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Can Market Basket fire its employees?

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NASHUA – With some Market Basket employees putting their jobs on the line this week to demonstrate in favor of ousted CEO Arthur T. Demoulas, legal experts in New Hampshire and Massachusetts say federal labor laws might offer protections to workers who face the threat of being terminated by the company.

Employees faced a deadline Monday to either return to work or risk being “replaced.” The company announced via newspaper advertisements that it was seeking store directors and assistant directors in New Hampshire and Massachusetts, as well as accountants, grocery buyers and other administrative employees.

Despite the termination threat, droves of Market Basket employees returned this week to the picket lines outside of the company’s 71 stores. Hundreds more amassed outside Market Basket’s corporate headquarters in Tewksbury, Mass.

While it was unclear Monday night whether any employees were terminated, labor law attorneys watching the saga unfold said collective action by the workers could be interpreted as a form of protected activity under the National Labor Relations Act – particularly when it comes to workers who are demonstrating while they’re off the clock.

“Generally speaking, these employees, as long as they abide by their working hours and other working conditions ... are generally protected,” Manchester attorney James Reidy said. “Market Basket has to be careful not to retaliate against someone here or terminate their employment because of that activity.”

Grocer put on notice

Market Basket was put on notice last week by New Hampshire Attorney General Joseph Foster and his counterpart in Massachusetts that authorities are monitoring how the predicament is resolved. Foster warned the company to follow all applicable laws if it chooses to terminate any employees.

In New Hampshire, that means paying all wages due to employees who are fired within 72 hours, including any bonuses, earned sick time, holiday or vacation pay and benefit plan contributions.

New Hampshire law allows workers to sue for wrongful termination if they can show they were terminated for activity that would be supported by public policy, or if they refused to do something harmful, such as polluting or declining to open the company’s books for an auditor. However, legal experts say there are few other provisions in state law that could prevent Market Basket from terminating its workers.

“We’re monitoring the situation, but at this time, they haven’t broken any New Hampshire labor laws,” said Michele Small, administrator of the New Hampshire Department of Labor’s Inspection Division.

Federal labor laws

Workers enjoy broader protections under the National Labor Relations Act, a piece of New Deal-era legislation that guarantees employees the right to organize to improve their working conditions. While the act is often associated with union activity, it also guarantees non-union employees the right to engage in other “concerted activities” together for the purpose of “mutual aid or protection.”

“You generally think of concerted action as being union related, but you don’t actually have to be in a union to have that kind of federal labor relations protection, so there’s a potential at least that if the Market Basket CEO takes action against the employees for essentially striking, that there may be some federal labor protections that apply,” said attorney Andru Volinsky, of Bernstein Shur in Manchester.

The protections generally apply when workers voice concerns on behalf of a group of employees related to wages, benefits or working conditions. Workers who voice individual gripes or complaints against Market Basket probably wouldn’t have any recourse, but as a general rule, workers can’t be fired for expressing their opposition to management on proper grounds, said Reidy, a shareholder at the business law firm Sheehan, Phinney, Bass and Green.

Legal gray areas

However, it’s open to interpretation whether the National Labor Relations Act would protect demonstrating Market Basket employees from the threat of layoffs. One unanswered question is whether the act would protect the supervisors who have joined forces with lower-level staff on the picket line.

Generally, the act applies only to non-management employees. That might be one key to explaining why the company’s opening salvo in the dispute was a decision to fire eight managers who helped organize the protests, Boston employment attorney Ellen Messing said.

Volinsky agreed that supervisors are viewed differently because they have different responsibilities and act collectively for different reasons, but Volinsky said the National Labor Relations Board – which adjudicates labor complaints – might view the widespread collaboration by Market Basket workers differently.

“The issue seems to cross the line between supervisor and non-supervisor,” he said.

Another open question is whether Market Basket would have grounds to fire employees who refuse to return to work. Reidy said federal laws don’t protect workers from being terminated if they protest inside stores, or if collective action interferes with their job duties.

Market Basket employees have taken a variety of approaches to supporting the ongoing demonstrations, which launched in mid-July when delivery drivers and some warehouse workers refused to do their jobs. While some workers are staying off the job, others are joining protests only after they finish their shifts, or during breaks. Still others are splitting shifts inside the store and out on the picket lines.

Volinsky said he agrees there are fewer protections for workers who aren’t clocking in for work. He pointed out that Market Basket’s new leadership has only raised the prospect of laying off employees who don’t return to work.

However, Messing said at its core, the National Labor Relations Act protects the right of workers to withhold labor as a bargaining tool. She said she believes that protection could extend to non-union workers who are engaged in a labor dispute.

“What federal law protects is this notion of, ‘You can take action for mutual aid or protection, and that action can include going on strike,’” she said.

Fighting for a CEO

If the Market Basket dispute ever reaches a labor panel, one of the thorniest issues will be whether calls for a former boss to be reinstated constitute a collective action in favor of better working conditions.

The upheaval at Market Basket began with the firing of former CEO Arthur T. Demoulas, who was deposed in June by a coalition of board members loyal to one of his relatives. Workers fear their salaries and benefits will take a hit under the company's new leadership, but to date, Market Basket's new CEOs have not publicly announced any changes in employee compensation.

While the changes may not be tangible, Volinsky said one key factor to consider is the number of workers engaged in the protests.

"I think the key to it is not so much the reason they're doing it, but that it's concerted activity," he said.

Messing said in one historical case, the National Labor Relations Board sided with employees who were demonstrating on behalf of a supervisor, but a federal appeals court in Boston overturned the decision, ruling that the manager didn't have close enough contact with low-level employees to be protected under the National Labor Relations Act.

If the situation at Market Basket ever winds up in the legal system, the personal testimony of employees who say Demoulas played a direct role in their day-to-day activities could be raised as evidence of his function in the company, she said.

"I would think it would be based a lot on what the evidence would be – if people who brought the case would be able to show that their working conditions were a function of who their CEO was," she said.

"They would have to really show that this is not an abstract principle but something that affects their life on the job, and I would think the outcome of the case would turn on how successful they are making this pitch."

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