

## Arkansas Business Fights NLRB to the Eighth Circuit



**Nathan Read**  
nread@mwlaw.com  
(479) 464.5663



**Devin Bates**  
dbates@mwlaw.com  
(501) 688.8864

10/02/2019

A recent Eighth Circuit Court of Appeals opinion should serve as a reminder to Arkansas businesses that the National Labor Relations Board (“NLRB”) (the federal governmental agency responsible for enforcing U.S. labor law in relation to collective bargaining and unfair labor practices) remains alive and well in our state. A protracted labor dispute between an Arkansas business and the NLRB began with the business withdrawing recognition of a union, which led to complaints alleging unfair labor practices, and eventually culminated with an appeal to the Eighth Circuit Court of Appeals. In its recent opinion, the Eighth Circuit upheld and reversed different parts of the NLRB’s decision.

Part of the dispute involved allegations that an employee was disciplined and told not to discuss the discipline with other employees. The employee was later disciplined for engaging in the prohibited discussions. The Eighth Circuit pointed out that some employees have rights to discuss discipline or disciplinary investigations with fellow employees and that “[a]n employer may prohibit such discussion only when a ‘substantial and legitimate business justification’ outweighs the ‘infringement on employees’ rights.’” (*quoting Caesar’s Palace*, 336 N.L.R.B. 271, 272 (2001)). On appeal the business did not challenge this rule, but instead focused on a dispute of fact that existed as to what the business actually told the employee. In essence, a credibility issue existed as there was conflicting accounts of what happened. The administrative judge made a finding on this issue, one that the NLRB and the Eighth Circuit stuck by. Accordingly, the Eighth Circuit concluded that the business had violated the law in telling the employee to keep quiet about the discipline.

The other part of the case involved an employee’s prior final written warning, and whether standing alone it satisfied the NLRB’s burden to prove a case of discriminatory discipline. The Eighth Circuit reversed this portion of the case, citing “serious problems with the [NLRB’s] legal analysis.” Mainly, the NLRB failed to present evidence showing a connection between the business’s discipline of the employee and her protected union activity years earlier.

A partial win and partial loss, this case should serve as a reminder to Arkansas businesses that the NLRB continues to enforce workplace conduct standards for certain employers in our state. The best way to prevail on these types of issues is to seek advice of legal counsel early when issues arise. Often times, coaching through labor difficulties in the workplace can head off litigation before it arises. However, when protracted litigation occurs, appealing matters to a higher court can be an important strategy for a business. Errors made by an administrative law judge or governmental agency can be, and often are, corrected by an appeals court like the Eighth Circuit.

Case Reference: *S. Bakeries, LLC v. NLRB*, No. 18-2370, 18-2568 (8th Cir. Sept. 11, 2019).