International, LLC,* 356 NLRB No. 82 (Jan. 28, 2011).

Section 8(a)(1) of the National Labor Relations Act prohibits employers from terminating employees who engage in concerted activity. While the act of engaging in a "concerted activity" is most often engaged in by two or more employees seeking to discuss or improve terms and conditions of employment, it can also be engaged in by a single employee when done for the purpose of initiating or inducing group action.

In *Parexel,* a registered nurse spoke with a recently rehired employee originally from South Africa about whether the employee and his wife had received raises as an inducement to return to work. The South African employee falsely answered that they had received raises. A day or two later, the nurse spoke to her immediate supervisor, stating that the whole unit should quit and come back with a raise. The nurse also stated that the manager whom she believed had approved the raise, also South African, looked after employees from South Africa.

The nurse was questioned by a representative from human resources and the South African manager. The nurse repeated her conversation with the recently rehired South African employee. She also expressed her belief that the employer was paying higher wages to South Africans and that the South African manager would continue to favor South Africans. When asked if she had talked to anyone else about the matter, the nurse replied that she had not. (At trial, the South African manager admitted that they met with the nurse out of concern that the nurse had been talking to other employees.)

Approximately one week later, the nurse was terminated. The Administrative Law Judge and Board quickly dismissed alleged performance reasons for the

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termination and, instead, focused on whether the nurse had been terminated for her concerns about alleged raises and preferential treatment for South African employees. The Board agreed with the Administrative Law Judge that the nurse had not been engaging in concerted activity when she spoke with the recently rehired South African employee or when she spoke with her immediate supervisor. There was no evidence that she had engaged in these conversations on behalf of other employees or with the object of initiating or inducing group action.

Nevertheless, and even though the employee had not engaged in any concerted activity, the Board majority found the discharge unlawful because it found the discharge to be "a pre-emptive strike to prevent her from engaging in activity protected by the Act." The Board majority found that the employee was terminated because of the employer's concern that she would, in the future, discuss favoritism with regard to wages and preferential treatment for South Africans with other employees and its fear of what those discussions might lead to. The employer's effort to "nip" concerted activity "in the bud" was found by the Board majority to interfere with and restrain employees in the exercise of their rights under the Act.

Although the Board dissenter intimated his serious reservations with the holding of the majority, he never reached the merits of that ruling. Instead, he found that the theory espoused by the majority was not alleged in the complaint or closely related to the complaint. Further, he found the theory of violation was not fully litigated. Therefore, according to this Board member, fundamental due process precluded a ruling on the pre-emptive discharge theory.

While not directly involving a union, the holding of the Board majority is just the latest example of the Board shift to a less friendly attitude toward employers. The decision has potential application to a broad array of future cases in which employees are terminated before engaging in any union or concerted activity. Employers should continue to exercise caution and consult with labor and employment counsel before making termination decisions.

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