

in this issue:

JULY 2006

Employees in healthcare facilities have long had the right to wear union-related buttons and other insignia outside of immediate patient care areas. A recent National Labor Relations Board decision, however, has significantly restricted this right, giving employers broader discretion in some circumstances to ban the wearing of certain union-related buttons.

Littler Mendelson is the largest law firm in the United States devoted exclusively to representing management in employment and labor law matters.

Health Care Edition

A Littler Mendelson Newsletter
specifically for the Healthcare Industry

Increasing Employer Control: The NLRB Significantly Restricts Nurses' Right to Wear Certain Union-Related Buttons

By Gregory C. Keating and Roberta L. Ruiz

The National Labor Relations Board (NLRB or "the Board") has long recognized an employer's right to restrict the wearing of union-related buttons and other insignia in immediate patient care areas. Outside immediate patient care areas, however, such a restriction was presumptively invalid. The Board did recognize a very limited exception to this rule by allowing an employer to rebut the presumption of invalidity by showing "special circumstances," i.e., that the restriction is necessary to avoid disruption of healthcare operations or disturbance of patients. In a recent decision, the Board significantly expanded this traditionally limited "special circumstances" exception. In *Sacred Heart Medical Center*, 347 N.L.R.B. No. 48 (2006), the Board held that an employer satisfied the "special circumstances" exception because the button's message related clearly and directly to issues of patient care and hospital safety and not simply to collective bargaining issues. The button at issue in the case stated "RNs Demand Safe Staffing."

This decision significantly contracts nurses' ability to organize and engage in solicitation activities. Just this year, for example, the seven Change to Win unions have expressly called for an unprecedented unified effort to organize millions of workers in campaigns focused on exclusively-targeted industries, one of which is healthcare. In addition, employer-employee conflicts involving nurses' staffing ratio have increasingly made headline news. This issue, in itself, has raised concerns among employers for quite some time because

of their traditionally limited control over the wearing of union-related buttons and other insignia. In light of the *Sacred Heart Medical Center* decision, employers now have more flexibility to control the wearing of union-related buttons and other insignia in healthcare facilities. Even where the employer has traditionally allowed such practices outside immediate patient care areas, *Sacred Heart Medical Center* signals a shift toward greater recognition of an employer's right to manage the workplace according to its own business judgment.

Background

Sacred Heart Medical Center operates an acute care medical center in Spokane, Washington. The Washington State Nurses Association (WSNA) represents approximately 1200 of the Employer's nurses. The Employer and the Union maintained a collective-bargaining relationship for at least the past 20 years, during which time the nurses had worn a variety of buttons without objection from the Employer. One of such buttons stated, "Staffing Crisis – Nursing Shortage – Medical Errors – Real SolutioNs WSNA." During the course of negotiating a contract to replace the agreement set to expire in January 2004, nurses wore a new button that read, "RNs Demand Safe Staffing" (the "Safe Staffing button"). In response to this button, the Employer's nurse managers expressed concerns to the Hospital's Human Resources Department over the button's impact on patients and their families. As a result, the Employer issued a memorandum prohibiting nurses from wearing the Safe Staffing button in any area of the Hospital

where they may encounter patients or family members. The memorandum carefully explained the basis of the prohibition by stating, among other things, that the button's message disparaged the Hospital by giving the impression that there was a lack of safe staffing, leading patients and family members to fear that the Hospital was not able to provide adequate care. The Employer did not discipline any nurse for wearing the Safe Staffing button. Several nurses were, however, asked to remove the buttons from their uniforms following the issuance of the memorandum.

The Union filed unfair labor practice charges over the Employer's Safe Staffing button prohibition. The Administrative Law Judge (ALJ) found that the Employer violated the National Labor Relations Act (NLRA or "the Act") by promulgating, maintaining, and enforcing a policy that prohibited its employees from wearing the Safe Staffing button outside immediate patient care areas.

The Board's Decision

In a 2-1 decision (Chairman Battista and Member Schaumber, with Chairman Liebman dissenting), the Board reversed the ALJ's decision. The Board agreed with the ALJ that the Employer's restriction was presumptively invalid because it extended beyond immediate patient care areas to areas where employees might encounter patients and their families. However, the Board found that the Employer rebutted the presumption of invalidity by showing "special circumstances" that justified the restriction.

The Board reasoned that, in the context of an acute-care medical facility, the Safe Staffing button's demand that staffing be made safe sent a clear message to patients that their care was in jeopardy. Accordingly, the Board found that such a message was likely to cause unease and worry among patients and their families and disturb the tranquil hospital atmosphere that is necessary for successful patient care. The Board rejected the Union's claim that special circumstances could not be shown in the absence of evidence of actual disturbance of patients. To that end, the Board stated that the United States Supreme Court has made

clear that evidence of actual disturbance is not required because a hospital need not wait for the awful moment when patients and their family are disturbed by a button before it may lawfully be restricted.

The Board distinguished this case from its prior decisions in two ways. First, the Board emphasized that the Safe Staffing button's message was clear, rather than cryptic, thus requiring no inferential leap to conclude that a reasonable patient would be disturbed by the message. Second, the Safe Staffing button's message related directly to the issue of patient care and hospital safety and not simply to bargaining over staffing levels.

The fact that the Employer previously allowed other buttons to be worn did not establish a violation of the Act, but, in fact supported the Employer because it showed that the Employer was not seeking to undermine the Union, but simply to narrowly restrict the use of this single button that might jeopardize patient's welfare. The Board further noted that the Employer had not broadly prohibited the wearing of the Safe Staffing button in areas where patients and their families were not present and took pains to explain to the nurses that the justification for the restriction was concern over patient care.

In sum, the Board held that the NLRA does not forbid a hospital from using its business judgment to conclude that certain insignia are more disruptive than others. Thus, the Employer successfully rebutted the presumption of invalidity by showing special circumstances that justified the restriction.

Recommendations for Employers

Sacred Heart Medical Center significantly reduces nurses' ability to organize and engage in solicitation by restricting their right to wear certain union insignia in areas where employers' restrictions were traditionally invalid. Now, employers in the healthcare industry have greater latitude to control the wearing of certain union-related insignia outside of immediate patient care areas so long as the employer can show "special circumstances." The good news is that "special circumstances" may now

be determined by an employer's business judgment.

Employers should avoid imposing a restriction in overly broad areas of healthcare facilities, however, and should provide employees with a clear patient welfare-related basis for the restriction. Employers are further cautioned to limit any restriction to buttons and other insignia that send a clear message, rather than a cryptic one, and which require no inferential leap in order to conclude that a reasonable patient would be disturbed by the message.

Gregory C. Keating is a Shareholder in Littler Mendelson's Boston office and is co-chair of Littler's Healthcare practice group. Roberta L. Ruiz is a Summer Associate in Littler Mendelson's Boston office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Keating at gkeating@littler.com or Ms. Ruiz at rruiz@littler.com.
