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NLRB Continues to Define Employer Ability to Protect Property and Access; Overturns Union-Friendly Precedent

SEPTEMBER 9, 2019

Authors: Adam Primm, W. Eric Baisden

On Friday, September 6, 2019, the National Labor Relations Board (the "Board") issued its third decision of the summer regarding employers' ability to restrict access by nonemployees to its property (see prior analysis: Board Restricts Non-Employee Access to Public Spaces and Board Restricts Access of Off-Duty Contractors). In *Kroger Mid-Atlantic*, 368 NLRB No. 64 (Sep. 6, 2019), the Board determined that an employer can bar nonemployees from protesting against the employer on the employer's property while still allowing nonprotest activities such as solicitations for charitable donations or civic groups. In doing so, the Board found the employer's actions were not discriminatory and overturned a twenty-year-old decision that greatly expanded nonemployee access to employer property. In *Kroger Mid-Atlantic*, the Board overruled *Sandusky Mall* and its progeny, finding that it "improperly stretched the concept of discrimination well beyond its accepted meaning in a manner that finds no support in Supreme Court precedent or the policies of the Act."

Similar to its decisions earlier this summer, the Board relied heavily on long-term precedent to overturn the Board's subsequent expansion of precedent. In *NLRB v. Babcock*, 351 U.S. 105 (1956) (upheld in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)), the Supreme Court generally found an employer had the right to restrict access to its property, subject to two narrow exceptions: inaccessibility (which was not discussed in *Kroger Mid-Atlantic*) and discrimination. Unfortunately, the *Babcock & Wilcox* decision did not define the scope of "discrimination."

In 1999, the Board in *Sandusky Mall Co.*, 329 NLRB 618, interpreted *Babcock* to require employers to grant access to nonemployee union agents for any purpose if the employer also allowed civic, charitable, and promotional activities by nonemployees. The Board overruled that expansive interpretation of *Babcock*. The Board's decision in *Kroger Mid-Atlantic* provided distinct layers of its analysis. First, the Board found that *Babcock* and subsequent appellate decisions analyzing an employer prohibition on nonemployee access to the property limit unlawful discrimination to unequal treatment of activities that are similar in nature. In fact, the *Sandusky Mall* analysis has been rejected by every appellate court to analyze its broad interpretation of *Babcock*, including the Sixth Circuit refusing to enforce the actual decision in *Sandusky Mall*. 242 F.3d 682 (6th Cir. 2001). The Board found that the appellate courts uniformly concluded that nonemployee protests or boycotts are not comparable or similar to nonemployee charitable, civic, or commercial solicitations, and that an employer does not discriminate under *Babcock* when forbidding the former, but allowing the latter.

Next, the Board noted that *Sandusky Mall* failed to acknowledge the Board's own decision applying the *Babcock*

exception narrowly, stating that "a denial of access for Sec[tion] 7 activity may constitute unlawful disparate treatment where by rule or practice a property owner permits *similar activity in similar relevant circumstances*." *Kroger Mid-Atlantic* citing *Jean Country*, 291 NLRB 11, 12 fn. 3 (1988) (emphasis added). The Board found that *Sandusky Mall's* broad interpretation of the discrimination exception beyond similar circumstances was not necessary to protect employees' Section 7 rights. Thus, its decision to overrule *Sandusky Mall* would have no effect on employees' right to engage in Section 7 activity. The Board reiterated *Lechmere* and *Babcock* to state that the discrimination exception "is a narrow one" and the National Labor Relations Act only restricts an employer's right to exclude nonemployees from its property in "limited circumstances." *Sandusky Mall* expanded the discrimination exception to prevent an employer from prohibiting nonemployees advocating a boycott of the employer if the employer previously allowed Girl Scouts to sell cookies or the Salvation Army to seek donations. The Board found that this analysis resulted in the "narrow" and "limited" exception applying to almost every situation. At that point, it ceases to be an exception and simply becomes the rule, which was not intended by *Babcock* and its progeny.

Additionally, while finding that *Sandusky Mall* was overbroad, the Board found that the standards applied by the appellate courts were too narrow. The Sixth Circuit limited discrimination under *Babcock* to "favoring one union over another, or allowing employer-related information while barring similar union-related information." The Second Circuit similarly limited the exception to discriminatory restriction of nonemployee Section 7 activity or communication. Under these standards, an employer could allow protest activity for some reasons (i.e., environmental) while denying similar protest activity related to Section 7 activity, which inferred hostility to union activity. As a result, the Board articulated a new standard.

Under the Board's new standard, employer discrimination against nonemployee access to its property under *Babcock* means treating "nonemployee activities that are similar in nature disparately." The Board will not find discrimination when nonemployee activities permitted by an employer on its property are not similar in nature to prohibited activities. Thus, the Board distinguished between activities that directly undermine the purpose of the employer, such as a boycott or protest, while permitting charitable, civic, or commercial activities. This standard applies equally to all nonemployee organizational activity, whether focused on union activity or otherwise.

For more information, contact a member of the firm's Labor & Employment Practice Group.

Eric Biasden | ebaisden@beneschlaw.com | 216.363.4676

Adam Primm | aprimm@beneschlaw.com | 216.363.4451