



NLRB Confirms that Intermittent Strikes in Furtherance of an Unchanging Goal are Unprotected

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In *Walmart Stores, Inc.*, 368 NLRB No. 24 (July 25, 2019), a majority of the National Labor Relations Board ("NLRB" or "Board") reaffirmed that a union's intermittent strike scheme is unprotected where the short duration strikes are part of a strategy to achieve the same purpose or goal. The Board emphasized that such conduct is not a genuine strike as "a genuine economic strike involves employees fully withholding their labor in support of demands regarding their terms and conditions of employment until their demands are satisfied or they decide to abandon the strike . . . Striking and then returning to work with the intention of striking again is simply not the same." *Id.* at *4.

Generally, a strike by more than one employee is recognized as protected concerted activity, however not all strikes share the same protection. For instance, strikes for an improper purpose (e.g. intermittent strikes) fall outside the protection of the National Labor Relations Act ("NLRA") and therefore employees engaging in unprotected strikes can be subject to discipline for their unprotected conduct.

In *Walmart*, the Board ruled that the employer did not violate federal labor law by firing or disciplining employees who engaged in a nationwide strike organized by a union-backed labor group because there was direct evidence that the strike was a part of a larger strategy to intermittently strike in support of the same goal of broadly improving employees' wages, hours, benefits, and other working conditions. *Id.* at *2. From October 2012 to November 2013, the labor group composed of non-union workers, backed by the United Food and Commercial Workers union ("UFCW"), began organizing a series of four separate nationwide work stoppages and protests. In May 2013, over one hundred employees left work to protest at the employer's annual shareholders' meeting. As a result, the employer disciplined dozens of the participating employees for violating the employer's attendance policy. In response, the UFCW filed charges alleging the employer violated Section 8(a)(1) of the NLRA by disciplining employees for participating in protected activity and the Administrative Law Judge ("ALJ") agreed. However, in a 2-1 decision the Board recently reversed the ALJ's decision and concluded the 2013 strike was part of an unprotected intermittent strike scheme in furtherance of a common goal and therefore the employer was permitted to discipline employees pursuant to its attendance policy.

In its analysis, the Board made clear that in light of direct evidence of a strategy to use a sequence of strikes in support of an unchanging goal, work stoppages are unprotected – no further inquiry required. The Board noted that the *Walmart* case appeared to be a rarity because the UFCW and the labor group provided direct evidence when the groups stipulated to the intention to use a series of strikes in an effort to improve employees' wages, hours, benefits, and other working conditions. *Id.* at *2. In the absence of such direct evidence, the Board has previously examined the surrounding circumstances to determine whether work stoppages were pursuant to an overarching strategy to strike in furtherance of a common goal. The Board here noted that the ALJ improperly applied that multifactor analysis where direct evidence on the ultimate inquiry made clear such a strategy existed.

The Board's recent *Walmart* decision provides a roadmap for identifying when repeated strikes are unprotected intermittent strikes under the law. However, an employer should nonetheless consult with a labor attorney prior to disciplining employees for engaging in what it believes is unprotected intermittent strike activity, as improper disciplinary measures may run afoul of employees' Section 7 rights.

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