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SIXTH CIRCUIT SKIRTS LABOR BOARD'S SEVERANCE STANDARD AND UPHOLDS NLRB ON PRIOR PRECEDENT

On September 19, 2024, the United States Court of Appeals for the Sixth Circuit affirmed the determination of the National Labor Relations Board ("NLRB" or "Board") that McLaren Macomb, an employer of hospital employees in Michigan ("Employer"), violated the National Labor Relations Act ("NLRA" or "Act") when it bypassed the Union and dealt directly with employees in proffering severance agreements with broad non-disparagement and confidentiality provisions. However, the Court explicitly sidestepped the question of whether the Board properly adjusted its standard for determining whether the mere proffer of severance agreements with broad non-disparagement and confidentiality provisions violates the Act. *National Labor Relations Board v. McLaren Macomb*, No. 23-01403 (6th Cir. 2024)

In February 2023, the National Labor Relations Board ("NLRB" or "Board") issued its decision in *McLaren Macomb*, 372 NLRB No. 58 (2023), which overturned two Trump-era decisions, *Baylor University Medical Center*, 369 NLRB No. 42 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020). According to the Board, *Baylor* and *IGT* had improperly reversed "long-settled precedent" that agreements broadly prohibiting employees from exercising Section 7 rights are unlawful because they require employees to forfeit those rights, and that the proffer of these agreements is illegally coercive, regardless of whether the agreements were proffered under other coercive circumstances, such as unlawful discharge. Accordingly, the Board determined that the severance agreements proffered by the Employer, which had broad nondisparagement and confidentiality provisions, were unlawful in and of themselves, notwithstanding the fact that the Employer also committed failure-to-bargain and direct-dealing violations in contravention of the Act.

The Sixth Circuit agreed that the Employer violated Section 8(a)(5) and 8(a)(1) of the Act by failing to bargain with the Union regarding permanent furloughs and by dealing directly with employees regarding those furloughs and severance agreements. The Court also agreed that the severance agreements violated the Act. However, the Board had provided two rationales for its decision finding the agreements unlawful: (1) because the agreements were proffered under "circumstances that would tend to infringe on" Section 7 rights (the *Baylor*/*IGT* standard), and (2) because the agreements alone violated Section 8(a)(1) by their overly broad terms. Accordingly, because the agreements were unlawful under both the new standard and under *Baylor*/*IGT*, the Sixth Circuit affirmed the Board's decision about the agreements without passing judgment on whether the Board properly overruled *Baylor* and *IGT*.

LABOR BOARD FINDS HEAD OF SCHOOL'S POST-VOTE EMAIL WAS NOT COERCIVE

On September 27, 2024, the National Labor Relations Board ("Board" or "NLRB") found an administrator's employer-wide email regarding a representation election did not violate the National Labor Relations Act ("Act"). The case is *Blue School*, 373 N.L.R.B. No. 120, (Sept. 27, 2024).

The Blue School ("School") is a private school in New York City where Local 2110, Technical Office & Professional Union, UAW ("Union") filed a petition to represent a unit of professional and nonprofessional employees. A mail-ballot election occurred in August and September 2021, but counting was delayed due to challenged ballots. The Head of School sent several schoolwide emails during the delayed counting. On March 20, 2022, the day before the ballot count was to resume, he sent another schoolwide email. After stating the School's view on the election process and concerns about how the Union acted during the election, he included the following statement which went to the heart of the ULP charge: "Because of this, if the election is certified, the school will decline to recognize the union if asked to do so and will exercise its right to appeal the outcome." The Union won the election, but the School refused to recognize and bargain with it in order to challenge the election result.

The Board Majority found that the email did not violate the Act. An unlawful threat of futility is established when an employer states or implies that it will ensure its nonunion status by unlawful means. To determine if a statement is an unlawful threat, the Board looks to the context in which it was made and whether it tends to coerce a reasonable employee.

Here, the Board found that the email was sent long after employees voted in the election and could not have influenced how they voted. Nor did the email address potential negotiations between the parties and suggest the futility of potential negotiations. Instead, the Board found, the email conveyed the School's intent to seek judicial review of that certification. There was no allegation of other unfair labor practices contemporaneous with the email either. According to the Board, no reasonable employee could read the email to indicate that the School would refuse to bargain. The stated purpose of the refusal to bargain was to appeal the outcome of the Union's certification. Therefore, it did not violate the Act.

Dissenting Board Member Prouty argued that the School had indeed presented to employees a threat that their efforts to unionize would be futile as the School stated it would not bargain with the Union but act unilaterally by giving wage increases.

DOES THE SUPREME COURT CRACKDOWN ON AGENCY AUTHORITY EXTEND TO COLLEGE BASKETBALL?

The United States Supreme Court's recent decision in *Loper Bright* continued the current Court's ongoing project to dramatically change, if not completely eliminate, the so-called Administrative State. A further sign that the case will have an enormous impact in some unexpected places came recently when Dartmouth College answered a complaint from the National Labor Relations Board ("NLRB") that it had committed unfair labor practices against its student-athletes on the basketball team by claiming that the players are relying on "an impermissible attempt to create new law that is not entitled to deference and will not withstand judicial scrutiny."

The fundamental holding of *Loper Bright* was that federal courts no longer have to defer to administrative agencies' expert opinions on laws which were ambiguous. On behalf of the team, its Union, Service Employers International Union Local 560, filed an unfair labor practice charge alleging that the College refused to bargain over wages, hours, and other working conditions. Earlier this month, the agency's general counsel's office issued a complaint and notice of hearing, and Dartmouth's filing memo answers that complaint.

In February, NLRB regional director Laura Sacks found Dartmouth men's basketball players were employees within the meaning of the NLRA. At that time, the players became Dartmouth employees, notwithstanding the College's opposition. The players voted to unionize in March. The College now alleges that the finding that the team is eligible for unionization should not receive deference. The school claimed that the basketball players are not employees who can unionize under the NLRA.

The College argued that the regional director's decision about the Dartmouth basketball players was an "unprecedented and unsupported departure from every applicable Supreme Court, federal court and board precedent." The regional director wrongly concluded that nonmonetary benefits could be considered forms of payment that support the finding that the players are employees under a common-law analysis, the university said. "This determination, devoid of any statutory support under the act, is an impermissible attempt to create new law that is not entitled to deference and will not withstand judicial scrutiny," the university said, referencing the Supreme Court's opinion in *Loper Bright.*

Dartmouth is a part of the Ivy League, which does not allow athletic scholarships, but the regional director found that the basketball players receive equipment, clothing and other benefits as compensation. Sacks also noted that the university has "significant control over the basketball players' work." Dartmouth challenged the regional director's decision in a request for review, which awaits a ruling from the NLRB.

Dartmouth also said any rulings in this case would not be legal because administrative law judges are unconstitutionally shielded from removal by the U.S. President, and board members have "insulation from presidential control, which violates Article II of the Constitution," continuing an argument which has been seen elsewhere

seeming to argue that not only are administrative agencies not entitled to deference in their areas of expertise, but that the whole structure of agencies is somehow unconstitutional to the extent that the Executive Branch-the President-does not have direct control over the process, but rather the administrative judges are subject to civil service protections.

The case is *Trustees of Dartmouth College and SEIU Local 560*, case number 01-CA-348789, before the National Labor Relations Board Region 1.

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