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The NLRB broadens employee protection under federal labor law by recognizing a “preemptive strike” theory of retaliation

By Joshua M. Henderson

Does an employer unlawfully “interfere” with an employee’s rights by terminating the employee in anticipation that the employee may exercise those rights in the future? In the Parexel case, the National Labor Relations Board (“NLRB” or “Board”) by a 2–1 vote, answered “yes” to this question under the National Labor Relations Act (“the NLRA” or “the Act”).

According to the Board’s decision, Parexel International, LLC performs research studies for pharmaceutical companies. For reasons left unexplained, a large number of its employees hail from South Africa. This detail is relevant, however, as the case involves a concern of an employee, Theresa Neuschafer, that Parexel discriminates against non-South Africans in the payment of wages.

Neuschafer, a non-South African, told her supervisor about a conversation she had with a South African employee, John Van der Merwe, who falsely told Neuschafer that he and his wife had received pay raises. Neuschafer’s supervisor reported to her manager what she had heard. Soon after, the manager and a human resources consultant held a meeting with Neuschafer. The employee told them she had heard South Africans were being paid higher wages, and she expressed her concern that South Africans would continue to receive more favorable treatment. The manager asked whether Neuschafer had discussed this matter with anyone other than her immediate supervisor. Neuschafer said she had not. Approximately one week later, Parexel discharged her.

Section 8(a)(1) of the Act makes it an unfair labor practice “for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” Section 7 rights include the right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .”

Well-established principles of federal labor law derive from these statutory provisions:

- Wage discussions are a quintessential form of protected concerted activity.
- Having a rule against discussing wages is unlawful, even if no employee has engaged in protected concerted activity by discussing wages.

1 Parexel Int’l, LLC, 356 NLRB No. 82 (Jan. 28, 2011)
In *Parexel*, Neuschafer had not yet discussed her concerns about wage discrimination with other employees.\(^2\) In other words, *she had not engaged in protected concerted activity*. The Board, however, found this to be no impediment to ruling the employer had committed an unfair labor practice by discharging her: “If an employer acts to prevent concerted protected activity—to ’nip it in the bud’—that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more.” The Board emphasized that Parexel had shown an “intent to suppress protected concerted activity.”\(^3\) The Board found circumstantial evidence of this intent in, among other things, the candid admission of the HR consultant that management was concerned that Neuschafer had already spoken to other employees, and the fact that management asked Neuschafer at the meeting whether she had discussed the substance of her initial conversation with Van der Merwe with anyone. The Board concludes its summary of the evidence with this observation: “Satisfied that Neuschafer had not yet stirred up any concern about wages or possible discrimination among other employees, the [employer] discharged her before she could do so.”

Despite the unusual set of circumstances in *Parexel*, the Board’s decision is significant and will affect employers of all stripes. The Act applies to unionized and non-union employers and employees alike. Indeed, nothing in the decision turns on whether Parexel’s employees are represented by a union. Moreover, *Parexel* can be seen as part of a continuing pattern of expansive interpretation of not just the NLRA, but of the various sources of federal anti-retaliation law. This decision of the NLRB, coupled with the United States Supreme Court’s recent Title VII retaliation decision in *Thompson v. North American Stainless, LP*,\(^4\) means that employers must act with increased caution when deciding to terminate an employee or take other adverse employment action.

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\(^2\) For the sake of the argument, the Board considered the initial conversation with Van der Merwe (when Neuschafer was told of the alleged wage disparity) to not be protected concerted activity.

\(^3\) Curiously, in this decision the Board uses two different phrases—“protected concerted activity” and “concerted protected activity”—to describe the same conduct. The latter phrase is no doubt used in error.

\(^4\) 2011 U.S. LEXIS 913 (Jan. 24, 2011). In *Thompson*, the Supreme Court held that, in certain circumstances, a third party may be protected from retaliation under Title VII of the Civil Rights Act of 1964.