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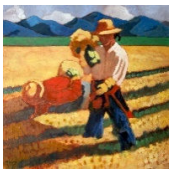

Employment Law Note

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The NLRB – Down, but Not Out

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The epic saga that has arisen from President Trump's firing of National Labor Relations Board (NLRB) member Gwynne Wilcox back in January of 2025 turned another chapter when on December 5, 2025, the D.C. Circuit Court of Appeals affirmed the Administration's position that it could remove Ms. Wilcox from the Board. The impending Supreme Court case of *Trump v. Slaughter* (which involves President Trump's firing of an FTC commissioner) should squarely put before the Court the question of whether the executive branch can terminate – at will and without cause – members of independent agencies (potentially overturning 90 years of precedent stemming from *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)).

Until the Supreme Court issues its ruling, the NLRB currently operates with only one sitting member (out of five), rendering the Board inert due to the lack of a quorum. Some might assume that since the NLRB's leadership is hamstrung, we've entered a free-for-all period of lawlessness. Not so, as the Ninth Circuit reminded us via its recent decision in *NLRB v. North Mountain Foothills Apartments*, 157 F.4th 1089 (9th Cir. 2025).

Open Season for Constitutional Challenges?

In that case, the NLRB had sought to enforce its decision that North Mountain had violated the National Labor Relations Act (NLRA) by firing a maintenance worker after he had blabbed to coworkers about his $25/hour salary and $1,500/month housing subsidy. Before the Ninth Circuit, North Mountain (perhaps taking inspiration from the new Administration's willingness to shake pre-existing norms) raised a host of existential constitutional challenges to the NLRB's authority.

North Mountain argued that because the NLRB's administrative law judge could only be fired for "good cause," this violated Article II of the Constitution (thus echoing the arguments in favor of President Trump's termination of Ms. Wilcox from the NLRB). In addition, North Mountain claimed the NLRB's proceedings violated the Seventh Amendment's right to a jury trial because of the awarded monetary remedies. Finally, North Mountain alleged a violation of the Fifth Amendment's right to due process because the NLRB carried out both investigative and judicial functions.

Perhaps not surprisingly, the Ninth Circuit swatted down each of these constitutional assertions, citing longstanding precedent. The Court sidestepped the question of whether administrative law judges could be fired at will since no firing of the judge was at issue in the case. Regarding the jury-trial and due-process arguments, the Court reaffirmed the legitimacy of the NLRB and its ability to grant relief to claimants with the "presumption of honesty and integrity."

The NLRB lives on – at least for now.

Protected Activities Are Still Protected

Having failed to deal a constitutional *coup de grace* to the NLRB, North Mountain protested the merits of the case, i.e., the NLRB's finding that the company had

unlawfully interfered with the maintenance worker's protected activity.

What was the protected activity in question? Under the NLRA, protected activity must be both concerted (done with or on behalf of other employees) and for mutual aid/protection (e.g., intended to improve the terms and conditions of employment). For the maintenance worker, the protected activity was his disclosure to other employees about his compensation. The Court took the opportunity to acknowledge and adopt the NLRB's position on wage discussions: "Although we have not previously held that discussing compensation qualifies as protected activity, the NLRB has long recognized as much. We agree with the NLRB."

Thus, the Ninth Circuit accepted that when the employee shared with coworkers he was being paid $25/hour and was being offered a free $1,500/month rental unit, this qualified as protected activity under the NLRA. When North Mountain's Operations Manager scolded the employee (in a recorded conversation) for creating a "crisis situation" akin to a "hornet's nest" – which necessitated "damage control" – and then later fired him, this violated the law.

Implications for Employers

The Ninth Circuit's *North Mountain* decision further solidifies the NLRB's stance that employees should be free to discuss wages and compensation without fear of retaliation. Employers may be uncomfortable with employees engaging in open discussions related to pay and compensation. However, employers should check any impulses toward blanket restrictions (e.g., in social media use policies), confidentiality demands, and other adverse employment actions that may be construed as violating the NLRA.

In Washington State, discussions about pay are doubly protected by the Equal Pay and Opportunities Act (RCW 49.58, et seq.), which expressly prohibits retaliation against employees for discussing wages (regardless of whether the discussion was related to concerted activity for mutual aid/protection as under the NLRA). In short, an employer walks a thin line if they expect to enforce a code of omertà regarding employee compensation.

While the *North Mountain* case specifically involved compensation discussions, the case also highlights more broadly that the NLRB's enforcement actions are still ongoing and that employers should not assume that existing legal protections have somehow been swept away by executive fiat. Cases still make their way through regional offices, and the circuit courts continue to review and enforce NLRB decisions. The administrative and judicial machinery continues to churn the wheels of justice.

By enforcing the NLRB's decision against North Mountain, the Ninth Circuit has reminded all of us that – amidst the uncertainty of the NLRB's future composition – existing decisions still rule the land. The NLRB may be down, but they are far from out.

Employers with questions about their obligations under federal, state, or local employment laws are encouraged to contact Sebris Busto James.

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