2016's Ten Most Surprising Decisions of the National Labor Relations Board and Department of Labor

Presented by:

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Trustees of Columbia University in the City of New York

364 NLRB No. 90 (August 23, 2016)

- Student teaching and research assistants are "employees" and can unionize
- NLRB overrules its own *Brown University* decision

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Dalton Schools, Inc.

364 NLRB No. 18 (June 1, 2016)

- Employees who have rightful access to their employer's email system in the course of their work may use the system for protected activity and do not lose that protection "merely for criticizing management in sharp and unequivocal terms"

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Retro Environmental/ Green JobWorks

374 NLRB No. 70 (August 16, 2016)

- When do two unrelated employers become one such that a Union can force recognition upon both?
  - R.E., a construction contractor had a contract for staffing with GJW Company for labor
  - GJW would remove one of its staff from R.E. if asked although this never occurred
  - GJW sets wages and benefits
  - R.E. supervises workers assigned to it
- NLRB: Joint employers even though no ongoing projects under *Browning Ferris* standard

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Miller & Anderson, Inc.

364 NLRB No. 39 (July 11, 2016)

- NLRB overturns its own prior precedent to hold that an appropriate unit can include "jointly employed" (temps) and "solely employed" (regular) employees of a single user employer
- Employer consent to such a combined unit is "no longer necessary"

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American Baptist Home of the West, d/b/a/ Piedmont Gardens

369 NLRB No. 13 (May 31, 2016)

- Employees of nursing home strike, and employer replaced them permanently, as the law allowed for 60+ years
- Held:
  - The hiring of permanent replacements for strikers is unlawful if "motivated by a purpose prohibited by the Act" and it is not necessary to show an illegal motive extrinsic to the strike
  - Replacing workers to punish strikers or to discourage future strikes is an "independent unlawful purpose"

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T-Mobile USA, Inc.

363 NLRB No. 171 (April 29, 2016)

- Unlawful to maintain or enforce a policy that requires employees to:
  - "maintain a positive work environment by communicating in a manner that is conducive to effective working relationships"
  - "refrain from making recordings in the workplace"

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Whole Foods Market, Inc.

363 NLRB No. 87 (Dec. 24, 2015)

- Policy guides unqualifiedly prohibited "all workplace recording"
- Held:
  - Policy was overbroad because it could easily be construed by employees to prohibit activity protected by the Act
- Applies to both union and non-union settings

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AT&T

Wis. Bell, Inc., 2016 NLRB LEXIS 506 (July 12, 2016)

- Facts:
  - At beginning of negotiations, employees begin wearing large buttons reading “WTF” with “where’s the fairness” in smaller type below
  - Policy prohibited altering required apparel “in any way, which includes adding buttons, pins, stickers, etc.”
- AT&T’s Argument:
  - After charges filed, AT&T argued that customers would ascribe to the button the common meaning which is vulgar, profane and offensive

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AT&T

Wis. Bell, Inc., 2016 NLRB LEXIS 506 (July 12, 2016)

- Held:
  - Because “where’s the fairness” appeared below, customers could view the button as signifying a labor dispute and could not be interpreted so as to offend customers
- Applies to both union and non-union settings

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Chipotle Mexican Grill

364 NLRB No. 72 (August 11, 2016)

- Unlawful Handbook Policy
  - "You may not make disparaging, false, misleading, harassing or discriminating statements about or relating to Chipotle, our employees, suppliers, customers, competition or investors"
  - "This code does not restrict any activity that is protected by the National Labor Relations Act"
- The rule is sufficiently "imprecise" such that it could encompass protected activity

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Capital Medical Center

364 NLRB No. 69 (August 12, 2016)

- Facts:
  - Acute Care hospital is bargaining with UFCW
  - Sixty employees begin informational picketing and hand billing on the sidewalk
  - No interference by hospital
  - Group of off duty employees moves into the lobby to picket
  - Employees told to picket outside or be disciplined
  - Cops called
  - No arrests or discipline

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#1 Capital Medical Center

364 NLRB No. 69 (August 12, 2016)

- NLRB:
  - Even the threat of discipline violated the Act since patients were not actually blocked from entering
  - Violation unless "concrete evidence" that patients were disturbed or operations were disrupted or that disruption was certain and imminent based on objective evidence
  - "Speculation of possible harm" not enough
- Impact:
  - Expanded longstanding rule allowing solicitation and distribution (in non-work areas) to picketing
  - May apply in union and non-union settings

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BONUS CASE

Cooper Tire & Rubber Co.

363 NLRB No. 194 (May 17, 2016)

- Facts:
  - Employer locks out employees during a labor dispute and hires temporary replacements
  - Locked out employee Runion shouts at van carrying replacement workers including African American workers
    - "Hey, did you bring enough KFC for everyone?"
    - "Hey, anybody smell that? I smell fried chicken and watermelon."
  - Cooper fires Runion, termination upheld by arbitrator
  - ALJ orders reinstatement, finding that arbitrator's decision is "clearly repugnant" to the NLRA

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BONUS CASE

Cooper Tire & Rubber Co.

363 NLRB No. 194 (May 17, 2016)

- Appeal to the 8th Circuit—NLRB argues:
  - Employer can terminate for picket line misconduct only if misconduct "would reasonably tend to coerce or intimidate employees in the exercise of their rights"
  - While "offensive to the dignity of African-American replacement workers," the remarks "were not so egregious as to cause him to forfeit the [NLRA's] protection"
  - Cooper faced no real jeopardy under Title VII had it failed to police such off-duty misconduct

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