

NLRB SENDS HOSPITAL'S TERMINATION OUT THE WINDOW AND DOWN THE DRAIN

WINDOWS AND SINKS AND EMPLOYEE COMPLAINTS

Employees have a right to complain about a lot of things, including windows and sinks. When they join together to complain, an employer needs to make sure that those complaints are not factors in the decision to fire the complaining employees. In this NLRB case, a hospital fired a CT Tech for sleeping on the job. It turns out, however, that this same employee had, over several months, raised complaints following the renovation of the hospital's X-Ray suite where he worked. He and several others complained that the window between the scanning room and the control room was too high to see a patient in the scanning machine. He and others also complained that before the renovation there was a sink in the scanning room and now it was gone. Employee and patient safety were at stake, according to the complainers.

CAUGHT SLEEPING ON THE JOB?

One day the employee's supervisor passed by the control room and saw the employee lying on the CT control console with his head down, wrapped in a sheet and with a pillow case covering his head. He was confronted, suspended and eventually fired for sleeping on the job. He claimed he was not sleeping but was only trying to keep warm because he was cold. He then filed a charge with the NLRB alleging that he was fired for exercising his protected right to complain under the National Labor Relations Act. The employee was not a union member and no union was involved in the case.

THE NLRB ORDERS REINSTATEMENT AND BACK PAY

After a hearing, where the credibility of the supervisor was key, the NLRB adopted the findings of the Administrative Law Judge and ordered the CT Tech to be reinstated to his former position without any loss of pay or benefits. Although sleeping on the job is cause for discharge, this decision of the NLRB highlights the problems employers will face if there might be other motivations for firing an employee who has raised complaints on behalf of himself and others. These so-called "mixed motive cases" often will be decided based on credibility determinations of the witnesses, which is what happened here. The supervisor was not a good witness. She couldn't remember certain key facts and sometimes changed her story. These contradictions destroyed her credibility in a way that the NLRB determined that it was more likely than not that the employee's complaints were at least "*a motivating factor*" in the decision to discharge him for allegedly sleeping on the job.

LESSONS FOR EMPLOYERS

The lesson for employers to be drawn from this case is that even though you might have a very good reason to discharge an employee who has a history of complaining, you must be able to prove with credible and consistent evidence and testimony that you would have taken the same action even in the absence of the employee's protected activity, which is sometimes a heavy burden. It is a burden that is best borne by making sure managers and supervisors are well trained and the incidents are well documented and consistent. The federal law does, after all, state in Section 10(c): "*No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.*" Proving that the sleeping employee was "*discharged for cause*" with credible and consistent evidence is not always easy - as this employer found out.

Reference: *St. Bernard Hospital & Health Care Center, NLRB, December 2, 2013*).

If you have any questions please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.