The Right to Talk to Co-Workers and Management About Working Conditions: A Study of Enforcement at the NLRB

NATIONAL institute FOR WORKERS' RIGHTS

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Executive Summary

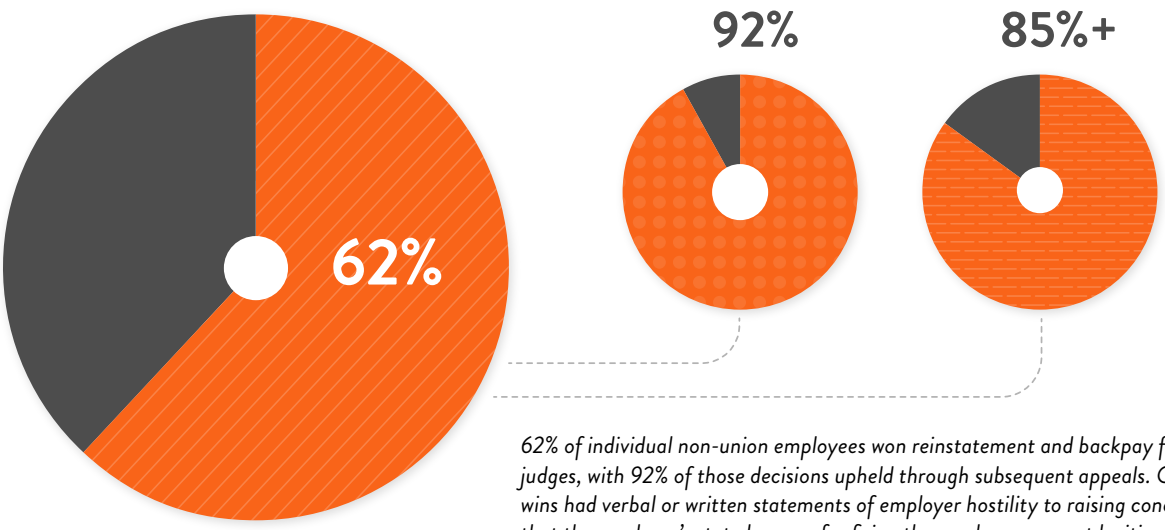
Background

- Both union and non-union employees have the right under federal law to engage in discussions with their colleagues about their terms and conditions of employment, including wages, hours, and working conditions; and to join together to improve these conditions. Low-income, low-educational-attainment, and non-white workers are least likely to feel comfortable discussing workplace conditions with their colleagues.*
- These rights are often violated. Research suggests that as much as half of the US workforce have been "discouraged or prohibited" from discussing pay.**
- Meanwhile, neither workers nor unions can enforce these rights by suing the employer. Rather, it's up to the National Labor Relations Board ("NLRB") to bring a complaint against the employer, and most claims that workers bring to the NLRB do not result in such a complaint or a hearing in front of an administrative law judge.
- This report analyzed all decisions issued by administrative law judges between 2015 and 2020 on "concerted-activity" retaliation complaints brought by individual workers to the NLRB. These were complaints brought by workers who lacked union representation, where the worker says that they tried to band together to improve working conditions but faced retaliation by their employer.

Findings

- 62% of individual non-union employees won reinstatement and backpay from administrative law judges, with 92% of those decisions upheld through subsequent appeals.
- Over 85% of those employee wins had either verbal or written statements of employer hostility to raising concerns ("animus"), evidence that the employer's stated reason for firing the employee was not legitimate ("pretext"), or both.
- Circumstantial evidence that the employee was treated unfairly was rarely sufficient without additional evidence of pretext or animus.
- Although most credibility determinations in our sample were assessed against the employer, in 61% of employee losses in our sample, the judge expressly identified the charging-party employee as less credible than the employer or employer's witnesses.
- When employees lost, the most common reason was that their actions were not sufficiently "concerted" or directed at mutual aid. In other words, the employee's actions were done on their own, and not with and on behalf of co-workers.

* Alexander Hertel-Fernandez, *American Workers' Experiences with Power, Information, and Rights on the Job: A Roadmap for Reform*, 28, Roosevelt Institute, Apr. 2020, https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_WorkplaceVoice_Report_202004.pdf.
** *Id.* at 17.



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Implications for Workers

- Overall, our analysis suggests that the NLRB does vindicate strong claims of retaliatory discharge for efforts to improve working conditions *if the complainants can get to an administrative law judge hearing*. Although Board-level policy decisions may vary dramatically across Administrations, the average employee win rate before an NLRB judge is more consistent.
- Our data indicates that on these claims, neither the administrative law judges nor the Board are rubber stamps for the NLRB General Counsel who prosecutes these claims. The General Counsel brings only the strongest complaints, and yet administrative law judges still reject nearly four out of ten such claims. The Board overwhelmingly affirms decisions when presented with appeals from both sides.

Legal and Policy Considerations

- While overall win rates before judges are encouraging, workers are entirely dependent on the NLRB to even bring a complaint to a judge at all. Even successful claims take months if not years to get limited relief, in part because of the agency's chronic underfunding. Congress should increase enforcement of this right by fully funding the NLRB and passing the Protecting the Right to Organize ("PRO") Act, which would give workers the ability to file a suit against their employer and increase penalties for employers.
- In the meantime, worker advocates can focus on expanding access to these rights by continuing to push the NLRB to recognize the full scope of the rights implied in the Act. Expanding the "inherently concerted" doctrine to include discrimination and health and safety complaints is both consistent with the law and would increase the accuracy of outcomes on such concerted-activity claims.
- Additionally, holding employers accountable for lack of process or consistency is crucial, challenging the common "equal-opportunity jerk" defense and ensuring fair treatment irrespective of an employer's management practices.
- Finally, the NLRB should make sure that administrative law judges recognize the power imbalances that make raising concerns in an "at will" workplace difficult and not hold employees to an unrealistically high standard of proof in showing concerted activity.