The Great Temperature Debate

CASE STUDY 3-1 The Employer is a small, nonunion furniture manufacturer with 15 employees engaged in interstate commerce. Both of the employees involved in this case worked in the machine shop building as band-saw operators. Because the band saws were located near the shop's large overhead door, to facilitate the disposal of sawdust, the band-saw operators were often subject to lower temperatures and drafts on cool or cold days, whereas other employees farther from the overhead door often felt too warm. To resolve this long-standing problem, the plant manager established a rule that stated: "The overhead door will remain open when the temperature in the shop exceeds 68 degrees and closed when the temperature is at or below 68 degrees."

On the day in question, employees Drake and Keeler, who were both band-saw operators, complained to the shop supervisor that they were too cold and requested that the overhead door be closed. When questioned by the shop supervisor, the majority of the other shop employees present responded that they thought the door should be left open. The thermometer on the wall of the shop supervisor's office, located in approximately the center of the machine shop building, read 72 degrees.

On this day, employee Drake was wearing a sleeveless shirt and shorts. Employee Keeler was dressed in blue jeans, a short-sleeved shirt, a flannel shirt, and a heavy sweater. Both Keeler and Drake claimed it was too cold and drafty at their workstation near the open overhead door. The shop supervisor refused to close the overhead door because the majority of employees wanted it left open. During a scheduled lunch break, Drake and Keeler discussed their problem and decided to walk off the job for the remainder of the day to protest the cold temperature at their workstation.

Upon returning to work the following morning, Drake and Keeler were informed by the plant manager that they had been fired for leaving work the previous day without management's permission. Drake and Keeler subsequently filed an unfair labor practice charge with the NLRB alleging their discharge represented unlawful discrimination of their right to engage in concerted and protected activity under Sec. 7 of the LMRA. Drake and Keeler requested a remedy to include reinstatement with full back pay and restoration of any lost privileges.

Questions

1. Because Drake and Keeler's employer meets the standard for coverage under the LMRA by engaging in interstate commerce, which specific employee right protected by Sec. 7 of the LMRA could Drake and Keeler argue they were engaged in which at least partially motivated the employer's decision to discharge them?
2. On what grounds might the Employer try to argue that the discharge of Drake and Keeler was an appropriate (legal) exercise of management's rights?
3. Was the Employer's discharge of Drake and Keeler an unfair labor practice under the LMRA, as amended? If so, what should be the appropriate remedy?

A Matter of Timing

CASE STUDY 3-2 Ramon Ortiz had been employed for six years as a waiter in the employer's restaurant at the time of his June 19 discharge. On May 11, Ortiz was scheduled to work from noon until 10 P.M. After clocking in, Ortiz requested and received permission from restaurant manager Hildago to leave work early if Ortiz would return in time to work the 4:30 P.M. dinner period. Ortiz left work but later claimed that he "forgot to clock out." When Ortiz's brother Juan reported for work at 6 P.M. he clocked himself in and clocked his brother Ramon out at 6:04 P.M.

A week later, manager Susan Post noticed while reviewing time card records that both Ortiz brothers had clocked in and out at virtually the same time (6 P.M.) on May 11. Manager Post interviewed both Ortiz brothers to solicit their explanation of the time card entries. Ramon Ortiz

concerted activity for the protected purpose of expressing employee grievances to management. Ortiz was acting on behalf of several other employees who had authorized him to contact manager Gaines to arrange a meeting with higher level company representatives who could receive and respond to job related employee concerns. The General Counsel argued that the real reason or motive behind Ortiz's discharge was that restaurant management did not like the idea that Ortiz was stirring up trouble by going over their heads and contacting corporate management directly about alleged problems at the restaurant. The previous incident on May 11 involving the time clock could not have been the real reason for discharge (as the employer claims) because management had already disciplined Ortiz for that incident weeks before by placing a written warning in Ortiz's file. One likely effect of permitting the company to discharge a recognized employee leader in the union organizing campaign on the basis of a pretext would be to intimidate other restaurant employees from risking the exercise of their legitimate right to form or join a labor organization under Sec. 7 of the LMRA, a result not intended by Congress.

The respondent (employer) argued that management had no knowledge of any union organizing campaign until being informed by the NLRB of the union's representation election petition filed on July 11. The employer also denied any knowledge of concerted and protected activities in which Ortiz might have engaged prior to his discharge on June 19. The employer stated former manager Gaines had never disclosed to other managers at the restaurant that he had met with Ortiz on June 15. The employer argued that the investigation into the May 11 time clock incident had been a continuing affair and was concluded on June 19 with the decision to terminate Ortiz's employment. The employer did not call former manager Gaines or any other restaurant managers as a witness to testify at the unfair labor practice hearing and provided no written evidence to support the claim that the investigation of the May 11 incident had continued beyond the date the warning notice was placed in Ortiz's file.

Questions

1. Evaluate the employer's decision not to call any management witnesses or offer any written evidence to support the employer's stated position in the case. What are some examples of testimony or written documentation that an employer in a similar situation could use to prove the employer's theory of the case?
2. Was Ramon Ortiz unlawfully discharged in violation of Sec. 8 (a) (1) and (3) of the LMRA, and if so, what should be the appropriate remedy? Explain your reasoning.

Determination of Supervisory Status

CASE STUDY 3-3 The union sought to become the exclusive bargaining representative for a group of five harbor pilots employed by Pacific Coast Docking Pilots (the Employer). The Union won a National Labor Relations Board (NLRB)–supervised secret ballot election by a vote of 5-0. The employer refused to recognize and bargain with the union in an effort to force a federal court to determine if the five harbor pilots who composed the bargaining unit were supervisors or employees. The Union filed an unfair labor practice against the Employer for a refusal to bargain in good faith. The Board granted summary judgment in favor of the Union, which the Employer then appealed to a federal court of appeals for review.

The Employer argued that the harbor pilots should be classified as "supervisors" and therefore excluded from the definition of "an employee" covered under the LMRA, as amended. The burden of proving the supervisory status of an employee is on the party asserting such a status. Under Section 2 (11), LMRA defines a supervisor as: "any individual having authority, in the interests of the employer, to

hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The Supreme Court has established a three-part test for determining the supervisory status of an individual under the LMRA, as amended (*NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 [1994]). First, an employee must perform at least one of the 12 specific functions outlined in the statutory definition of a supervisor under Section 2 (11) of the LMRA. Second, in performing one of the 12 specified supervisory functions, the individual must be required to exercise independent judgment. Third, the exercise of independent judgment in performing one or more of the 12 listed supervisory functions must be "in the interest of the employer." The third test is typically the easiest to prove because virtually any action related to the attainment of a legitimate business goal or purpose of the firm will be considered an act "in the interest of the employer." Most cases involving the determination of supervisory status will rest on an analysis of the evidence related to parts one and two of the three-part supervisory status test.

The Employer maintains that the docking pilots make recommendations on hiring and promotion decisions, assign work to employees, and are responsible for directing employees' work during the docking process. More specifically, the Employer states that the advice of docking pilots is almost always followed in making decisions regarding who to hire or promote into a docking pilot position or relief docking pilot position. U.S. Coast Guard regulations require that docking pilot trainees make trips with licensed docking pilots before becoming eligible to obtain a docking pilot's license. Docking pilots are required to evaluate the performance of trainees on such trips and provide a recommendation as to the suitability of each trainee for the job position of docking pilot. Docking pilots do not discipline other employees, adjust employee grievances, or evaluate the job performance of non-trainee pilots. The final authority for all hiring and promotion decisions rest with the president and vice president of the employer.

When a large ship enters a port, it requires the assistance of tugboats to maneuver into a position to dock or undock. The docking pilot receives from the Employer a list of the ships scheduled to arrive or depart the port on a given day. The information provided by the Employer includes such items as the current location and dimensions of each ship. The docking pilot uses this information together with current information on other factors (e.g., current wind speed, water current speed, existing navigation hazards in the channel), to determine the number of tugboats required to accomplish the docking procedure. Once a ship's captain has entered the port, a tugboat delivers the docking pilot to the ship. The docking pilot then assumes command of the ship from the ship's captain and directs the docking procedure. The docking pilot communicates directly with the captain of each tugboat involved to ensure that each tugboat will render the necessary assistance to ensure a safe and accurate docking experience. Essentially, the docking pilot communicates what must be accomplished to each tugboat captain, who then determines what actions his tugboat crew must take to accomplish the defined objective. Each tugboat captain is responsible for directing his or her own boat crew to carry out the instructions of the docking pilot. Tugboat captains have been previously determined by the NLRB to be supervisors under the LMRA. Once the docking procedure is completed, the docking pilot returns control of the ship to the ship's captain and reboards one of the tugboats to prepare for the arrival or departure of the next ship on the daily schedule.

The Employer argued that the docking pilot's determination of how many tugboats will be required to perform a particular docking operation constitutes an assignment of work using independent judgment, which is a supervisory function under the LMRA's definition of a supervisor. The Employer also notes that a docking pilot "responsibly directs" others during the docking procedure by giving orders to the tugboat captains regarding the number and placement of towing lines to ensure a safe and efficient docking procedure.

The Union argued that the five docking pilots were professional employees covered by the

LMRA, not supervisors. The docking pilots have no authority to hire anyone, although they may be asked to give a professional opinion regarding the qualifications of an applicant for a vacant docking pilot position. Compliance with Coast Guard regulations, which requires less-experienced pilots to ride along with a more experienced pilot to learn information about a particular port before assuming responsibility for docking procedures in that port, represents a discharge of professional responsibility, which is a job duty of being a docking pilot. The docking pilots do not discipline other employees, handle grievances, or formally evaluate other employees' job performance.

The Union further argued that instructions given by docking pilots to other tugboat captains (who are supervisors) during docking procedures are part of the job duties of a professional docking pilot. The docking pilot has no authority to order members of a tugboat captain's crew to perform any specific job duties. The determination of the number of tugboats required to perform docking procedures is a function of the size of the ship to be docked and prevailing sea and weather conditions. This determination does not require the exercise of significant independent judgment on the part of the docking pilot.

Questions

1. Should the docking pilots be classified as supervisors and thus excluded from participating in a bargaining unit for purposes of collective bargaining? Explain your reasoning.

Challenge of Employer Policy on "Inquiries by Government Representative"

CASE STUDY 3-4 Sec. 8 (a) (1), LMRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Sec. 7 of the Act. Sec. 8 (a) (4), LMRA makes it an unfair labor practice for an employer to discharge or otherwise discriminate against an employee for filing an unfair labor practice charge or giving testimony in any NLRB proceeding. The employer's employee handbook provided to every company employee contained the following written policy entitled "Inquiries by Government Representative":

> *From time to time, management may be called, visited or sent written communication by a representative of a federal, state, or local government agency investigating a possible violation of law or seeking other information.*
>
> *It is our policy to cooperate with all authorized government agencies in the legitimate pursuit of their regulatory or enforcement functions. The following procedures must be followed for all such contact other than those regarding routine forms and other communications relating to sales taxes, business licenses and permits, and routine local health inspections.*
>
> *If you are the person contacted, immediately notify the person in charge of your Facility. If the visit is made after hours, contact the department vice president. If this fails, call the Emergency Phone number which is posted at all company facilities. Additionally, these guidelines should be followed:*
>
> *Be cordial to the person making the request. The visitor should be treated with the same courtesy as any guest at the Facility.*
>
> *Do not volunteer any information, or admit or deny the truthfulness of any allegation or statement the inspector may make, nor sign any written statements, such as reports or affidavits, without express approval from a company attorney.*

During the course of an investigation into the alleged unlawful discharge of two employees at the company's nonunion facility for union activity, several employees expressed a reluctance to be interviewed by NLRB staff investigators or to testify at any unfair labor practice hearing out of concern that such action on their part