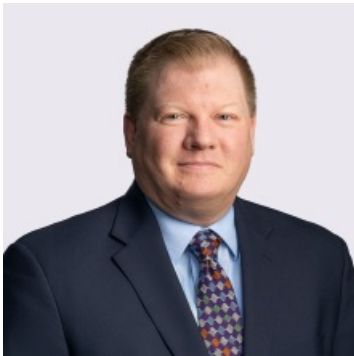


Labor Judge Decision Explains Employer Discipline of Employee for Serious Performance Issues

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Two important principles under the National Labor Relations Act are worth reiterating to construction employers: first, employees cannot be disciplined for engaging in activity protected by that Act; and, second, employers may still discipline employees in the wake of protected activity as long as the discipline occurs for unrelated misconduct.

The decision of a National Labor Relations Board administrative law judge (ALJ) in the matter of *Redi Carpet, Inc.*, No. 16-CA-292266 (June 1, 2023), clearly illustrates these principles.

Background

Redi Carpet involved a nationwide flooring contractor that specializes in multi-family flooring. At its headquarters in Texas, it employed Charlene Tiarra De Leon as a purchasing inventory clerk. In early-January 2022, the company hired another employee in the same department as De Leon. Based on that other employee's prior experience, she was hired at a pay rate of \$18.00 per hour. At the time, De Leon was earning \$16.50 per hour. After learning of this pay discrepancy, De Leon complained to management that she should be paid more. She also complained about the pay disparity to coworkers. De Leon caused such a ruckus with her complaints that the new hire resigned her employment after only a few weeks.

The company issued De Leon a final warning for disruptive work behavior. Among other conduct, it said she had "engaged in open discussion of a team member's salary which created an environment the teammate [sic] was no longer comfortable working in, resulting in her resignation."

After the written warning, the company learned of serious performance issues. De Leon had not processed orders correctly. Her failure to do so cost the company a large customer worth about \$3 million in business. The company terminated De Leon's employment in response.

De Leon then filed unfair labor practice allegations with the National Labor Relations Board against the company.

ALJ Decision

Although the company argued that some of De Leon's conduct should have been considered unprotected by the Act, the ALJ found the written warning violated the Act. Employees have the right under the Act to discuss salaries, including the salaries of coworkers. That the company disciplined De Leon for doing so was a violation, the ALJ said.

Yet, the ALJ pointed out, the company's violation of the Act in issuing the written

warning did not mean any discipline issued for different reasons would violate the Act. The ALJ found the termination was lawful because it was for legitimate business reasons. In particular, the ALJ found the company thoroughly investigated De Leon's errors. He also found the treatment of comparators favored the company, as another employee who had not engaged in protected activities was discharged for an error that resulted in a loss of less money than De Leon's error caused. In other words, disparate treatment evidence supported that the company acted only because of the business reason and not because of the prior wage complaints.

Takeaways

The general principles in *Redi Carpet* apply across industries, but the legitimate reason for the termination rings especially true in the construction industry. Construction companies must rely on office staff to ensure that time-sensitive projects are processed so projects are staffed properly and client needs are met promptly. A failure in this area can result in lost revenue and lost clients. The ALJ recognized the business justification for the discipline resulting from the poor work performance in this case.

An employee's activity protected by the Act may often occur around the same time as unprotected misconduct. *Redi Carpet* provides two good lessons on how to handle such situations. Although the company disciplined the employee for the protected activity of speaking with others about wages, further discipline was not foreclosed. Where legitimate business reasons for a termination exist, that discharge can be defended by the seriousness of the misconduct, the thoroughness of the investigation, and any helpful comparators. Here, those factors were in the company's favor and led the ALJ to not order the employee's reinstatement.

If you have any questions regarding the Act and employee discipline, please contact a Jackson Lewis attorney.

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