

PROHIBITION ON RECORDINGS IN WORKPLACE UPHELD BY NLRB

In a split ruling, the NLRB upheld AT&T's prohibition on recording conversations in the work place, even though the company used the rule to threaten a worker. The Republican members of the National Labor Relations Board overruled part of the Board's decision in *Lutheran Heritage*, 343 NLRB 646 (2004). In *Lutheran Heritage*, the Board's decision required companies to fix or rescind rules that were used to violate workers' rights under the National Labor Relations Act.

In *AT&T Mobility*, *LLC*, 05-CA-178637, the Board found that the Company had violated the NLRA in its application of its rule, but that the rule itself under the Board's 2017 *Boeing* decision did not violate the Act. The *AT&T* rule prohibited employees from recording conversations with managers or fellow employees. The rule stated, "employees may not record telephone or other conversations they have with their co-workers, managers or third parties unless such recordings are approved in advance by the Legal Department."

In this case, a union steward attended a meeting where an employee was being fired and recorded the conversation. A manager learned about the recording, asked to meet with the steward and deleted the recording off of his phone. The manager also told the steward not to encourage other employees to make any instore recordings, as that would violate the company's policy.

The Board found that the steward was engaged in protected concerted activity under the Act when he recorded the meeting. In addition, AT&T violated the Act by telling him to encourage other employees not to make recordings. However, the Board found that just because the policy was applied illegally it did not make the policy itself illegal. The Board said that a broad ban of the rule after one incorrect misapplication would fail to

give proper weight to the legitimate interests of the company in enacting the rule. This holding is where the current Republican members of the Board overturned the *Lutheran Heritage* holding, which would have required the rule to be rescinded, as its potential to infringe on workers' rights would outweigh the company's interest in, for example, keeping customers' information private.

Chairwoman McFerran dissented, noting that the rule did not distinguish between recordings which would be protected by the Act and those that are not. She found that as written, the rule was overly broad and even applied to conversations not held on work time or at the work location.

This decision is the most recent example of the split at the current Board between the Republican and Democratic members. This may be another decision to keep an eye on as the Biden Administration appoints its members to the Board and we begin to see the Trump Board decision challenged.

ASHER, GITTLER & D'ALBA, LTD. 200 West Jackson Boulevard, Suite 720 Chicago, IL 60606 – 312.263.1500

© 2021 Asher, Gittler & D'Alba, Ltd. All rights reserved. Dated: May 17, 2021

This release informs you of items of interest in the field of labor relations. It is not intended to be used as legal advice or opinion.

U.S. News & Report's Best Law Firms Designation is for Chicago Tier 1 rankings in Employment Law (Individuals), Labor Law (Union), and Litigation (Labor and Employment) and a National Tier 2 ranking in Litigation (Labor and Employment).



