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No Cake for You: How Denying Fringe Benefits to Employees Can Translate Into an Unfair Labor Practice

By Warren E. Buliox

Birthday treats for everyone on everyone's birthday. It is a tradition your company has faithfully honored for who knows how long and one that, unfortunately, can no longer continue. You have grown, and given the number of employees you now have and other more pressing expenses, continuing this tradition is just not the most fiscally responsible move for the company right now. As such, you, alongside other managers, decide to discontinue the tradition effective immediately.

Your timing could not have been worse, though. As it turns out, a small group of employees in your non-unionized workforce joined together a week earlier and demanded increased wages and more evenly distributed hours. For these employees, taking away this birthday-treat tradition after demands for better working conditions crosses the line, and they file suit, claiming that you violated the National Labor Relations Act (the "Act"). Did you? We are talking about only birthday treats after all.

If the discontinuation of this seemingly harmless tradition can in any way be tied to some type of animus against employees for engaging in protected activity under the Act, such as protesting working conditions, then your actions could very well be held to be

in violation of the law, and you can be required to reimburse employees for any benefit lost. A case decided last month by an administrative law judge with the National Labor Relations Board ("NLRB") demonstrates this.

In *Gates & Sons Barbeque of Missouri, Inc. and Workers' Organizing Committee, Kansas City*, an unfair labor practice charge was filed against Gates & Sons Barbeque after daily free lunches were eliminated following a one-day strike.

By way of background, employees at Gates & Sons Barbeque had enjoyed a number of benefits over the years, including daily, free lunches. In July 2013, a number of these employees decided to join a local labor union and other food workers across Kansas City in a one-day strike to obtain higher wages and better benefits. According to the employees' allegations, after a manager for the company received word of this, he told a group of them that if he found out they played any role in the strike, "they would feel [his] wrath." He also reportedly told one employee that "you are either with me or against me," and that if the employee was with the union "we can find ways to get rid of you right now."

The strike went as planned, and no one was let go as a result. When the striking employees returned to work, however, they learned that certain benefits were being discontinued. A notice posted by the employer provided that "[t]here will be no employee meals, no loans, no tabs. Don't ask." And, for the next two months or so, employees were not provided free meals and other benefits. This prompted the complaint with the NLRB.

Specifically, the complaint alleged that, by discontinuing the free meal benefit in retaliation for employees engaging in concerted, protected activity, the employer had violated Section 8(a)(1) of the Act, which makes it an unfair labor practice for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under the law. (As we have written about in the past, this applies to and arises in unionized and [non-unionized workplaces](#) alike.)

In response, the employer argued that the elimination of certain benefits was not retaliatory, but rather a result of poor employee performance and declining customer satisfaction. The employer also said that the decision to eliminate the benefits predated the employees' strike. In analyzing the case, the administrative law judge applied the *Wright Line* framework, which examines employer motivation and requires the charging party to first establish that the adverse action at issue was motivated, at least in part, by an unlawful consideration. If the charging party is able to make this showing, the burden shifts to the employer to show that it would have taken the same action regardless of the protected activity

alleged.

Applying this analysis, the judge found that the charging party easily met its burden by showing that employees had engaged in protected activity by participating in a strike for better benefits and pay, that the employer clearly knew of their activity, and that the employer demonstratively harbored animosity toward their activity as evidenced by both the timing of the removal of benefits and the manager's alleged comments threatening to take punitive action should employees move forward with the planned strike.

The administrative law judge was not persuaded by the company's arguments in response, noting that the company provided no documentation to show either that its decision was based on both employee performance and a deterioration in customer satisfaction or that the decision predated the strike. Further, the fact that the elimination of benefits came only days after the strike had been executed was suspect in and of itself and indicated an improper motive on the part of the employer. For these and other reasons, the judge found that the employer failed to meet its burden of showing that the removal of benefits would have taken place regardless of the protected activity. By denying employees free meals, then, the employer was found to have engaged in an unlawful labor practice, and, among other items, was ordered to reimburse employees for the amount of the meals missed, plus interest.

The readily apparent lesson in all of this is to not retaliate against employees for engaging in protected activity, even if the action contemplated only affects a seemingly trivial aspect of the employment relationship. The perhaps somewhat finer lesson is how to navigate matters before and after a protected activity to lessen the chance of legitimate business decisions being successfully challenged as unfair labor practices. In this regard, the judge's comments regarding what he viewed as the utter lack of documentary evidence to suggest the adverse action was based on legitimate business metrics or made prior to the protected activity is quite instructive. Document, document, document. In our birthday treat scenario or similar situations, employers would be well served in documenting any discussions or decisions to eliminate or cut back on benefits and/or making sure that managers have the numbers to support their decision before moving forward.

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