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Proceed With Caution In Restricting Union Buttons

Law360, New York (June 12, 2008) -- In 2006, the National Labor Relations Board held in Sacred Heart Medical Center that employers had the right to restrict the wearing of union-related buttons and other insignia in immediate patient care areas. See Littler's July 2006 ASAP "Increasing Employer Control: The NLRB Significantly Restricts Nurses' Right to Wear Certain Union-Related Buttons."

Subsequently, the Washington State Nurses Association (WSNA) filed a petition with the U.S. Court of Appeals for the Ninth Circuit requesting a review of the NLRB decision.

The Ninth Circuit granted the petition and, on May 20, 2008, issued a ruling remanding the case with directions for the board to reinstate findings that the hospital's button ban violated the rights of employees under the National Labor Relations Act (NLRA). (*Washington State Nurses Ass'n v. NLRB*, 9th Cir., No. 06-74917, 5/20/08).

Background

Sacred Heart Medical Center (SHMC) operates an acute care medical center in Spokane, Wash. The WSNA represents approximately 1,200 of the employer's nurses.

During collective bargaining negotiations, hospital nurses had previously worn a variety of buttons without objection from the employer, including buttons that read: "Together Everyone Achieves More," "SHMC WSNA RNs Remember '98," and "Staffing Crisis – Nursing Shortage – Medical Errors – Real Solutions WSNA."

During the course of negotiating a contract to replace the agreement set to expire in January 2004, nurses wore a new button that read, "RN's Demand Safe Staffing" (the "Safe Staffing button"). SHMC nurse managers expressed concerns over the effect of the button's message on patients and their families.

As a result, the employer issued a memorandum prohibiting nurses from wearing the Safe Staffing button in any area of the hospital where they could encounter patients or

family members. In the memorandum, SHMC explained that the button's message disparaged the hospital by giving the impression that there was a lack of safe staffing, leading patients and family members to fear that the hospital was not able to provide adequate care.

Several nurses were asked to remove Safe Staffing buttons from their uniforms following the prohibition, but the hospital did not discipline any nurse for wearing the button.

The union filed unfair labor practice charges over the employer's Safe Staffing button prohibition. The Administrative Law Judge (ALJ) found that the employer violated the NLRA by promulgating, maintaining, and enforcing a policy that prohibited its employees from wearing the Safe Staffing button outside immediate patient care areas.

The Board's Decision

In a 2-1 decision (Former Chairman Battista and Member Schaumber, with Chairman Liebman dissenting), the board reversed the ALJ's decision.

The board agreed with the ALJ that the employer's restriction was presumptively invalid because it extended beyond immediate patient care areas to areas where employees might encounter patients and their families.

However, the board found that the employer rebutted the presumption of invalidity by showing "special circumstances" that justified the restriction.

The board reasoned that, in the context of an acute-care medical facility, the Safe Staffing button's demand that staffing be made safe sent a clear message to patients that their care was in jeopardy. Accordingly, the board found that such a message was likely to cause unease and worry among patients and their families and disturb the tranquil hospital atmosphere that is necessary for successful patient care.

The board stated that the U.S. Supreme Court has made clear that evidence of actual disturbance is not required because a hospital need not wait for patients and their families to be disturbed before it may lawfully restrict such a message.

In addition, the board emphasized that the Safe Staffing button's message was clear, rather than cryptic, thus requiring no inferential leap to conclude that a reasonable patient would be disturbed by the message.

Moreover, the employer's actions demonstrated that it was not seeking to undermine the union, but simply to narrowly restrict the use of one particular button (as opposed to previous buttons) that might jeopardize patients' welfare.

The board concluded that the NLRA does not forbid a hospital from using its business judgment to conclude that certain insignia are more disruptive than others.

The Ninth Circuit Rejects The Board's View

WSNA petitioned for review of the NLRB ruling, and the Ninth Circuit granted the petition.

The Ninth Circuit held that the board's finding about the disruptive effect of the Safe Staffing button was not supported by the evidence presented, as there was no evidence of any actual disturbance occurring during the several months in which the nurses wore the button before it was banned.

Rather, the court stated, the employer offered only speculation about the potential effects of the WSNA Safe Staffing button, with no supporting testimony that similar buttons had ever before caused a disturbance among patients.

Furthermore, the court rejected the board's conclusion that the hospital was not required to wait for patient complaints before taking preventive action, stating instead that "[e]vidence of what actually occurred is far more telling than unsubstantiated conjecture about what might occur."

In doing so, the court emphasized that special circumstances justifying a restriction on employees' right to wear union insignia must be established by "substantial evidence in the record."

The court also found that "[t]he Board's approach was contrary to its established precedent, to our sister circuit's precedent, and to the basic adjudicatory principle that conjecture is no substitute for evidence."

The court cited to *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837 (6th Cir. 2003), where both the board and the U.S. Court of Appeals for the Sixth Circuit found that a hospital violated the NLRA by ordering nurses not to wear buttons that read "FOT" with a line drawn through the letters, a button intended as a protest against forced overtime.

The court found that the board's attempt to distinguish *Mt. Clemens* from the instant case was unavailing because "[i]n fact, the messages conveyed by the buttons are almost identical – they advocate for adequate staffing levels."

The Ninth Circuit remanded the case to the NLRB with directions to reinstate the ALJ's decision and order that SHMC violated the NLRA.

Recommendations For Employers

Washington State Nurses Ass'n v. NLRB reinforces the long recognized right under Section 7 of the NLRA that union members have a protected right to wear union insignia in the workplace.

The main standard has not changed: in the health care context, restrictions on the wearing of union insignia in "immediate patient care" areas are presumptively valid, while similar restrictions in other areas of a hospital are presumptively invalid.

On the one hand, employers remain able to rebut the presumption of invalidity by showing that "special circumstances" justify the restriction. As the Ninth Circuit reaffirmed, special circumstances exist where the restriction is "necessary to avoid disruption of health-care operations or disturbance of patients."

On the other hand, employers in the health care industry, and especially in the Ninth Circuit, should be more cautious in implementing such restrictions, as the burden of showing "substantial evidence" of disturbances in order to show special circumstances is now significantly higher.

Employers are advised to document evidence of past disturbances (patient complaints and other incidents) in order to establish the special circumstances required to justify a ban.

In addition, employers should continue to be especially careful to avoid restricting buttons and other insignia that send a cryptic message as opposed to those that require no inferential leap in order to conclude that a reasonable patient would be disturbed by the message.

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