Using the NLRA to Nip Anticipatory Retaliation in the Bud

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Michael C. Duff, *New Nip in the Bud: Does the Obama Board's Preemptive Strike Doctrine Enhance Tactical Employment Law Strategies?*, (forthcoming Employee Rights and Employment Policy Journal), available at SSRN.

I'm still fascinated by employment retaliation cases. Not so much traditional labor law. I've generally lost interest. But Michael C. Duff's forthcoming essay on the possible implications of the National Labor Relations Board's decision in Parexel International serves as a reminder to me (and others) that the NLRA might still have some role to play in addressing retaliation even in non-union workplaces.

Parexel involved an employee who claimed she was fired for complaining about what she believed was employer favoritism on the basis of nationality. Her complaint was internal, the workplace was non-union, and she had not yet mentioned her concerns about favoritism to her co-workers, let alone sought to rally their support. These facts take the case outside the range of the typical charge of interfering with the right to engage in concerted activities. Moreover, as Duff chronicles, existing Board precedent was only somewhat helpful to the employee's claim that she had been fired for exercising her right to engage in protected concerted activity. Yet, the Board found the employer had violated by Section 8(a)(1) of the NLRA by *seeking to prevent* protected concerted activity. In other words, the employer violated the Act by trying to nip concerted activity in the bud.

While approving of the outcome, Duff questions the Board's application of existing precedent in *Parexel* and offers an alternative rationale for the Board's decision. Duff argues that even if the employee in *Parexel* had not actually engaged in protected concerted activity, Section 7 of the Act provides more expansive protection. Section 7 guarantees the *right* to engage in concerted activities, and it was that right the *Parexel* employer interfered with, Duff argues. Given the fact that one employee's complaints of unlawful employer behavior may benefit other workers, it is reasonable to presume that other employees would support the employee's actions. Thus, "the stamping out of a lone complaining worker may represent an attack on the right of all workers to engage in concerted activity for their mutual aid or protection."

There are actually numerous retaliation cases brought under anti-discrimination statutes that involve similar employer behavior. The decisions split as to whether this type of "anticipatory retaliation" is unlawful. *Compare* Beckel v. Wal-Mart Assocs., Inc., 301 F.3d 621, 624 (7th Cir. 2002) (stating that anticipatory retaliation can be unlawful under Title VII), *with* Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1313 n.3 (6th Cir. 1989) (stating that anticipatory retaliation cannot be unlawful under Michigan Civil Rights Act). Courts have also split on the related question of whether an employer who retaliates against employee on the mistaken belief that the employee has or is about to complain about employer behavior has engaged in unlawful retaliation. *Compare* Brock v. Richardson, 812 F.2d 121, 125 (3d Cir. 1987) (holding mistaken belief retaliation to be unlawful under FLSA), *with* Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 385 (5th Cir. 2003) (holding mistaken belief retaliation to be lawful under Title VII). Therefore, Duff's new essay contributes to the dialogue on the increasingly relevant issue of workplace retaliation.

But Duff's most significant contribution with this essay is his reminder of the fact that the NLRA may

have a role to play in such cases. Indeed, Duff argues that retaliation claims most naturally find their home in traditional labor law. Anticipatory retaliation, Duff argues, represents "an attack on the right of all workers to engage in concerted activity for their mutual aid or protection." Since labor law is "the only body of law explaining to workers by virtue of its very existence that there is indeed safety (and power) in numbers," labor law should have a role to play in addressing the problem.

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