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Federal Labor Relations Authority

Discrimination

*The Federal Service Labor-Management
Relations Statute*

Discrimination Defined

- 5 U.S.C. § 7116(a)(2) It is an unfair labor practice for an Agency to *encourage* or *discourage* Union membership in a labor organization by discriminating in connection with hiring, tenure, promotion or other conditions of employment.
 - 5 U.S.C. § 7116(a)(4) It is an unfair labor practice for an Agency to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under the Statute.
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What is Protected Activity?

- Protected Activity: Employees have the right to form, join or assist Unions or to refrain from such activity. 5 U.S.C. § 7102.



Examples

- ❑ Filing a petition to form a Union
- ❑ Serving as a Union Steward
- ❑ Filing a grievance
- ❑ Giving a statement to an FLRA Agent in a ULP
- ❑ Participating in contract negotiations

See 5 U.S.C. § 7102 (form, join, or assist, or refrain from such activity); see also *U.S. Dep't of the Air Force, Aerospace Maintenance and Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636 (2003); *U.S. Dep't of Labor, Employment and Training Admin., S.F., Cal.*, 43 FLRA 1036 (1992) .

Proving Discrimination

- To establish a *prima facie* case of discrimination:
 1. Employee was engaged in protected activity;
 2. Discriminatory action was taken against the employee; *and*
 3. Employee's protected activity was a motivating factor in the Agency's treatment of the employee.

Letterkenny Army Depot, 35 FLRA 113 (1990).

Letterkenny:

Evidence of Motivating Factor”

- Nature, Extent and Timing of protected activity?
- Was the Agency aware of the protected activity?
- Nature of action taken against employee?
- How were other employees who were not engaged in protected activity treated? (Disparate Treatment)
- Explanation give by Management
- Did Management follow its own Procedures?
- Is there evidence of anti-Union animus? (e.g., anti-union statements)

Ultimate Question: Was the protected activity a motivating factor in the action?

Letterkenny Army Depot, 35 FLRA 113 (1990).

Letterkenny Test: Legitimate Justification

Even if the evidence shows a link between the protected activity and the action taken, no violation will be found if:

- ❑ there was a legitimate justification for the action; *and*
- ❑ the same action would have been taken even in the absence of the protected activity.

Letterkenny Army Depot, 35 FLRA 113 (1990).

Questions of Pretext or Mixed Motive

- If it can be shown that the reasons for taking the action are false or pretextual, then there is no legitimate justification for the action.
- In cases of mixed motive (action based on both lawful and unlawful considerations) the decision is still based on whether there are legitimate reasons and the same action would have resulted absent protected activity.

Letterkenny Army Depot, 35 FLRA 113 (1990).

Flagrant Misconduct

- Not All Conduct Involving Protected Activity is Protected
- Conduct that constitutes “flagrant misconduct or otherwise exceeds the boundaries of protected activity” loses its protection

See U.S. Dep't of Agriculture, Food & Nutrition Serv., Alexandria, Va., 61 FLRA 16 (2005); U.S. Dep't of the Air Force, Aerospace Maintenance and Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz., 58 FLRA 636 (2003).

Flagrant Misconduct Factors to Consider

1. Place and subject matter of discussion;
2. Whether an outburst was planned or impulsive;
3. Whether conduct was provoked; and
4. Nature of any intemperate language or conduct.

Dep't of the Air Force, Grissom Air Force Base, Ind., 51 FLRA 7 (1995).
