

N.J. Supreme Court: Strikers may be entitled to unemployment

The New Jersey Supreme Court recently held that an employer that continues to provide all or substantially all of its services during a strike will be hard-pressed to oppose its striking employees' applications for unemployment benefits. That's true even if the strike results in significant losses in revenue and profits.

In *Lourdes Medical Center of Burlington County v. Board of Review*, the court held that the hospital's striking nurses were entitled to unemployment benefits because the medical center managed to maintain its normal level of patient care services during the strike.

The court held that the medical center's financial strain wasn't enough to satisfy the "stoppage of work" requirement in the labor dispute exception of New Jersey's unemployment benefits statute. Since Lourdes continued to provide full services to the public, kept patient census up and never experienced a substantial curtailment of work, the strikers were eligible for unemployment benefits while they were on strike.

Work continues despite strike

The Lourdes Medical Center's nursing staff is represented by the Jersey Nurses Economic Security Organization (JNESO). In April 2004, during contract bargaining, JNESO led approximately 240 nurses on strike against the medical center. Bargaining had stalemated on economic issues and work scheduling. Almost 100 strikers applied for state unemployment benefits.

Lourdes continued to function at full service during the strike. Although the medical center incurred greater operating costs during the strike, the strikers proved that Lourdes successfully replaced the striking nurses and it was business as usual.

New Jersey's unemployment statute

has a labor-dispute provision that says striking workers can't receive unemployment benefits when "the unemployment is due to a 'stoppage of work' which exists because of a labor dispute at the factory, establishment or other premises at which the individual is or was last employed."

A New Jersey Department of Labor regulation defines "stoppage of work" as a "substantial curtailment of work which is due to a labor dispute." The same regulation provides that an "employer is considered to have a substantial curtailment of work if not more than 80 percent of the normal production of goods or services is met."

After a hearing and appeal, the strikers were awarded unemployment benefits. Despite the significant costs Lourdes incurred, there had been no "stoppage of work." Both the hearing examiner and the Board of Review rejected Lourdes' policy argument that the regulation shouldn't apply to a hospital owing to the type of critical services hospitals provide.

Supreme Court hears the case

The case wound its way to the New Jersey Supreme Court, which agreed with the original conclusions.

The court analyzed two issues:

1. Whether the board's decision violated express or implied legislative policies
2. Whether the board's finding was supported by sufficient credible evidence in the record

First, the court rejected Lourdes' policy argument that the stoppage of work proviso shouldn't apply to hospitals because of their importance to the public.

Second, the court found that the evidentiary record adequately established that, although Lourdes lost revenue and incurred extra costs of over \$1 million per month to hire replacement nurses, the medical center

continued to provide its patients the same quality of services.

The court concluded that an employer's mere loss of revenue attributable to a strike, which causes neither a shutdown of operations nor a substantial curtailment of work, doesn't satisfy the requirement for a "stoppage of work" for purposes of determining a striking worker's entitlement to New Jersey unemployment benefits.

What it means for employers

The decision is problematic for employers in heavily regulated service industries such as health care. *The problem:* It erodes the basic financial disincentive for employees to avoid a strike.

Although the court's decision is narrow and based on an analysis of one employer's commitment to maintain a normal level of operations during a strike, a prudent employer faced with the prospect of a strike should consider the implications of the *Lourdes Medical Center* decision for a labor strategy of maintaining full or near-full operations during the strike.

Any employer preparing for a strike should closely align its communications strategy with its labor relations strategy. In this case, lack of that kind of alignment affected the legal outcome. The Supreme Court's decision was clearly influenced by the medical center's repeated public pronouncements that the strike was having no effect on its continuing ability to provide the local community with high quality patient care. The court took Lourdes at its word.

Patrick W. McGovern, Esq., is a partner and Gina M. Schnieder, Esq., is an associate at Genova, Burns & Vernoia, a New Jersey-based law firm with offices in Newark, Red Bank, Camden, New York and Philadelphia. Contact McGovern at (973) 533-0777 or pmcgovern@gbvlaw.com.