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Litigation to Rise With New NLRB Rules, Employee Free Choice Act

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January 2009

Recent changes to the National Labor Relations Board ("the Board") procedures and the looming threat of passage of the Employee Free Choice Act ("EFCA") could significantly impact employers defending their termination decisions of employees in the face of union activity. It is increasingly likely that the Board will challenge, and employers will be forced to litigate, an appropriate back-pay damage award to an employee.

In 2007, the Board issued its decision in *St. George Warehouse*, 351 NLRB No. 42 (2007), which, for the first time, shifted part of the burden of proof from the employer to the Board regarding the issue of whether a terminated worker failed to adequately mitigate back-pay damages by searching for a substantially equivalent job, which would reduce the amount of back-pay owed. Earlier this month, the Board's General Counsel issued a Guideline Memorandum to its regional attorneys which sets forth and further explains the Board's new burden of proof and how presentation of evidence should be allocated in a compliance proceeding.

Prior to *St. George Warehouse*, when the Board alleged that an employer's decision to terminate a worker violated the National Labor Relations Act, the Board initially bore the burden of demonstrating the amount of back-pay damages (*i.e.* what the worker would have earned but for the illegal discrimination) that the worker was owed from the employer. The employer then had an opportunity to present an affirmative defense, arguing that the worker did not properly mitigate post-employment damages by failing to adequately search for interim employment. To prove failure to mitigate, the employer had to present evidence that substantially equivalent jobs were available in the relevant geographic area during the relevant time period, and that the employee had failed to apply for these jobs. Employers challenged the employee's failure to accept a slightly lower paying or skilled position as unreasonable efforts in the mitigation of damages. Equally important, the employer demanded records concerning an employee's job search and proof of registrations with state and/or private employment services. Often, employers hired an expert to challenge an

employee's efforts with statistics and numbers.

Under the current law, in light of the Board's *St. George Warehouse* decision, employers no longer carry the difficult burden of proving whether an employee conducted a diligent job search. Once an employer has proved that there were substantially equivalent jobs available to the worker, the burden then shifts to the Board to prove that the worker took reasonable steps to seek those jobs. While the ultimate burden of proof remains with the employer as to whether the employee failed to mitigate damages, the Board must now take certain steps in its investigation and prosecution of the case. For example, the Board attorneys must instruct employees to begin their search for work within a short time-frame following termination and to maintain careful records of their employment search. Additionally, workers will be directed to register with state and private employment services and check newspapers and internet advisements, and the Board attorneys will conduct their own investigation regarding the availability of jobs. Further, the General Counsel suggests that regional attorneys defend an employee's failure to secure a job by arguing that the employee's age, health, education, job skills, employment history, physical disability or lack of access to a car prevents the employee from finding a new position.

This change to Board procedures increases the likelihood that the Board attorneys seeking back-pay for workers will have to litigate whether the workers conducted a reasonable search for work, making it more costly for employers to defend such cases and more likely that they will seek a resolution without having to present evidence at a compliance proceeding.

The issue will become even more difficult for employers in the event that the Employee Free Choice Act becomes law in 2009. Under the current version of the bill, in addition to injunctive relief, the EFCA will increase the amount of monetary fines and back-pay imposed on employers that terminate workers during union organizing campaigns. Thus, if an employer terminates a union activist, under the EFCA, the worker could seek three-times the amount of back-pay otherwise owed to the employee, as a penalty to the employer. The increased financial exposure to employers under the EFCA will certainly encourage employers to challenge whether the worker had appropriately mitigated damages following employment, making the new burdens under *St. George Warehouse* even more important for employers.

With Board procedures changing and the EFCA looming, employers should be ready to put forth a strong defense to alleged unfair labor practices that result in a worker's termination. It will become financially imperative for employers to take the time and pay the cost to adequately defend these cases in order to reduce the increased monetary fines and back-pay awards that the Board will be seeking.

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