

IN CONCERT
A Beginner's Guide to Labor
and Employment Law's Old and Well-Kept Secret

Some years ago a few of the musicians in a certain symphony orchestra told me a joke as prelude to a question.

The joke: The orchestra was at the time being directed, briefly, by a particularly inept conductor. He could not keep up with the music, much less lead the musicians. At a minor concert at which this conductor's performance was particularly incompetent, the timpanist was completely overcome with frustration. He began to bang furiously on his drums and cymbals. The other musicians stopped playing and the timpanist continued on alone for about 15 seconds, creating an awful racket. When he finally stopped, the conductor, red-faced and furious, yelled "If I ever find out who did that, he's fired."

The question: Would the timpanist be protected from discipline because he was acting "in concert?"

These musicians are among the very few workers who are aware that the law protects the right of employees to act "in concert" to protest their working conditions. Although the right is an old one – born with the passage of the National Labor Relations Act (NLRA)¹ the same year as Elvis – almost no employees are aware of its existence, and my colleagues representing management tell me that employers are equally oblivious.² Indeed, even many employment lawyers do not understand that employees who speak or act "in concert" to improve their lot as

¹ 29 U.S.C. § 151 et. seq.

² See e.g., Charles J. Morris, NLRB Protection in the Workplace: A Glimpse at a General Theory of Section 7 Conduct, 137 U. Pa. L. Rev. 1673, 1675 (1989) ("perhaps most [employers] and certainly most employees are totally oblivious of this important body of law").

workers are often protected. As a result, the right has been called “one of the best kept secrets of labor law.”³

Perhaps the primary reason that most workers are unaware of this right is that no workplace posting is required, as with many other employment laws. Two reasons that so many employment lawyers know so little about the right seem dominant. Many lawyers believe, given the dichotomy in this country between “labor” and “employment” law, that the NLRA deals entirely with union-management relations and does not apply where no union or union organizing is present. In addition, because no private right of action or provision for attorneys’ fees exist, and because the remedies are modest at best, the right is not one which many plaintiff employment lawyers have become familiar.

Nevertheless, the right is an important one for lawyers to be familiar with, both in helping to provide a remedy for employees who speak or act to improve their working conditions where other statutes do not, and also in preparing employees who plan to take such action. The right to act “in concert” is the “principal source of legal protection for employees who engage in workplace protests.”⁴ This article attempts to provide a basic understanding of the substantive and procedural law surrounding the law. The first of six sections provides a brief history and overview of the Section 7 right found in the NLRA. The second explains the requirements of the three elements necessary to claim the right. The third section describes how to prove causation between activity protected by the statute and retaliatory action by an employer. The fourth section explains briefly the categories of employers and employees who are not covered by the

³ William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 *Berkeley J. Emp. & Labor Law* 259, 267 (2002).

⁴ Richard M. Fischl, *Self, Others and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 *Colum. L. Rev.* 789 (1989).

statute. The fifth section explains how to enforce an employee's rights under the Act. The final section describes the three best concerts this author has attended.

Section 1: Brief History and Overview

In 1935 Congress passed the National Labor Relations Act, sometimes called the Wagner Act in honor of the senator whose efforts and expertise delivered what remains the heart of present American labor law. Congress' stated purpose for passing the NLRA was to encourage collective bargaining to remedy a perceived disparity in bargaining power between employers and employees and thus promote the country's economic health.⁵ Senator Wagner, who called the NLRA "the next step in the logical unfolding of man's eternal quest for freedom," stated at the time:

Caught in the labyrinth of modern industrialism, dwarfed by the size of corporate enterprise, [the employee] can attain freedom and dignity only by cooperation with [other employees].⁶

To accomplish this broad purpose, the NLRA conferred on employees an enforceable right to organize. The cornerstone of the new NLRA was Section 7, which originally provided

Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.⁷ (emphasis added)

An employer is prohibited from interfering with an employee's exercise of Section 7 rights by Section 8(1)(1) of the NLRA, which provides that it is an "unfair labor practice" (ulp) for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."⁸ Thus an employer who interferes with, restrains or coerces

⁵ 29 U.S.C. § 151.

⁶ 79 CONG. REC. 7565 (1935) (remarks of Senator Wagner).

⁷ 29 U.S.C. § 151. After amendment in 1947, Section 7 also protects the right of employees not to engage in such activity.

⁸ 29 U.S. C. § 158(a)(1).

employees who exercise their Section 7 rights to engage in concerted activity for mutual aid or protection commits an unfair labor practice that can be remedied by the National Labor Relations Board (“the NLRB” or “the Board”). Almost any adverse action against employees for exercising their Section 7 rights can violate Section 8(a)(1).

Although a primary goal of the NLRA was to protect the right of employees to unionize,⁹ Section 7 also protects the right of employees to engage in concerted activity for mutual aid or protection even where no union representation or union activity exists. In NLRB v. Washington Aluminum Co.,¹⁰ a group of machine shop employees with no union representation and no collective bargaining agreement complained individually to management that their shop was too cold. On a particularly severe day, seven employees walked off the job to protest the lack of heat. The employer immediately discharged them for violating a plant rule forbidding employees from leaving work without permission. The Supreme Court held that the NLRB had properly concluded that the employees’ conduct was an exercise of their Section 7 rights and that their termination therefore violated Section 8(a)(1). Justice Black, speaking for a unanimous court, made plain that employees do not need to be represented by a union to exercise the rights protected by Section 7.¹¹

Section 2: [Protected] Concerted Activity for Mutual Aid and Protection

Whether any particular activity of unorganized employees is protected depends on whether the activity fits within the definition of Section 7. The activity must have three components. First, as the statute states, the activity must be “concerted.” Second, as the statute

⁹ See e.g., Cynthia L. Estlund, What Do Workers Want? Employee Interests, Public Interests and Freedom of Expression Under the National Labor Relations Act, 140 U. Pa. L. Rev. 921, 942 (1992) (“no doubt [exists] that the NLRA and Section 7 of the Act were primarily concerned with the promotion of independent labor organizations and with collective bargaining over wages and other terms and conditions of employment”).

¹⁰ 370 U.S. 9 (1962)

¹¹ Id. at 14-15.

also states, the conduct must be for “mutual aid or protection.” Third, the activity must be carried out in a manner that does not deprive it the Act’s protection.¹² These three prongs taken together are often referred to as “protected concerted activity” (“pca”). Each is described briefly below.

A. Concerted.

The “in concert” prong may be the most important, for it is the prong least likely to be satisfied.¹³ When two or more employees act together, whether their actions are organized or spontaneous, they are plainly acting “in concert” within the meaning of the statute. The activity of a single employee is more problematic, depending on the purpose and effect of the employee’s action. Speaking very generally, under the Board’s current view, an individual’s actions may be deemed “concerted” if engaged in with or on the authority of other employees and not solely by and on behalf of the individual employee.¹⁴ This includes actions by individual employees who seek to initiate, to induce or to prepare for group action, as well as individuals who bring group complaints to management’s attention.¹⁵ Also included are concerns expressed by an individual which are a “logical outgrowth” of concerns expressed by a group.¹⁶

¹² Put otherwise, “1) it must be concerted; 2) it must be for the objective of mutual aid or protection; and 3) the nature of the activity must not be unlawful, too disloyal to the employer, in breach of contract, or such that it undermines the authority of a labor organization that represents a majority of the employees in a bargaining unit.” Corbett, *supra*, note 2 at 279, citing Morris, *supra*, note 1 at 1689-90.

¹³ Corbett, *supra*, note 1 at 279.

¹⁴ *Meyers Industries*, 268 NLRB 493, 497 (1984) (Meyers I).

¹⁵ *Meyers Industries*, 281 NLRB 882, 887 (1986), (Meyers II) (adopting comments in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

¹⁶ See e.g., *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992) (four employees’ refusal to work overtime when approached individually held logical outgrowth of prior concerted protest over reduction in schedule and employer believed they were engaged in concerted activity); *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (employee who called Department of Labor regarding her employer’s lunch hour policy held engaged in concerted activity because call was continuation of efforts initiated by group of employees; even though no evidence employees agreed to act together they did agree they had a grievance they should take up with the employer); *KNTV Inc.*, 319 NLRB 447 (1995) (an individual reporter’s expression of concerns about pay held concerted where the “logical outgrowth” of matters raised by a group several weeks earlier); *Golden Stevedoring Co., Inc.*, 335 NLRB 410 (2001) (employee’s threat to stop working if drinking water did not arrive where the “logical outgrowth” of his and other employees’ concerns).

The standard for judging whether activity is concerted is objective, not subjective. Consequently, employees' subjective opinions about other employees' motives for concerted activity have little bearing on whether conduct will be considered concerted.¹⁷ An employee may act for reasons that are both altruistic and selfish. Further, the Board's current view is that an employer must know of the concerted nature of an employee's action for it to be considered within the Act's protection.¹⁸ On the other hand, an employer's retaliation against an employee it believes was engaged in concerted activity would be unlawful, even if in fact it was not concerted.¹⁹

Some examples of activity found to be "concerted", other than work stoppages such as in Washington Aluminum, include an employee's raising the issue of sick leave to address family medical emergencies after the employee had discussed the issue with co-workers and found they shared his concerns and at least one encouraged him to speak up;²⁰ an employee's statement at a group meeting that he had questions on behalf of himself and co-workers after having discussed the issue with co-workers;²¹ remarks among several hotel employees expressing dissatisfaction with working conditions and discussing a walk out when the hotel was busy;²² two employees' refusal to return to work for the purpose of pressuring an employer to reverse his decision to discharge a third employee;²³ employees jointly complaining about uniforms, equipment and tools;²⁴ and employees' discussions about wages generally.²⁵

¹⁷ Circle K Corp., 305 NLRB 932 (1992); Aroostook County Regional Ophthalmology Center, 317 NLRB 218 (1995).

¹⁸ See e.g., Center Ridge Co., 276 NLRB 105 (1985) (employee's protest to media not considered "concerted" because employer did not know employee had discussed concerns and possibility of protest with others).

¹⁹ Potential School for Exceptional Children, 282 NLRB 1987 (1987); Daniel Construction Co., 277 NLRB 795 (1985).

²⁰ Phillips Petroleum Co., 339 NLRB 916 (2003).

²¹ Air Contract Transportation Inc., 340 NLRB 688 (2003).

²² JCR Hotel Inc., 338 NLRB 27 (2002), *enforced*, 342 F.3d 837 (8th Cir. 2003).

²³ Labor Ready Inc., 331 NLRB 1656 (2000).

²⁴ Halle Enterprises Inc., 330 NLRB 1157 (2000), *enforced* 247 F.3d 268 (D.C. Cir. 2001).

A few examples of conduct found not to be “concerted” include an employee’s refusal to perform an assignment based on his belief that equipment was unsafe when other employees had not complained,²⁶ an employee’s asking a co-worker if the co-worker had been placed on probation, when the employee did not seek to initiate, induce or prepare for group action;²⁷ an employee’s complaint to a state agency when not done with others;²⁸ and an individual’s “gripping” about overtime.²⁹

B. Mutual Aid or Protection

Even activity that is plainly “concerted” also must satisfy the Section 7 requirement that it was taken for “mutual aid or protection.” Employees who act together in their own self-interest concerning their own working conditions are clearly covered. This includes employees who come to the aid of fellow employees even if about matters not directly affecting them, based upon a potential reciprocal benefit – the assisted employee may some day return the assistance.

Activity for “mutual aid or protection” can also extend beyond the employees’ own workplace. In Eastex, Inc. v. NLRB,³⁰ the Supreme Court recognized that Congress intended this clause to extend the scope of protected activities beyond those associated with grievance settlement, collective bargaining and self-organization to include activities “in support of employees of employers other than their own. . . [as well as] through channels outside the immediate employee-employer relationship.”³¹ In Eastex, the Court considered whether the distribution of a newsletter that encouraged employees to oppose an attempt to make the state’s statutory right-to-work law part of the state constitution and the President’s threatened veto of an

²⁵ Independent Stations Co., 284 NLRB 394 (1987).

²⁶ Goodyear Tire and Rubber Co., 269 NLRB 881 (1984).

²⁷ Adelphi Institute, 287 NLRB 1073 (1988).

²⁸ Oakes Machine Corp., 288 NLRB 456 (1988).

²⁹ Kohls v. NLRB, 629 F.2d 173 (D.C. Cir. 1980).

³⁰ 437 U.S. 556 (1978).

³¹ Id. at 564-65.

increase in the federal minimum wage was for “mutual aid or protection.” The Court upheld the NLRB’s determination that the activity was for “mutual aid or protection,” even though the employer was not in the position to cure either complaint.

“Mutual aid or protection” has been found to include a wide range of activity including expression of sympathy for striking employees of another employer;³² assistance in organizing another employer’s employees;³³ distribution of literature in support of another employer’s employees;³⁴ solicitation of funds for benefits of agricultural laborers employed elsewhere;³⁵ wearing a t-shirt with the slogan “Just Say No to Drug Testing;”³⁶ a letter to management criticizing promotion of an unpopular coworker;³⁷ letters to legislators by engineers opposing the relaxation of immigration laws contrary to their employer’s position;³⁸ use of internal email to contact other employees to oppose implementation of a new vacation policy;³⁹ drafting and faxing a letter to a board of trustees seeking intervention in a manager’s decision to restructure a salary schedule;⁴⁰ and a memo to management by an employee group expressing concerns about working conditions affecting other employees.⁴¹

The Court in Eastex recognized, however, that “some concerted activity bears a less immediate relationship to employees’ interest as employees than others” and that “at some point the relationship becomes so attenuated that an activity cannot fairly” be viewed as within the meaning of “mutual aid and protection.”⁴² Where employees are concerned about the public

³² NLRB v. J.G. Boswell Co., 136 F.2d 585 (9th Cir. 1943).

³³ Fort Wayne Corrugated Paper Co. v. NLRB, 111 F.2d 869 (7th Cir. 1940).

³⁴ Yellow Cab, 210 NLRB 568 (1974).

³⁵ General Electric Co., 169 NLRB 1101 (1968).

³⁶ NLRB v. Motorola, Inc., 991 F.2d 278 (5th Cir. 1993).

³⁷ Atlantic-Pacific Construction Co. v. NLRB, 52 F.3d 260 (9th Cir. 1995).

³⁸ Kaiser Engineers, 213 NLRB 752 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976)

³⁹ Timekeeping Systems, Inc., 323 NLRB 247 (1997).

⁴⁰ Friends of the Homeless, 199 NLRB 511 (1999).

⁴¹ Delta Health Ctr., 310 NLRB 26 (1993).

⁴² Eastex, *supra* at 567-68.

rather than their own working conditions, their activity may be found not to be for “mutual aid or protection.” Unlike speech by public employees, which must be about matters of public concern to be constitutionally protected, speech by private sector employees must be about employees to receive the Act’s protection.

Some examples of conduct found not to be for “mutual aid or protection” include employees who raised concerns with their employer about quality of patient care;⁴³ the posting of a sarcastic letter critical of management’s attempt to show appreciation to employees by serving ice cream cones;⁴⁴ proposals to other employees that the employees gain control of the company through purchasing stock because this activity did not advance their interest as employees but as entrepreneurs, owners and managers;⁴⁵ and employee efforts to prevent management’s purchase of the assets and to purchase assets themselves.⁴⁶

C. Protected

While the “in concert” and “mutual aid or protection” prongs come directly from the language of the statute, the third prong – that the activity not be carried out for a purpose or in a manner that forfeits the Act’s protection - has been developed by the Board and courts. The general test for this requirement is that the conduct not “so violent” or “of such character as to render [the employee] unfit for further service.”⁴⁷

Such unprotected conduct falls into several categories. One includes conduct that, although “concerted” and “for mutual aid or protection,” is activity that is unlawful or violent.⁴⁸

Another is activity indefensibly injurious to the employer’s interests, such as an unjustified

⁴³ Lutheran Social Service of Minnesota, Inc., 250 NLRB 35 (1980).

⁴⁴ New River v. NLRB, 295 F.2d 1290 (4th Cir. 1991), *denying enforcement of* 299 NLRB 773 (1990).

⁴⁵ Harrah’s Lake Tahoe Resort Casino, 307 NLRB 182 (1992).

⁴⁶ Nephi Rubber Products Corp., 303 NLRB 151 (1991).

⁴⁷ Wolkerstorfer Co., 305 NLRB 592, fn 2 (1991); Hawthorne Mazda, 251 NLRB 313, 316 (1980).

⁴⁸ Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942) (unlawful activity unprotected), NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (violence not protected).

disparagement of an employer's product or services,⁴⁹ deceptive appeals to the public to discourage it from using the employer's services,⁵⁰ or taking or releasing confidential information.⁵¹ A third is that, while a strike or walkout – the total withholding of services – is protected, partial strikes, slow downs, insubordination, or other disruptions of work usually are not.⁵² However, the fact that the activity is in breach of a company policy – as claimed in Washington Aluminum for example – does not make it unprotected. Indeed, a company policy that restricts protected concerted activity – for example by prohibiting discussion of wages among employees – can itself violate the Act.⁵³

Section 3: Causation

Sometimes no dispute exists about whether an employer's discipline of an employee was in retaliation for concerted activity protected by the Act; the employer essentially admits causation at the time of the discipline because the employer was unaware that such discipline violated the law. Where an employer does maintain that discipline was issued for reasons other than activity protected by the Act, the Board analyzes causation under its Wright Line approach.⁵⁴ Under Wright Line, once a prima facie case establishes that the protected concerted activity was a "motivating factor" in an employer's decision to discipline an employee, the burden of proof shifts to the employer to demonstrate that it would have taken the same action even absent the employee's protected conduct. If the employee's protected activity was a

⁴⁹ NLRB v. Local 1229, International Brotherhood of Electrical Workers (IBEW) Local 1229 (Jefferson Standard Broadcasting Co.), 346 U.S. 464 (1953).

⁵⁰ Montefiore Hospital and Medical Ctr. v. NLRB, 621 F.2d 510 (2d. Cir. 1980).

⁵¹ NLRB v. Brookshire Grocery Co., 919 F.2d 359 (5th Cir. 1990), *enforcing in part*, 294 NLRB 462 (1989); Canyon Ranch, 321 NLRB 937 (1996).

⁵² Can-Tex Indus. v. NLRB, 256 NLRB 863 (1981), 683 F.2d 1183 (8th Cir. 1982), *enforcement denied in part* (turning off equipment essential to production); In re Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000), *enforcement denied in part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002) (gross insubordination); Yale University, 330 NLRB 246 (1999) (withholding of grades by teaching fellows not protected).

⁵³ Independent Stations Co., 284 NLRB 394 (1987).

⁵⁴ Wright Line, Inc., Wright Line Div., 251 NLRB 1083 (9180), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (9182).

motivating factor for the employer's action – in the sense that the employer would not have otherwise taken the action – then the relative weight of the activity in comparison to other lawful factors is inconsequential. The concerted activities need be only a cause rather than the major or dominant cause:

It is enough that the employee's protected activities are causally related to the employer's action Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.⁵⁵

Section 4: Employers and Employees Not Covered

Not all employees enjoy the protection of Section 7. Because the Act does not cover some employers at all, it does not cover those employers' employees. And even where an employer is itself covered, certain of its employees may not be.

The largest group of employers not covered by the Act are public employers. The statute specifically excludes "[t]he United States or any wholly owned Government Corporation, or any federal Bank or any state or political subdivision thereof."⁵⁶ As a result, most public employees are not covered by the Act. The Act also does not cover those employers subject to the Railway Labor Act, which are primarily railroads and airlines.⁵⁷

Further, the NLRB's jurisdiction extends only to private employers whose operations affect interstate commerce, based upon the employer's annual revenues and its interstate activity determined by purchases from outside the employer's state. In its exercise of administrative discretion, the NLRB has limited its assertion of jurisdiction to cases which in its opinion have a substantial effect on commerce. For example, in most non-retail and non-service industries, the NLRB asserts jurisdiction over businesses with a gross volume of business of \$250,000 or

⁵⁵ *Id.* at fn 14. See generally, G.C. Memorandum 7.05 (October 12, 2006).

⁵⁶ 29 U.S.C. § 152(2).

⁵⁷ *Id.*

greater. The NLRB has set out similar jurisdictional limits for office buildings, shopping centers, apartment complexes, transit systems, taxi cab companies, newspapers, communication systems, hotels and motels, restaurants, private clubs, gaming industries, hospitals, nursing homes, unions as employers, private colleges and universities, symphony orchestras, architectural firms, stock brokerage firms, and credit unions, among others. The result is that many small employers, and thus all their employees, are not covered by the Act.

Even if an employer is covered, certain of its employees may not enjoy the Act's protection. The statute specifically excludes agricultural laborers, those in domestic service of a family or person at his or her home, those employed by their parents or spouses, independent contractors, those employed by employers subject to the Railway Labor Act, and supervisors.⁵⁸ The Board has also interpreted the Act to exclude managerial employees.⁵⁹ Nevertheless, the Act covers not only blue collar workers but many categories of professional employees, including lawyers, doctors, and symphony musicians to note just a few, so long as they are not supervisors or managers. Employees are covered during orientation or probationary periods, as are prospective employees.

Section 5: Procedure and Remedy

No private right of action for enforcement of an employee's Section 7 rights exists. Instead, an employee must rely on the NLRB to remedy the unfair labor practice.

A claim under the Act is commenced by the filing of an unfair labor practice ("ulp") charge with one of the 32 local Regional, Subregional, or Resident offices of the NLRB. The

⁵⁸ 29 U.S.C. § 152(3). Supervisors are defined in the statute as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the forgoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11)

⁵⁹ Bentley Hedges Travel Service, Inc., 263 NLRB 1480 (1982).

NLRB does not initiate ulp charges on its own, but responds to charges filed in its offices. The Board's General Counsel in the NLRB's Washington, D.C. office is responsible for the investigation and prosecution of unfair labor practice cases, but the Regional Director of each regional office is responsible for making the initial determination on cases arising within the geographic area served by the region.

The ulp charge must be filed within six months of the date of the event or conduct which is the subject of the charges.⁶⁰ The charge should be filed on the NLRB's standard form used in all its regional offices. The regional office will assist a charging party in filing a charge, which must be filed in the region in which the unfair labor practice occurred.

All regional offices use a standard case numbering system. The first two numbers assigned to the case indicate the regional office in which the charge is filed. The next two numbers indicate whether the charge is against an employer or union and which provision of Section 8 is allegedly violated. The final numbers are the numerical sequence of the charge within the regional office.

After a charge is filed in a regional office, it is referred to either an attorney or a field examiner for investigation. Charges are processed following the Board's Rules and Regulations and its Casehandling Manual for Unfair Labor Practice Proceedings ("CHM").⁶¹ In an effort to maximize the Board's resources, cases are prioritized into three categories based on their significance and relative impact on the public.⁶² Charges alleging discharge in retaliation for protected concerted activity are usually placed in the highest priority category. The investigator reviews the facts, researches the law, takes affidavits from witnesses and requests the charged party to provide a statement of its position and offer any evidence it wishes in its defense. The

⁶⁰ Beverage Management, Inc., Seven Up Bottling Co. of Detroit Division, 223 NLRB 911 (1976).

⁶¹ 29 U.S.C. § 160(b).

⁶² The NLRB's CHM may be found at www.nlr.gov/manuals/chm1.asp.

charging party is expected to cooperate with the Board and to provide a complete written account of all facts on which the charge is based, copies of relevant documents and the names and addresses of witnesses. A failure to cooperate may lead to the dismissal of a charge.

After the investigation, if the Regional Director determines that the ulp charge lacks merit, the agent or attorney conducting the investigation will contact the charging party and suggest that the charge be withdrawn. If the charging party will not withdraw the charge, the Regional Director will dismiss the charge, using either a “short” or “long” form dismissal. A short form dismissal briefly states that the charge has been dismissed. The longer form, which gives a detailed explanation, must be requested. If the charge is dismissed, the charging party can appeal the dismissal to the General Counsel’s Office of Appeals in Washington, seeking to have the decision of the Region reversed.⁶³

The General Counsel’s office reverses fewer than 10% of Regional Directors’ decisions that are appealed. The General Counsel’s decision on appeal is final; no further appeal to the Board or to the courts exists. If a charging party does not intend to appeal the dismissal, the party may withdraw the charge. A new charge may be refiled after such a withdrawal if new evidence is discovered, but the new charge must be filed within six months of the occurrence of the alleged ulp.

If the Regional Director determines that a charge has merit, the employer is advised and a settlement is proposed in which the employer agrees to cease the unfair labor practice and to take whatever action may be necessary to correct the wrong, including back pay if appropriate. The Board encourages the resolution of all ulp cases through informal or formal settlement

⁶³ CHM §§ 11740, et seq.

agreements or through non-Board adjustments.⁶⁴ The large majority of cases on which complaints issue are settled. If the employer is unwilling to enter into a settlement, the Regional Director will issue a formal Complaint, establishing jurisdiction and detailing allegations summarizing the facts constituting the alleged ulp violation, and listing provisions of the Act that have been violated. The Board may base its Complaint on the alleged charges and also on any additional related violations that the investigator discovers during the course of the investigation. Although an ulp charge must be filed with a regional office within six months, no time limit exists between when a charge is filed and a decision whether to issue a complaint exists, and sometimes many months may elapse.

After a Complaint has been issued -- which the employer must answer within fourteen days of receipt -- a hearing is held before an Administrative Law Judge, a federal civil service appointee independent of the NLRB.⁶⁵ The hearing, held in the region where the alleged ulp arose, is a formal proceeding, similar to a civil trial, in which the Federal Rules of Evidence apply. The Regional office provides counsel to represent the government in prosecuting the allegations of the complaint and who carries the burden of proving that the Act was violated as alleged in the Complaint. The charging party is not required to have an attorney but may do so at his or her own expense. Even if the charging party does have his or her own attorney present, the General Counsel's attorney from the regional office has primary responsibility for trying the case. The charged party, called the respondent, is entitled counsel at its own expense.

Following the hearing and briefing, the Administrative Law Judge issues a written decision, called a Recommended Decision and Order, typically about a year after the filing of the

⁶⁴ Instructions about how to take an appeal, including deadlines and procedures are provided in the letter dismissing the charge.

⁶⁵ Though rarely used with protected concerted activity cases, the General Counsel has the authority in the case of particularly egregious violation to seek an injunction in federal court under Section 10(j) of the Act to return an employee to work without waiting for the ALJ, the Board, and the Court of Appeals to issue their decisions.

ulp charge. If finding a violation, the ALJ will list the actions the employer must undertake to cure the effects of its unlawful actions. This can include back pay, minus mitigation, but punitive damages, liquidated damages, and damages for pain and suffering are not available under the Act. Either the charging party, the General Counsel, or the employer has a right to appeal the ALJ's Recommended Decision and Order to the Board by filing exceptions. Almost always decided on briefs, the Board's decision issues on average more than a year after the ALJ's decision. The Board's decision may then be appealed directly to a United States Court of Appeals.

Obviously a gazillion different situations can arise. The overall analysis is often the same:

1. Would filing of an ulp charge fall within the six month statute of limitations?
2. If so, is the employer covered by the Act?
3. If so, is the employee covered by the Act?
4. If so, was the activity "concerted" within the meaning of the Act?
5. If so, was the conduct for "mutual aid or protection" within the meaning of the Act?
6. If so, was the activity conducted in a way so as not to lose the Act's protection?
7. If so, can a causal relation between the protected activity and the discipline be demonstrated?

This article touches upon only the most basic aspects of the substance and procedure surrounding employees' Section 7 rights. The Developing Labor Law⁶⁶ provides a more thorough analysis of the substantive law, and How to Take a Case Before the NLRB⁶⁷ describes in detail the procedural law. Another helpful source is the NLRB's website, at www.nlr.gov. Any case will almost certainly involve a number of strategic decisions. Here, as in most areas of life, experience is usually the best teacher; those new to the issue will likely benefit from consultation with a labor lawyer familiar with NLRB litigation.

⁶⁶ CHM §§ 10124-10170.

⁶⁷ Patrick Hardin and John E. Higgins, Jr., eds. (4th ed. 2001) and its Cumulative Supplement, published by BNA.

Section 6: Your Author's Three Most Memorable Concerts

Your author, who has so little musical talent he can barely play the radio, nevertheless has been fortunate to attend many great concerts over the years, from the Ryman to the Bolshoi. These, however, are the most memorable:

3. The same symphony musicians mentioned at the very beginning of this article were once locked-out by their employer during a labor dispute. The musicians held their own well-attended and successful outdoor concert to raise money. The music was particularly beautiful and the experience emotional. Your author, then a young attorney, had recently purchased a new and, for him, expensive suit which he was wearing for the first time. He held up a musician's baby to play "airplane;" the baby puked on the new suit.

2. In the early 90's and shortly after the fall of communism, while in Lithuania consulting with that country's newly formed independent trade unions, your author was invited to the first public concert of the many musical and dance groups that had been performing underground throughout the country during the communist regime. The audience – your author was the only non-Lithuanian in the hall – was laughing and weeping, but mostly full of joy – the evening was breathtaking. When your author returned on another trip he was advised upon arrival that he needed to attend another concert that very evening because the American James Brown was playing. Although exhausted, your author of course attended. This James Brown, however, whose wife was somehow attached to the American Embassy, turned out to play only passable rockabilly.

3. On an occasion many, many years ago, your author sat in a Chicago bar listening to Waylon Jennings before Jennings was well-known. Jennings' act was tight, your author was loose, and what he can remember was outstanding. Can you beat these?