

First Week
Second Week

Labor Law
Fall 2009
Professor Cooper

Textbooks and Assignments

The text is LABOR LAW IN THE CONTEMPORARY WORKPLACE by Dau-Schmidt, Malin, Corrada, Cameron and Fisk (2009) and its 2009 Statutory Supplement. After consideration of some introductory materials on labor history and agency structure and procedure, the course will focus on employee and employer rights in the union and non-union workplace under the National Labor Relations Act; the process in which employees decide whether they wish union representation; collective bargaining; strikes, boycotts, and picketing. The course also will address how elements of the current socioeconomic climate, including immigration, technology and globalization relate to these legal issues. All references to page numbers in these assignment sheets are to pages in the casebook unless otherwise indicated.

Assignment sheets will be distributed on TWEN, The West Educational Network (see below).

Examination and Course Grades

Your grade in the course will be based on your performance on the final examination. Grades may be increased by one level (such as from a B+ to an A-) for regular positive contributions to class discussion.

Attendance

In accordance with the Law School's Rules of Scholastic Requirements, Rule 1.1, regular class attendance is required. If, after a warning about excessive absences, the pattern continues, a student's grade may be lowered or the student may be required to drop the class.

Prohibition of Recording — Use of Electronics in the Classroom

You are not permitted to make a recording of a class without the express permission of the instructor. Please note that law school policies prohibit your use of computers or other electronic media for any non-class-related use while class is in session. Such conduct is distracting and disrespectful to members of the class and to me. If you see others violating these rules, please ask them to stop and if the conduct nevertheless persists please let me know.

Special Honor Code Rule Regarding PowerPoint Slides

It is an Honor Code violation to have on your computer or to view in hardcopy or electronic form PowerPoint slides for the Labor Law class that were distributed in a prior semester.

The West Educational Network and E-Mail

A web site has been established for communications regarding this class at <<http://lawschool.westlaw.com>>. You will need your Westlaw password in order to register to use the web site. You will also need an additional password specific to this class that I will provide to you in class. Assignment sheets will be available for downloading from the web site. Overhead slides used in class will also be posted on TWEN only after class discussion of the topic to which the slides pertain. From time to time, I will also post supplementary materials of interest on the web site that may or may not be mentioned in class. You are encouraged to post material on the web site as well, such as questions or comments about readings, topics discussed in class, labor law issues in the news; or responses to the postings of other class members. The web site is designed to permit you to make postings anonymously and that privilege will be retained so long as it is not abused. I retain the right to delete postings from the web site for objectionable content or language. The web site is also a very important means for me to find out what material discussed in class may need further explanation. It is entirely appropriate, for example, to post a message that says, "Would you please go over ____ again?"

Whenever possible, I prefer that electronic communications regarding the class be done on TWEN rather than e-mail so that the class as a whole can benefit from the discussion. If you have a personal communication, such as scheduling a time for an appointment or explaining an absence from class, feel free to use e-mail. My e-mail address is <lcooper@umn.edu>. In addition to your own e-mail provider, you can also use TWEN to send e-mail to me by clicking on my e-mail address wherever it appears at the web site.

Class Schedule

Professional responsibilities require my attendance at three out-of-town conferences this semester, all held at the end of the week. In lieu of my requested Monday through Wednesday schedule, the Associate Dean scheduled this course for four days a week to avoid having to schedule a significant number of make-up classes. The following schedule avoids consecutive four-day weeks. No classes will be held Thanksgiving week.

September 2009						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8 Class	9 Class	10 Class	11 Class	12
13	14	15 Class	16 Class	17 Class	18	19
20	21	22 Class	23 Class	24 Class	25 Class	26
27	28	29 Class	30 Class			

October 2009						
S	M	T	W	T	F	S
				1	2	3
4	5	6 Class	7 Class	8	9	10
11	12	13 Class	14 Class	15 Class	16 Class	17
18	19	20 Class	21 Class	22 Class	23	24
25	26	27 Class	28 Class	29 Class	30 Class	31

November 2009						
S	M	T	W	T	F	S
1	2	3 Class	4 Class	5	6	7
8	9	10 Class	11 Class	12 Class	13	14
15	16	17 Class	18 Class	19 Class	20	21
22	23	24	25	26	27	28
29	30					

December 2009						
S	M	T	W	T	F	S
		1 Class	2 Class	3 Class	4	5
6	7	8 Class	9 Class	10	11	12
13	14 Final Exam	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

Questions and Problems for Class Discussion

Tuesday, September 8: The Jurisdiction of the National Labor Relations Act

1. Read pp. 48-59 on the legislative history and provisions of the National Labor Relations Act. Also read pp. 108-111 on the Microsoft “perma-temps.”

2. Julia Goldsberry, Cynthia Cordrey and Ruby Wells are employed as licensed practical nurses at the Heartland Nursing Home. As staff nurses at Heartland, they make daily work assignments to and monitor the work of nurses’ aides. They are not represented by a union. They were, however, concerned about a number of problems at the nursing home. They thought it unfair that one of the nurses’ aides was permitted flagrantly to violate the absenteeism policy. They thought that there were an inadequate number of aides on the staff to care for the patients and that wages for aides were unreasonably low. They were concerned about additional paperwork for staff caused by a new procedure for handling medications and about management’s general failure adequately to communicate with employees. On their day off, the three nurses drove to another city to the headquarters of the company that owned the nursing home and explained their concerns to the company’s director of human resources. Sometime later, Heartland fired all three nurses. Assume that the three nurses were fired because of their joint effort to bring workplace problems to the attention of the nursing home’s management.

- (a) Consider the matter first as a question of policy rather than statutory interpretation. Should it be illegal to fire these three nurses for their action? Why or why not? Is it in the national interest that the action of the nurses be protected? Why or why not? What burden would creation of such a legal right impose on employers? Is this a reasonable burden?
- (b) Now consider the problem of the three nurses under the text of the National Labor Relations Act. First notice that Section 8(a)(1) of the Act, Supplement, at p. 47, makes it an unfair labor practice for an “employer” to interfere with the § 7 rights of “employees,” which include the right to “engage in . . . concerted activities for . . . mutual aid and protection.” Notice that § 7 only protects “concerted” action.

(There would be no protection for an employee who complained of workplace conditions in a manner unrelated to the action of other employees.) Why might the drafters of the statute have thought it appropriate to make concert a prerequisite to protection? See § 1 of the Act at p. 41 of the Supplement. Do employees have to be engaged in some kind of activity connected with a union in order to have protection under the NLRA?

- (c) Is Heartland Nursing Home an “employer”? What makes an entity an employer within the meaning of the NLRA? What kinds of entities are excluded? See Section 2(2) of the Act at p. 42 of the Supplement.
- (d) Are the three fired licensed practical nurses “employees” within the meaning of the Act? See the definition of “employee” at Section 2(3) of the Act, at pp. 42-43 of the Supplement. What kinds of people, whom we would normally think of, in other contexts, as employees, are excluded by this definition? In 1935, at the time of enactment of the NLRA, what was the demographic composition of persons excluded as members of the agricultural and domestic labor force? What is its demographic composition today?
- (e) Section 2(3) also excludes supervisors from the definition of employees. Who is a supervisor? See Section 2(11) of the Act, in the Supplement at p. 43. Why are supervisors excluded? Under what circumstances might Nurses Goldsberry, Cordrey and Wells be supervisors?
- (f) What if the three employees who went to headquarters were nurses’ aides rather than licensed practical nurses? Is it possible that nurses’ aides have rights under the NLRA that the licensed practical nurses do not?
- (g) Are the three staff nurses “professionals” within the meaning of the Act? Why or why not? See § 2(12) of the Act, in the Supplement at pp. 43-44. Does the Act exclude professionals from the definition of employees? Under the Act’s definition of professional, are the following categories of workers professionals: lawyer, lobbyist, journalist? What are the consequences under the NLRA if a person is considered to be a professional? See the first proviso to § 9(b) at p. 54 of the Supplement.

3. Are the Microsoft perma-temps, discussed in the text at pp. 108-111 “employees” under the NLRA? If so, what entity is their “employer” under the NLRA? How would the statutory definitions of “employee” and “employer” affect the ability of the perma-temps to organize a union to represent their interests? Is it within the power of the NLRB to conclude that workers employed by Microsoft and workers working with them, employed by a temporary agency, belong to a single bargaining unit? (If they are in a single bargaining unit and a majority of employees working for both employers want union representation, they are entitled to bargain with Microsoft and the temporary agency jointly for common wages, benefits and working conditions.)

Wednesday, September 9: Structure and Operation of the National Labor Relations Board

1. Continue reading about the later history of the NLRA at pp. 65-76. Recall that the NLRA excludes from its definition of a covered “employer” in § 2(2) “the United States . . . or any State or political subdivision thereof.” For an overview of the legal regulation of labor-management issues in the public sector, read pp. 82-88. Read pp. 88-102 on how globalization, immigration, and current socio-economic conditions influence the contemporary context for private sector labor organizing.

2. Much of this class will be devoted to a lecture on the scope of the course and the structure and operation of the National Labor Relations Board. See the final pages of this assignment sheet for an outline of the course and the material to be covered by lecture regarding NLRB structure and operations. Read Sections 3 and 10 of the NLRA in the Supplement.

Thursday, September 10: Undocumented Workers

1. Read pp. 152-165 (*Hoffman Plastic* and essay excerpts). The edited version of the *Hoffman* case in the text omits reference to the fact that the NLRB’s backpay decision was enforced by an en banc decision of the Court of Appeals of the District of Columbia.

2. Is the result of the Supreme Court’s decision in *Hoffman* that an undocumented worker is not an “employee” within the scope of coverage of the NLRA? If not, what rights, if any, does an undocumented worker have under the NLRA?

3. The Supreme Court majority says that “awarding backpay to illegal aliens runs counter to policies underlying IRCA.” First paragraph, p. 156. If that’s so, why did the Department of Justice, then responsible for enforcement of immigration laws, support the NLRA’s position in the *Hoffman* case? (Dissent of Justice Breyer, bottom of p. 156) Is there an argument that awarding backpay to Castro would *promote* the “policies underlying IRCA”?

4. The Supreme Court has stated that “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Under that doctrine, should the Supreme Court have deferred to the NLRB’s and INS’s interpretation of their respective statutes? Why or why not?

5. The Supreme Court majority says, in its last paragraph on p. 156: “Lack of authority to award backpay does not mean that the employer gets off scot-free.” What remedies remain available to the NLRB in a case in which an undocumented worker has been discharged because of union activities? How effective are such remaining remedies likely to be in deterring employers from illegally discharging employees for union activity?

6. You are an attorney for a union seeking to organize an employer’s janitorial workers. The union advises you that it believes a large proportion of the workers are undocumented. The union asks if there are any legal, practical, moral or ethical reasons not to pursue the organizational campaign. How do you respond?

7. Professor Cameron's essay, excerpted at pp. 158-160, criticizes the Supreme Court for using a "false conflict" to undermine the role of Congress as the designer of national labor policy. Did *Hoffman* present a "false conflict"? Did the *Hoffman* decision make the Supreme Court the "final arbiter of federal labor policy"? What are the respective roles of Congress and the Supreme Court in the making of federal labor policy? Which is the "final arbiter"?

8. If Professor Cameron is not correct that as a formal matter the Court is the "final arbiter" of U.S. labor policy, is he correct as a practical matter? Notice that despite enormous socio-economic changes in the American workforce since the 1935 enactment of the NLRA, the core provisions of the Act were only amended in 1947 and 1959. (Jurisdiction over health care institutions was added in 1974. See the asterisk footnote on p. 41 of the Supplement.) Why do you think Congress has so infrequently amended the NLRA?

9. Note 1 on pp. 163-164 reports that both the International Labor Organization and the Inter-American Court of Human Rights concluded that the *Hoffman* decision was inconsistent with international law principles. Of what use, if any, are the decisions of these international legal bodies and the international law principles outlined in Professor's Compa's essay, excerpted at pp. 161-163, to the practice of labor law in the United States?

Friday, September 11: Supervisors

1. Read pp. 165-183 (Notes and *Oakwood Healthcare*).

2. While the NLRA purports to define the jurisdictional limits of its regulation, it is clear from *Oakwood* that the statutory language leaves considerable discretion to the NLRB to interpret its terms, within the constraints of any decisions by the Supreme Court in cases such as *Kentucky River* (discussed at p. 168 and pp. 172-173). Consider the Board's potential sources for interpretation of the statutory text including statutory language, dictionary meanings of statutory text, the statute's statement of purpose, practical consequences of different interpretations, and legislative history. What sources of interpretation are employed by the majority and dissent? How do you assess the quality of the majority and dissent's interpretation of text?

3. Disputes about whether particular workers are supervisors can delay the conduct of a representation election. Delay can increase a union's organizational costs and cause it to lose support among employees. How well does the majority opinion in *Oakwood* establish clear guidelines that will obviate extensive fact-based hearings and detailed analysis by NLRB regional directors in determining supervisory status before conducting elections? Is there any reason why an employer's attorney should not make a claim (even a frivolous one) of supervisory status if the result is that the claim will cause delay and increase the employer's chances of prevailing in a representation election?

4. How does the determination that the twelve permanent charge nurses at Oakwood are supervisors affect the interests, rights and responsibilities of: (1) the employer; (2) the union;

(3) the twelve charge nurses? Does the majority or dissent in *Oakwood* take these interests into account? Should they?

5. The legislative history of the NLRA's supervisory exclusion includes an assertion that the line between true supervisors and non-supervisors is designed to separate as supervisors those workers who should provide "undivided loyalty" to the employer. (Bottom of p. 179) In what respect does the hospital in *Oakwood* require "loyalty" of permanent charge nurses different than the "loyalty" it requires of rotating charge nurses? Does the ability of an employee to participate in collective bargaining limit or preclude an employee's "loyalty" to an employer?

6. You represent a private hospital whose nurses have never been represented by a union. The hospital is considering restructuring its nursing department and asks you whether restructuring might have implications for its desire to remain union-free. Does *Oakwood* provide you with a template for restructuring that would advance the hospital's objective? If so, how? What do you advise the hospital?

7. *Oakwood* was decided by an NLRB with a majority of members appointed by a Republican President. Sometime in 2009 the NLRB will have a majority of members appointed by a Democratic President. Does the new NLRB majority have the discretion to reverse *Oakwood* and adopt the position of the *Oakwood* dissenters? Should it? (Wilma Liebman, one of the *Oakwood* dissenters, was appointed Chairman of the NLRB by President Obama on January 20, 2009.)

8. Note 7 on p. 183 observes that under some state public sector labor statutes supervisors possess the right to unionize and engage in collective bargaining. Minnesota is one of those states. Is there a logical reason why supervisors in the public sector should be permitted to engage in collective bargaining while supervisors in the private sector should not? Should the NLRA be amended to include supervisors within the definition of "employees"?

9. Research in the article by Professor Voos cited in Note 7 also finds that European countries generally permit supervisors to engage in collective bargaining. Is the NLRA's preclusion of collective bargaining rights for private sector supervisors a violation of the international law principles discussed in connection with the *Hoffman Plastic* case?

Tuesday, September 15: Concerted Activity

1. Read pp. 208-218 (Enderby problem and *Washington Aluminum*) and §§ 7 and 8(a)(1) of the NLRA in the Supplement at p. 47. Also read pp. 218-227 (*City Disposal* and Notes).

2. Consider the Enderby problem at pp. 208-210. (The hypothetical in the text is based on a question on my 2004 Labor Law final examination that was, in turn, based on an incident in the Twin Cities.) To fully answer the questions following the Enderby problem in the Notes at pp. 209-210 we will need to complete the reading in this chapter and some other chapters. The presentation of the problem here, at the beginning of the chapter, is designed to highlight the immediate relevance of the doctrinal issues addressed in the chapter. For now, try

to respond to the questions on a higher level of generality: Does the NLRA, with a stated purpose of fostering collective bargaining, have anything to say about the rights of employees involved in workplace actions unconnected to any union? Are any provisions of the NLRA likely to be implicated by the questions at pp. 209-210? If so, which ones? As a matter of general labor policy, rather than specific legal doctrine, how do you think the questions should be answered?

3. Consider the two definitions of “concerted” activity described at the bottom of p. 211. Which is consistent with the conception of concerted activity described in the excerpt from Professor Lynd’s essay at pp. 212-214? Which is consistent with the conception of concerted activity the Supreme Court finds protected in *Washington Aluminum*? Which is consistent with the conception of concerted activity the Supreme Court majority finds protected in *City Disposal*? Which is consistent with the conception of concerted activity that the dissent in *City Disposal* believes is entitled to statutory protection? Are both kinds of concerted activity protected by the Act? Is the protection of both kinds of concerted activity consistent with the purpose of the Act?

4. George is an employee of the Digital Computer Company, a company that has never been organized by a union. One day, George went to the Personnel Director at Digital and said, “I am really unhappy about the vacation benefits we get. Other companies give their employees a holiday on the Friday after Thanksgiving. Why can’t we have that day off?” The Personnel Director said to George, “With that kind of attitude you are lucky to have a job. A competitive industry like this one can’t afford employees like you. You are fired.” Did Digital commit any unfair labor practices in firing George?

5. Assume instead that at Digital Computer Company, George and another employee there, Elizabeth, go together to see the Personnel Director at Digital. While Elizabeth stands silently next to George, George says to the Personnel Director, “We are really unhappy about the vacation benefits we get. Other companies give their employees a holiday on the Friday after Thanksgiving. Why can’t we have that day off?” The Personnel Director says to George, “With that kind of attitude you are lucky to have a job. A competitive industry like this one can’t afford employees like you. You are fired.” Did Digital commit any unfair labor practices in firing George? If your answers to this question and the one immediately above are different, would a rational statutory scheme treat the two differently? Why or why not?

6. Assume instead that at the Digital Computer Company, George goes alone to see the Personnel Director. He says to the Personnel Director, “We are really unhappy about the vacation benefits we get. Other companies give their employees a holiday on the Friday after Thanksgiving. Why can’t we have that day off?” The Personnel Director says to George, “With that kind of attitude you are lucky to have a job. A competitive industry like this one can’t afford employees like you. I can’t have you riling up the other employees like that. You are fired.” As it turns out, while the employer believed that George had discussed the issue with others and was speaking on their behalf, George actually hadn’t spoken to any other employees before speaking to the Personnel Director. Would the employer’s discharge in this case constitute an unfair labor practice? Consider the following two scenarios: (1) The employee acts in concert but the employer is unaware that the activity involved more than one employee. (2) One employee acts

alone but the employer believes more than one employee was involved. In which of these settings, if either, is the employee protected by § 7?

7. The employees at the Steak Ranch restaurant have never been represented by a union. One day, Joan Baker, a waitress at Steak Ranch went in to the office of the Manager and said, “Your son John has been stealing our tips left on the tables when he clears the dishes.” The Manager responded, “My son is an honest boy. I don’t want to hear any more about this.” Joan responded, “I’m going to tell the other waitresses what I’ve seen John doing.” The Manager answered, “You’re fired.” Did the Manager of the Steak Ranch commit any unfair labor practices in discharging Joan?

8. You are an attorney for a union that represents truck drivers at a unionized facility with a collective bargaining agreement. The agreement prohibits the employer from discharging employees without “just cause.” The agreement includes a provision permitting submission of grievances alleging violation of the agreement and the resolution of such grievances in binding arbitration before a neutral arbitrator. An employee refuses to drive an unsafe truck. Should you seek redress for the employee’s discharge under the collective bargaining agreement’s grievance and arbitration procedure, or before the NLRB, or should you pursue the employee’s claim in both forums?

9. What if the employee in *City Disposal* who refused to drive a truck on the ground that it was unsafe was *not* represented by a union and the non-union employee was discharged for the refusal? Would the non-union employer’s conduct violate § 8(a)(1)? Could the non-union worker’s action be considered a continuation of the concerted efforts of workers generally to promote enactment of legislation to secure workplace safety? See Note 1 on p. 226. If the non-union employee is not protected by the NLRA is there some other source of legal protection when the employee is discharged for refusal to drive a truck thought to be unsafe?

10. Reconsider the problem of the Somali workers at pp. 208-209. Would the NLRA preclude Ms. Baker from discharging the workers (a) for picketing? (b) for distributing handbills? (c) for refusing to work until their issues were resolved?

11. See Note 4 on p. 227. Have you ever been told by an employer not to discuss your wage or salary rate with co-workers? Do you think the practice is widespread? If so, why might it be the case that the practice is both widespread and illegal?

Wednesday, September 16: Mutual Aid and Protection

1. Read pp. 228-241 (Notes, *IBM* and *Eastex*) and the Notes on *Eastex* at pp. 249-251 (The Notes pertaining to *Eastex* were misplaced in the text after another case.)

2. In the *Taracorp Industries* case, cited in the second full paragraph on p. 229, the Board held that “when an employee is discharged or disciplined for cause, that employee will not be entitled to reinstatement and backpay simply because his or her *Weingarten* rights were violated.” Thus, the Board’s remedy for violation of *Weingarten* rights is limited to a cease and desist order and a requirement that the employer post a notice in the workplace saying that the

employer has been found by the NLRB to have violated the NLRA and that the employer affirms that it will not do it again.

(a) If that is the extent of the remedy for a *Weingarten* violation, of what significance is the existence of the right, either to the employees or to the conduct of employers?

(b) An employee with *Weingarten* rights is necessarily an employee who is represented by a union and whose working conditions are generally governed by a collective bargaining agreement that offers binding arbitration if employees are discharged without “just cause.” Does the unwillingness of the NLRB to offer a reinstatement remedy to an employee discharged following an investigatory interview in which *Weingarten* rights were denied preclude an arbitrator under a collective bargaining agreement from reinstating the employee for violation of the employee’s statutory right to representation?

3. How persuasive are the *IBM* majority’s arguments that its *Epilepsy Foundation* decision had be overruled because of “changing patterns of industrial life” (last paragraph on p. 230)? Might the Board majority have had other reasons for overruling *Epilepsy Foundation* than it articulated in *IBM*?

4. The majority of the Board in *IBM* focuses largely on policy reasons supporting its holding. Does the *IBM* majority provide a basis in the text of the NLRA for differentiating between union and non-union employees with regard to their right to representation in investigatory interviews? What is the statutory source of the right? Do you see a distinction drawn in the text of the statute between union and non-union employees with regard to the right of representation?

5. How persuasive are the *IBM* majority’s policy arguments for why union and non-union workplaces should be treated differently under the NLRA with regard to a right to co-worker representation? In the third full paragraph on p. 232 the Board majority acknowledges that many of its concerns about the presence of a co-worker in a non-union setting also exist in a union setting, but it concludes that the “dangers are far less” in the union setting because “the assisting person is an experienced union representative with fiduciary obligations and a continuing interest in having an amicable relationship with the employer.” The person accompanying an employee at an investigatory interview in a union workplace is likely to be a union steward. A union steward is a regular member of the employer’s workforce who, as a volunteer, agrees to perform some roles in the workplace on behalf of the union, such as filling out grievance forms and answering employees’ questions about the collective bargaining agreement. Are co-worker representatives in the union and non-union workplaces likely to raise significantly different “dangers” for the employer? Just what are the union steward’s “fiduciary responsibilities”?

6. Note the history of the Board’s decisions (summarized by the textbook authors in the second full paragraph on p. 230) on the issue of whether *non-union* employees also possess the right to representation in investigatory interviews: 1982-Yes; 1985-No; 1988-No, but Yes permissible interpretation; 2000-Yes; 2004-No. See Note 1 on p. 235. Is the Board’s behavior between 1982 and 2004 in handling this issue consistent with the role the agency was designed

by Congress to serve? Why or why not? What are the values furthered by reliance upon precedent? Are these values as important for an administrative agency as they are for a court? What is likely to be the effect of the agency's regular reversals of doctrine on an appellate court's willingness to give deference to the decisions of the NLRB?

6. The dissent in *IBM* begins by saying that the majority's decision strips the nation's non-union employees of "a right integral to workplace democracy" (last paragraph on p. 232). Does the NLRA establish an employee right to "workplace democracy"?

7. An employee could be acting (a) to improve the worker's own work conditions; (b) to improve the work conditions of the employee and the employee's co-workers; (c) to improve the work conditions only of co-workers at the same place of employment; or (d) to improve work conditions of workers exclusively at other places of employment. In Professor Fischl's essay, excerpted at pp. 238-241, he suggests that Board and court interpretations of the NLRA protect employee self-interest but not employee altruism. Does that mean that alternatives (c) and (d) gain no statutory protection? In which category does the employee conduct in *Eastex* belong?

8. An employee at a non-union workplace, making more than the proposed minimum wage, stands alone in the employee parking lot before her shift and distributes leaflets encouraging employees to come to a rally to support a local minimum wage ordinance. Other employees at other workplaces with different employers are doing the same. Is she engaged in "concerted activity"? Is she engaged in activity for "mutual aid and protection"? Should her conduct be more or less protected if she is part of a non-work political organization working for enactment of the ordinance? Consider Note 2 on pp. 249-250.

9. Consider Question 4.d. on p. 251.

10. In *Eastex*, the Supreme Court, in the second full paragraph on p. 237, says that "at some point the relationship [between employee interest and their activity] becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." Does that mean that the Supreme Court or the NLRB is empowered to second-guess employee determinations of how best to pursue their workplace concerns? If not, must the Board and the courts always defer to employees' judgments about the tactical means to pursue employee interests? Is the test for what is for "mutual aid or protection" an objective or subjective test?

Thursday, September 17: Unprotected Conduct

1. Read pp. 241-249 (*Timekeeping Systems* and Notes).
2. How did Leinweber's conduct in *Timekeeping Systems* satisfy the statutory requirement for "concerted" activity? How did Leinweber's conduct in *Timekeeping Systems* satisfy the statutory requirement that the conduct be for "mutual aid or protection."?
3. What language in the NLRA, if any, permits the NLRB to decline to protect employee conduct that is unquestionably "concerted" and for "mutual aid or protection"? Does

the NLRA have the authority to deem conduct unprotected by the NLRA even if it meets requirements for concert and mutual aid?

4. Assuming that the NLRB has the statutory authority to deem some employee activity that is unquestionably both concerted and for mutual aid and protection nevertheless not worthy of statutory protection, where is the Board to draw the line? What is the legal standard for determining when otherwise protected employee conduct is not entitled to protection? Consider both *Timekeeping Systems* and *Jefferson Standard* (discussed in Note 2 on pp. 246-248). To what extent does that standard (or standards) give fair notice to both employees and employers of when the Board will permit an employer to discharge an employee for concerted activity engaged in for mutual aid?

5. In the *Carleton College* case, discussed in Note 1 on p. 246, an adjunct professor of music told the College's dean in a meeting (discussing his joint letter from a small committee of adjunct professors complaining about working conditions in the music department) that the department was the "laughing stock" of the Twin Cities music community and said, of the music department, that you could put perfume on a pig but couldn't make it smell sweet. The professor described being "pissed off" and told the dean that she should stop "farting around" by addressing insignificant matters and focus on his real concerns. Although the NLRB considered the College to have violated the NLRA, the Eighth Circuit reversed, saying:

Perhaps, such language might be excused in a different setting. However, in the context of a meeting with the dean of the college which was called to discuss professional expectations for the future, [the adjunct professor's] use of vulgarities and description of the music department as a "laughingstock" and a "pig" evidenced his disrespect of the music department and unwillingness to commit to act in a professional manner.

Did the professor's conduct meet the standard(s) articulated in *Timekeeping Systems* and *Jefferson Standard* to render otherwise protected conduct unprotected? Is the Eighth Circuit correct that a professor should not be afforded the range of "salty" language that would be legally protected if uttered by a factory worker?

6. Consider the questions about variations on the Somali workers hypothetical on p. 248 in the last paragraph of Note 2.

OUTLINE OF STRUCTURE AND FUNCTIONS OF THE NATIONAL LABOR RELATIONS BOARD

- I. Jurisdiction of the NLRB
 - A. Statutory Definition of “employer”
 - B. Statutory Definition of “employee”
 - C. Interstate Commerce Limitation

- II. Structure of the NLRB
 - A. **The Five-Member Board in Washington**
 - 1. Board Members and their Legal Assistants
 - 2. Executive Secretary
 - 3. Solicitor
 - B. **General Counsel**
 - 1. Division of Operations Management
 - 2. Division of Advice
 - 3. Office of Appeals
 - 4. Division of Enforcement Litigation
 - C. **Regional Offices**

- III. Unfair Labor Practice Procedures
 - A. Filing of a Charge
 - B. Regional Office Investigation
 - C. Issuance of a Complaint
 - D. Settlement Negotiations
 - E. Hearing Before an Administrative Law Judge
 - F. Decision by the Five-Member Board
 - G. Judicial Review in the United States Courts of Appeals

- IV. Representation Cases
 - A. Filing of a Petition
 - B. Regional Office Investigation
 - C. Stipulated Election Agreement
 - D. Hearing Before a Hearing Officer
 - E. Decision and Direction of Election by the Regional Director
 - F. Conduct of the Election and Tally of Ballots
 - G. Exceptions to the Election
 - H. Investigation or Hearing on Exceptions
 - I. Decision of the Regional Director
 - J. Limited Review by the Five-Member Board
 - K. Judicial Review of Representation Decisions only by the Commission of an Unfair Labor Practice

LABOR LAW COURSE OUTLINE

- I. **Introduction**
 - A. Structure and Operation of the National Labor Relations Act
 - B. Jurisdiction of the National Labor Relations Act
 - 1. Undocumented Workers
 - 2. Supervisors
- II. **Collective Action and Representation**
 - A. Concerted Activity
 - B. Mutual Aid and Protection
 - C. Unprotected Activity
 - D. Employer Domination
 - E. Exclusive Representation
- III. **Establishing Collective Representation**
 - A. Access for Organizing
 - B. Non-Employee Organizers
 - C. Laboratory Conditions
 - D. Regulation of Campaign Speech
 - E. Grant of Benefits
 - F. Interrogation, Polling and Surveillance
 - G. Protection Against Discrimination
 - 1. Individual Employees
 - 2. Plant Closings
 - H. Bargaining Units
 - I. Representation Election Procedure
 - J. Bargaining Orders
 - K. Authorization Cards and the Employee Free Choice Act
 - L. Voluntary Recognition
- IV. **Loss of Recognition**
 - A. Methods of Loss of Recognition
 - B. Employer Successorship
- V. **The Collective Bargaining Process**
 - A. Introduction to the Collective Bargaining Process
 - B. Unilateral Action
 - C. The Duty to Bargain in Good Faith
 - D. The Duty to Provide Information
 - E. Subjects of Collective Bargaining
- VI. **Economic Weapons**
 - A. The First Amendment and Economic Weapons
 - B. Strikes
 - C. Exceptions to Strike Protection
 - D. Replacement of Strikers
 - E. Secondary Activity
- VII. **Expanding Boundaries of Modern Labor Law Practice**
 - A. New Forms of Labor Organizations
 - B. Unions and International Law