



The Limits of Protected Concerted Activity:

Briggs v. Nova Services

By M. Edward Taylor

Although the doctrine of employment at will is still recognized under Washington law, court decisions over the years have significantly eroded employers' right to terminate an employee for "good reason, bad reason or no reason." The Washington Supreme Court recently handed Washington employers a rare victory in the case of *Briggs v. Nova Services*. The Court refused to recognize a claim of wrongful discharge in violation of public policy based on the terminations of employees that resulted from their efforts to have their superior discharged.

The Facts. Eight employees of a non-profit organization did not support the executive director, Brennan, who had been appointed by its Board. The employees, including six managers, wrote a letter to the Board expressing dissatisfaction with Brennan's performance in the areas of leadership, administration, finance, board development, corporate culture, and community and government relations. The Board retained counsel to investigate whether there were any actions of Brennan that were illegal, and the investigation concluded that there was no unlawful conduct. The Board then hired a human resources consultant to mediate the employees' concerns regarding Brennan. The mediation efforts were unsuccessful and the Board ultimately granted Brennan the authority to make any personnel changes she deemed necessary.

Brennan and the mediator then met with four of the managers, and Brennan said she was willing to make efforts to address their concerns. On the same day she terminated the other two managers for insubordination, petitioning grievances directly to the Board, and using company time to enlist the support of other managers to undermine Brennan's authority and position. The four managers and two other employees then sent a letter to the Board with the "non-negotiable" demand that the terminated managers be re-hired and that Brennan be fired, with the threat that the employees would not return to work unless their demands were met. The Board did not meet the demands, the employees did not return to work, and Brennan began hiring replacements.

The Legal Issue. The employees brought a lawsuit claiming that the terminations of two employees and replacement of the others constituted wrongful discharge in violation of public policy. The public policy they relied on was based on the state statute granting employees the freedom of "association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment," and the right to be free of interference, restraint, and coercion in concerted activities for the purpose of collective bargaining or other mutual aid and protection. The questions addressed by the Court were whether the statute relied on by the employees did reflect a public policy of Washington, and, if so, whether the employer's actions violated that policy.

The Holding. The Court readily concluded that the statute reflected a public policy that employees could not be terminated for engaging in concerted activity designed to improve their terms and conditions of employment. However, the Court found that the employees were not complaining about working conditions such as wages and hours, benefits, or work rules, but rather were complaining about perceived deficiencies in the executive director's performance. The Court then borrowed from precedent under the National Labor Relations Act ("NLRA") and held that the complaints were about "managerial decisions, which lie at the core of managerial control," which is a category that is excluded from the definition of terms and conditions of employment. The Court therefore held that the employees were not engaged in protected activity, and the termination of the two managers was not unlawful. The Court also held that the other six employees could not show either that they engaged in protected activity or that they were terminated. Significantly, the Court at least implied that managerial employees also have a protected right to engage in concerted activities to improve working conditions, which would be an expansion of rights of private sector employees covered by the NLRA because supervisors and managers are not protected by that law.

Lessons for Employers

- Employees have the right to engage in concerted activities designed to improve their terms and conditions of employment
- The definition of protected concerted activity is expansive and employers must be mindful not to take adverse action against employees who act jointly to improve working conditions, or against an individual employee presenting grievances on behalf of a group of employees (but complaining only about one's individual terms of employment is not concerted activity)
- Cases decided under the NLRA have found employees engaged in protected concerted activity when complaining about wages, benefits, breaks, safety issues, discrimination, harassment, and a host of other topics of common concern
- The right to engage in concerted activity does not extend so far as to supersede an employer's right to hire and retain the leadership of a company
- Employers need not agree to demands of employees acting in concert, but employers should listen to legitimate concerns and decide upon an appropriate response
- Employees should not be disciplined or discharged for making concerted demands -- unless in the narrow context of demanding the termination of a manager and taking unprotected action in furtherance of such a demand
- In the case of managers or supervisors making concerted demands about working conditions, an employer must proceed cautiously because the conduct might be protected even though there are also offsetting duties that a manager owes to the employer
- Before disciplining or terminating an employee who has arguably engaged in protected concerted activity, seek the advice of counsel

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