

A Closer Look At Congressional Investigations

By Tim Weatherholt (Louisville)

For the past few weeks, the news media has been fixated on the Congressional investigation and hearings into purported defects in Toyota vehicles. But why is it such a big story? In reality, Congress has held hundreds of investigative hearings during the past few years on matters involving nearly every industry. This article will review – in very basic detail – Congress’s power to conduct an investigative hearing, the limitations on those powers, and the practical effects of a Congressional investigation.

The Power To Investigate

We all know that the primary role of Congress is to pass legislation. As part of that role, Congress also has the capacity to conduct hearings and investigations. The power to investigate is not explicitly referenced in the text of the Constitution. Article I, § 8 of the Constitution simply provides that Congress has the authority “To make all Laws which shall be necessary and proper.” But the Supreme Court’s broad interpretation of the role clearly provides the authority for Congressional investigation into substantive matters.

In what is perhaps the most important case on this subject, Justice Willis Van Devanter noted that in legislative practice the power to secure needed information by means of investigations “has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures.” *McGrain v. Daugherty*.

Congress has delegated the power to initiate and conduct investigations and issue subpoenas for both documents and testimony to all of its standing committees and subcommittees. House and Senate rules afford those committees broad powers to conduct investigative proceedings. For instance, Senate Rule XXVI sets forth many of the hearing regulations to which committees must conform, including the quorum requirement, advance submission of witness statements, the opportunity for minority party Senators to call witnesses of their choosing, and procedures for closing a hearing to the public. Each committee is authorized to hold hearings and has broad discretion in doing so.

The typical chronology consists of an investigation, followed by a hearing, and then, for the most important investigations, a committee report detailing the results of the investigation and often calling for legislative changes which may or may not be implemented. Once an investigation is commenced, which can occur in any number of ways, there is no standard format that will be followed. A hearing is not like a formal legal proceeding; questions are tightly scripted and the subject of the hearing often has little chance to state his or her position. If a person does not comply with a committee’s investigative demands, the committee may hold the person in contempt.



Limitations On Investigations

Though broad, Congress’s investigative powers are subject to well-recognized limitations. In *Quinn v. United States*, the Supreme Court stated that the power to investigate “cannot be used to inquire into private affairs unrelated to a valid legislative purpose” and that it does not “extend to an area in which Congress is forbidden to legislate.” The Court further stated that “the power to investigate must not be confused with any of the powers of law enforcement,” which are assigned by the Constitution to the executive and the judiciary. Further limitations include the First, Fourth, and Fifth Amendments to the Constitution, as well as attorney-client privilege.

Practical Effects Of A Congressional Investigation

Recent years have seen widespread criticism of Congressional investigating committees, especially when their actual purpose seems to be subjecting individuals to public exposure rather than obtaining information necessary to legislate. The Congressional hearings on the issue of steroids in baseball is a good example. While any long-term changes were necessarily going to be implemented by a collective bargaining agreement between the players’ union and management, Congress took advantage of the public outcry by “addressing” the issue through its investigatory power.

Of course, the players’ union and the owners reached an agreement on steroids, thus showing the practical effect of a congressional investigation: to move entities into action. Other effects, unfortunately, often include additional investigations and lawsuits. As all automobile manufacturers are already committed to producing products of the highest possible quality, it is helpful to keep in mind that Toyota is not the only automobile manufacturer to recently issue a widespread recall. In March 2010, GM recalled approximately 1.3 million cars. To the extent that a similar investigation is not conducted into GM, it may be helpful to remember a fundamental truth about Congressional investigations: they are not judicial fact-finding proceedings searching for truth; rather, they are mainly driven by political considerations.

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Which Restroom?

Employers Face Challenges With Gender Identity Issues

By Phil Moss (Portland, ME)

Good Food Restaurant, Inc. runs a family restaurant in a state which prohibits discrimination in employment based upon gender identity and disability. Its employees are required to wear name-tags, and to dress the same (black pants and shirt, minimal jewelry, conservative make-up). It has men's and women's restrooms, used by customers and employees alike. An employee (George) tells the manager that he is in transition to becoming a woman, and wants

- to be addressed as Gail,
- to change her name-tag to read "Gail," and
- to use the women's restroom.

Several of the restaurant's female employees have told the manager that they intend to quit if Gail is permitted to share the women's restroom with them, and management is concerned with the reaction of its female customers if Gail is permitted to use the women's restroom.

This hypothetical is not far fetched. Employers are increasingly being forced to grapple with issues involving employees who state that they have a Gender Identity Disorder, or are "transgendered." Such individuals may claim that they are protected against discrimination in employment and that their employer must accommodate their need to be treated as a member of the sex they identify with.

A Protected Class?

Typically, an employee claiming unlawful discrimination must prove: 1) membership in a protected class; 2) an adverse employment action; and 3) a causal connection between the two. Federal law does not yet prohibit employment discrimination based on gender identity, but a number of states have amended or interpreted their own employment laws to prohibit this. For example, Maine law prohibits discrimination on the basis of "sexual orientation," defined as "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression." The Massachusetts Commission Against Discrimination has held that Massachusetts law prohibits employment discrimination against transsexuals on the basis of sex.

Accommodation

Employers are required to offer reasonable accommodation to qualified employees with disabilities, to enable them to perform the essential functions of their jobs. Although federal law (the Americans With Disabilities Act) continues to exclude transsexualism and other Gender Identity Disorders from the definition of "disability," they may constitute a disability as defined under state law, particularly if supported by a doctor's certification. Advocacy groups insist that employers should honor the transgendered individual's choices in matters of appearance and use of restroom.

Balancing The Legal Against The Practical

Going back to our hypothetical, in order to prove unlawful employment discrimination, Gail must show that she suffered a material "adverse employment action" because she is transgendered. It is doubtful that an employer's refusal to address an employee by other than his legal name and refusal to allow anything other than the employee's legal name to be displayed on his name-tag is a material adverse employment action. On the other hand, it is hard to see how it would interfere with or burden Good Food Restaurant's business interests to accede to these requests.



Harassment which is severe or pervasive may constitute a material adverse employment action. Good Food Restaurant should train its managers on the need to ensure that Gail is not subjected to jokes, innuendos, or disparaging comments by her co-workers. If harassment occurs, the offenders should be disciplined, just as they would be if they engaged in racial or sexual harassment, and Good Food Restaurant should require all employees to undergo training that spells out what is wrong with such conduct and the consequences for engaging in it.

The Restroom Problem

If Good Food Restaurant had only unisex restrooms (single occupant, may be used by either sex), there would be no "restroom problem." But its restrooms accommodate more than one user at a time, and are designated for use by men and women, separately. There have been relatively few cases addressing this issue. In one, the Minnesota Supreme Court held that although the state's Human Rights Act prohibited discrimination in employment against transgendered individuals, an employer could require a transgendered employee to use the restroom that corresponded to his biological gender. *Goins v. West Group*.

In another, a federal appeals court upheld the dismissal of a female employee's objection to a School District decision to permit a male employee who was transitioning to female to use the women's restroom. The employee argued that requiring her to share the women's restroom with someone who was biologically male constituted sexual harassment. The U.S. Court of Appeals for the 8th Circuit rejected this claim, *as a matter of law. Cruzan v. Special School District #1*.

But in other jurisdictions, such as Massachusetts and Maine, the courts are likely to treat this as an issue of fact which should be left to the jury to decide. Thus, the employer may be caught squarely in the middle: sued by the transgendered individual if he or she is not permitted to use the desired restroom, and sued by other employees if it does. It is also not a stretch to imagine a female customer complaining to management – or worse – if she learns that she is sharing the restroom with a transgendered male employee.

Where We Are Now

Inevitably, there will be more cases addressing this issue, and hopefully a consensus will emerge as to what an employer's rights and obligations are when confronted with such requests from transgendered employees. In the meantime, employers should proceed with caution based upon careful analysis of the legal and practical implications of each situation.

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Real World HR

Supervisors Really Do Matter

By John McLachlan (San Francisco)

We believe that many of the time-honored procedures relating to union organizing are going to change, although we don't know yet exactly how they will change. In our consideration of steps employers should be taking to prepare to compete on a playing field which will be decidedly tilted in the unions' favor, we have not yet discussed the role of first-line supervisors. Supervisors play a crucial role in any employer's strategy to maintain a union-free operation, and we'll consider that very important element of the employer's position in this article.

On The Firing Line

The reasons for the primacy of the supervisor's role in employee perceptions of the company are not hard to understand. For the average employee, the supervisor *is* the company. The supervisor is the daily conduit between workers and management. The supervisor gives work directions, evaluates performance, provides assistance or grief, relates well to employees or doesn't, and is a source of comfort or friction.

While everyone knows that upper management and the senior leadership team have more influence in the overall direction of the company than first-level supervisors, no member of management has as much influence on the daily lives of the individual worker. The fact that other managers have more authority is relatively unimportant to workers because it is the supervisor who has authority over *them*. No other member of management spends as much time every day with employees as does their supervisor.

So supervisors can either make or break your company's efforts to create a favorable workplace, which ultimately has a major impact on how employees view the company. That, in turn, directly impacts how receptive they will be to a union's sales presentation. Since this is so, we'll list here a number of questions we recommend clients ask themselves as they consider the roles the supervisor plays in their particular organizations. These questions are designed to cause you to consider new ways to make supervisors more effective at their jobs.

These are jobs which require a greater number of different skills than do many or perhaps a majority of those in a corporation. Supervisors are charged with: leading, inspiring, and guiding employees, while at the same time manufacturing the company's product (or providing its service) in a cost effective and timely manner, while maintaining employee morale and meeting quality, efficiency, reliability and safety standards, all within mandated cost parameters. It can make you tired just listing the diverse responsibilities one supervisor is expected to meet.

This generic, but fairly standard, set of expectations pretty much sums up why the position of supervisor is difficult and shows why it is so hard to do well. There are so many balls in the air and so many responsibilities competing for a supervisor's attention, the employee end of the equation is often forgotten.

Do You View Supervisors As Members of Management?

It is a truism that the first-line supervisor is frequently in a sort of no-man's land. All too often the supervisor is viewed neither as an employee, nor as a member of management. We believe that a supervisor is and should be viewed as an important member of management and that this view should be communicated at all levels of the organization in every way possible.

The National Labor Relations Act makes no distinctions between upper management and lower-level supervisors when determining the consequences of improper statements or actions found to be in violation of the Act. We see no reason why management should view supervisors any differently than the Board does.

What does it mean to treat supervisors as a member of management? It means recognizing the importance of their role. Supervisors certainly understand their responsibilities for getting product manufactured or produced because they are measured on their success typically on a shift-by-shift basis. There are usually metrics in place so that supervisors are aware, sometimes painfully so, of the importance of the production end of responsibilities.

But communications are usually much less frequent stressing their role in the management of the organization. That needs to change. Supervisors need to be recognized for the very important role they play and that role needs to be genuinely valued throughout the organization. Supervisors should be measured and evaluated on their management and communications skills as well as on their production records

Other ways to convey their management role are to communicate with them as you do with other members of management, including them whenever appropriate in communications, email, and management meetings. They, and everyone else in the organization, need to understand their role in the achievement of the company's objectives.

Do You Have An Effective Selection Procedure For Supervisors?

Selection procedures for supervisors often leave much to be desired. Supervisors are sometimes picked for their new leadership position based solely on their knowledge of the department or basic seniority and then are expected to step seamlessly into their new roles, which demand much more than departmental expertise. Paying attention to only a part of the job qualifications and skill sets necessary for success is no way to build a successful first-line management corps.

While companies are frequently careful to set out the criteria and necessary skills for "higher level" positions, they sometimes fail to take similar care in identifying the characteristics desired for a first-line supervisory position. We urge that employers give at least as much attention to identifying criteria which will predict success for a first-line supervisory position as they do with "higher level" management positions because a first-line supervisor is your key management player when it comes to implementing a successful union-free management philosophy.

Additional criteria which we believe should always be considered include an evaluation of the candidate's ability to interact with other individuals, desire to develop and grow, ability to plan and manage divergent tasks, ability to function effectively as a member of a team, and ability to communicate effectively.

Are You Giving Supervisors The Tools They Need To Succeed?

In case this point has not clearly been made earlier, functioning as an effective supervisor is a very difficult job. It isn't automatic and it isn't intuitive. Effective supervisors (and that is the only kind any employer wants) must have skills in a broad number of areas including leadership, human-interactions, employee evaluation and counseling,

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Supervisors Really Do Matter

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safety theory and practice, and what you can and cannot say about unions, to say nothing of the technical aspects of their jobs.

All of these skills are not automatically downloaded the day an individual becomes a supervisor. Since this is so, the enlightened employer will realize that continuous improvement of supervisory skills is as much of a responsibility as the continuous improvement of manufacturing processes and procedures.

Realistically, all supervisors are not equally effective and have different skill sets and different areas where they are challenged. A part of giving supervisors the tools they need to succeed requires a management mind set that holds supervisors accountable for the results expected of them. This accountability need not be draconian and should involve a good measure of mentoring and assistance in overcoming areas of weakness.

But the supervisory position is too important to do what we have seen a number of clients do, which is to accept substandard performance from supervisors with the excuse, "that's the way he's always been"; or the mindset that you can just work around them and they won't hurt you too badly. The supervisory position is too important

not to have it filled by effective and highly motivated individuals. You should neither expect nor accept anything less.

Do Supervisors Understand Their Role In Maintaining Your Union-Free Status?

Keeping union-free is not a spectator sport. It requires involvement and commitment. It requires giving employees intelligent, well thought out and convincing answers on questions asked about the company's position on unions. In an earlier article we discussed the importance of communicating to employees the reasons you wish to remain union free. Do your supervisors really understand the company's position on unions and equally importantly, do they understand the *reasons* for the company's position? If they don't understand the philosophy and the reasons behind it, they cannot possibly be effective advocates for the company's position with their employees.

Do supervisors understand that they can be legally obligated to support the company's opposition to union organizing? Employees have the protections of the National Labor Relations Act which guarantees them the right to engage in self-organization activities without fear of reprisal. Supervisors are not covered by the Act and do not have such protections which means that a supervisor could be disciplined or terminated without violation of the Act for engaging in union-organizing activities on behalf of employees. The idea here is not to threaten supervisors but to rather inform them that it is an important expectation of their role in the company to support the company's legal efforts to remain union free.

If you haven't communicated your expectations about their responsibility to keep the company union free, supervisors can hardly be expected to pick up these vibrations on their own. Supervisors are evaluated on areas the company believes are important (with measurement of unit output typically a major factor.) When their ability to help you remain union free is factored into their evaluation, it will become more important to them and also better understood by them. What gets measured, gets done.

These are not all the questions which should be asked about how first-line supervisors should function in any given organization, but they serve as a place to start thinking about the role you assign to them. The first line supervisor is your key position when it comes to avoiding unions.

Most organizations tend to assign responsibility for union avoidance to Human Resources or higher levels in the corporation. Certainly others have important roles in developing and implementing an effective union avoidance strategy. But first-line supervisors are the ones who really put that strategy into operation. . . or not. They call the daily plays in hundreds of little ways which can make the strategy effective or futile. In today's world, unions are struggling hard to return to relevance. Your company will not win if your primary assets are not used to the fullest advantage.

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