SPECIAL REPORT

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The Perils of Union Activism Have Been Greatly Exaggerated[1]

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I. SUMMARY

On March 1, 2007, the House of Representatives passed the bill known as the Employee Free Choice Act. As of this writing, the bill has been introduced but has not come up for a vote before the Senate. The EFCA's "majority signup" provision would allow a union to be certified as a bargaining representative whenever it produces signed authorization cards from a majority of employees. This would substitute for the secret-ballot election currently conducted by the National Labor Relations Board when the employer contests the union's majority status.

According to its supporters, the EFCA is good policy because employers may use the period leading up to an election to put pressure on employees. The most egregious allegation is that employers simply fire union supporters, a practice which proponents of the EFCA contend is reflected in various statistical research.

Specifically, the AFL-CIO and other pro-EFCA groups and politicians have focused on three studies, each of which has found that employers fire union activists in between 20 to 30 percent of organization campaigns:

- John Schmitt and Ben Zipperer's *Dropping the Ax: Illegal Firings During Union Election Campaigns* (2007) (20%)[3];
- Kate Bronfenbrenner's *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing* (2000) (25%)[4]; and
- Chirag Mehta and Nik Theodore's *Undermining The Right To Organize: Employer Behavior During Union Representation Campaigns* (2005) (30%)[5].

Pro-EFCA lawmakers have seized on these claims. Congressman George Miller and Senator Kennedy spoke on the EFCA together on February 6, 2007. Miller stated that "During organizing campaigns, one quarter of employers have been found to fire at least one worker who supports the union. In fact, employees who are union supporters

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1 A substantially abridged version of this article appeared in Employment Law 360 on April 20, 2007.

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3 John Schmitt and Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns*, Center for Economic and Policy Research (January, 2007) available online at www.cepr.net.

4 Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, Submitted to the U.S. Trade Deficit Review Commission (September 6, 2000) available online at http://digitalcommons.ilr.cornell.edu/reports/3.

5 Chirag Mehta and Nik Theodore, *Undermining The Right To Organize: Employer Behavior During Union Representation Campaigns*, Center for Urban Economic Development, University of Illinois at Chicago (December 2005) available online at http://www.americanrightsatwork.com/resources/index.cfm

have a one-in-five chance of being fired for legal union activities." Kennedy produced a "fact sheet" claiming that "Employers fire pro-union workers in 25% of organizing drives."

The AFL-CIO's "Employer Interference By The Numbers" publication cites these studies as the primary bases of statistical support for the EFCA.[6] These studies also have drawn attention from the popular press covering the debate regarding the Act. For example, in the wake of President Bush's announced intention to veto the legislation, the New York Times editorialized, citing Bronfenbrenner, that "25 percent of employers illegally fired at least one employee during organizing campaigns." *The Right to Organize*, N.Y. Times, March 6, 2007; see also R. Heaster, *Firings Foment Union Decline*, Kansas City Star, January 16, 2007; *Illegal Firings of Activists Blamed for Fall in Union Membership*, Seattle Post-Intelligencer, January 5, 2007. Similarly, the Bureau of National Affairs Daily Labor Report of January 5, 2007, accepted the Schmitt and Zipperer results at face value, repeating: "Nearly one in five union organizers or activists can expect to be fired as a result of their efforts in a union organizing drive…"

While these statistics make easy ammunition for pro-EFCA advocates, we believe they have no basis in fact. As explained below, a thorough examination of the research methodologies employed in each of these studies shows that their conclusions are based on arbitrary assumptions and/or biased data.

II. DROPPING THE AX?

In January of 2007, John Schmitt and Ben Zipperer of the Center for Economic and Policy Research published *Dropping the Ax: Illegal Firings During Union Election Campaigns*. Therein, Schmitt and Zipperer (relying heavily on an index developed by Weiler (1983) and LaLonde and Meltzer (1991)) concluded that pro-union workers involved in a union election campaign had a 1.4 to 1.8 percent chance of being unlawfully fired by their employers. They also contend that nearly a quarter of union election campaigns included an illegal firing in 2005.

We believe these conclusions are unsupportable because Schmitt and Zipperer's paper contains serious methodological flaws. We raise three principal objections. First, they misrepresent their data by claiming they limit their "analysis only to those workers to whom the NLRB offered reinstatement,…"[7] That statement is incorrect because the vast majority of reinstatements considered in their study were the result of informal agreements reached independently of any finding by the Board. Second, Schmitt and Zipperer's much-hyped conclusion that "almost one-in-five union organizers or activists can expect to be fired as a result of their activities in a union election" depends critically on unsupported assumptions. In fact, the NLRB data on which they base their conclusions reports only reinstatements, not illegal firings, and provides no information regarding the extent of union activism or sympathy of anyone who was offered reinstatement. Third, Schmitt and Zipperer rely on an outdated and unproved assumption that 51 percent of reinstatements are related to union election campaigns. However, the NLRB keeps *actual* statistics on which charges of discriminatory treatment arise in the context of an organizing campaign, and the percentage derived from these data by other researchers is a fraction of what Schmitt and Zipperer assume.

A. The Schmitt/Zipperer Methodology

Schmitt and Zipperer utilize a methodology they attribute to Paul Weiler in 1983[8] and later refined by Robert LaLonde and Bernard Meltzer in 1991.[9] Their methodology makes use of certain statistics reported annually by the NLRB. They begin with the total number of cases closed by the NLRB in a given year in which employees were offered reinstatement ("A") and assume, naively in our opinion, that (1) every offer of reinstatement remedies an unlawful firing. They next assume (2) that 51 percent of these cases arose during union election campaigns and (3) that, on average, 2.2 workers were reinstated in each case closed by an offer of reinstatement. Thus, they multiply these three numbers to estimate the total number of workers illegally fired in connection with a union election campaign in a given year. Schmitt and Zipperer then divide this by the total number of workers who voted in favor of a union in an union election that year ("B"), to obtain a "crude probability" that a pro-union employee is illegally terminated:

$$\text{"Crude Probability"} = \frac{A(0.51)(2.2)}{B}$$

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6 "Employer Interference By the Numbers," AFL-CIO, available online at http://www.aflcio.org/joinaunion/how/employerinterference.cfm.

7 Schmitt and Zipperer, at 5.

8 Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769 (1983).

9 Robert J. LaLonde and Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. Chi. L. Rev. 953 (1991).

10 Table 4- Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 2005, Seventieth Annual Report of the Nlrb For Fiscal Year Ended September 30, 2005, available at http://www.nlrb.gov/Publications/Publications/annual_reports.aspx.

In 2005, for example, the NLRB reported 1,042 cases in which employees were offered reinstatement (either by informal settlement or by Board order).[10] However, of these, 912 (nearly 90 percent) were settled with no determination by the Board, or any judicial or administrative body, regarding the merits of the charged unfair labor practice, despite Schmitt and Zipperer's contention that they limited their study only to instances of Board-ordered reinstatements. In the same year, the Board reported that 65,551 employees cast votes in favor of a union in an NLRB election.[11] Using their formula to estimate the "crude probability" of an unlawful discharge, Schmitt and Zipperer calculate that a pro-union employee had a 1.8 percent chance of being illegally fired during a union election campaign. Continuing to pile on assumptions, Schmitt and Zipperer further assume (4) that 10 percent of pro-union employees are "activists" or "organizers" and compound that with the additional assumption (5) that employers exclusively terminate activists rather than passive union supporters. Thus, they assume, but cannot substantiate, that 51 percent of all those reinstated, as reported by the NLRB, were union activists who were unlawfully discharged in the midst of an organizing campaign, and hence that an activist or organizer has 1 in 5 chance of being unlawfully fired during an organizing campaign.[12]

B. The Piling on of Assumptions Illegally Fired?

Schmitt and Zipperer claim that they "…count as illegal firings only those cases where the NLRB issued an order for reinstatement…" However, they include in their calculations for 2005 *all* 1,042 cases closed by reinstatement, including the 912 in which the employer offered reinstatement via an informal settlement agreement. These 912 cases that were settled without any *order* of reinstatement by *anyone*. Rather, they simply result from the voluntary resolution of disputed claims. Of the remaining 130 cases, the NLRB or its Administrative Law Judges ordered reinstatement in 76 cases, and federal judges ordered reinstatement in 54 cases. Thus, of the 1,042 cases relied upon by Schmitt and Zipperer, only 130 involved an actual determination by a neutral fact-finder of any wrongdoing.[13]

Contrary to Schmitt and Zipperer's assumption, there is no way to determine the merits of the remaining 912 cases in 2005 (or those settled in any preceding year). Indeed, the vast majority of those settlements, if our experience is typical, are likely to include explicit non-admissions clauses.[14] LaLonde and Meltzer, the scholars whose methodology Schmitt and Zipperer rely upon, have stated the obvious:

> On the one hand, such settlements presumably involve a greater likelihood of an actual violation of § 8(a)(3) than do cases dismissed or withdrawn. On the other hand, some charges of unlawful discrimination are presumably settled by employers even though no such discrimination occurred. Such settlements might be prompted by a desire to avoid legal expenses, reputational damage, or industrial unrest.[15]

Indeed, the NLRB will oftentimes agree to settle with a 20 percent reduction in backpay award in exchange for the certainty of a settlement with reinstatement.[16] Even facing the least meritorious of charges, this is sometimes an attractive option for employers contemplating the legal fees accompanying a hearing before an Administrative Law Judge, possibly followed by appeals to the NLRB and federal courts. Thus, by assuming that each voluntary reinstatement is an admission of an illegal firing, Schmitt and Zipperer depart from their stated methodology of considering only Board-ordered remedies, and undoubtedly exaggerate the true number of illegal firings.

If Schmitt and Zipper had, as they claimed, only counted the cases where a neutral found that an employer had made an illegal firing and ordered reinstatement, their results would have been very different. In 2005 for example, Schmitt and Zipperer would have found only a 0.17-0.22 percent chance of a given union supporter being

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11 *Id*. at Table 14. This is the sum of the votes for unions in "RC" and "RM" elections.

12 Schmitt and Zipperer use a 30 percent scaling factor to adjust (they say over-adjust) for the effect of the rising prevalence of card-check based union organizing campaigns (where employers are pressured by unions to forgo an NLRB secret ballot election and agree to simply check signed union authorization cards before recognizing the union). In other words, they believe the data on union voters may understate the true number of union supporters because some express their support in card-checks rather than elections. This increases the number of employees assumed to support unions (the denominator of their equation) by 30 percent to account for those who support unions but were not given an opportunity to vote one way or the other:

$$\text{"Crude Probability"} = \frac{A(0.51)(2.2)}{B(1.3)}$$

13 It is not entirely clear whether this 130 number includes double-counting of cases where reinstatement was ordered by the NLRB and subsequently enforced in the courtroom.

14 The NLRB suggests specific language for these clauses: "By entering into this Settlement Agreement the Charged Party does not admit that it has violated the National Labor Relations Act." NLRB Casehandling Manual, Appendix.

15 LaLonde and Meltzer, at 990.

16 NLRB Casehandling Manual ¶ 10592.1 (Authority of Regional Directors to Accept Settlements).

illegally terminated, around one-tenth of the 1.4-1.8 percent statistic reported in their paper. Although we have no way of knowing which figure is more nearly correct, it clearly would have behooved Schmitt and Zipperer to note that their conclusion was an extreme interpretation among a huge range of possibilities.

Finally, consider Schmitt and Zipperer's most inflammatory statistic, that there is a 1 in 5 chance of a union organizer or activist being illegally terminated during an organizing campaign. This statistic is based on their assumptions, for which they provide no foundation, that 10 percent of pro-union employees are organizers or activists and that they are the exclusive targets for illegal termination. Even assuming that these arbitrary assumptions are correct, had they considered exclusively Board or court determinations, as they contend, their estimated probability would have been reduced to a 1 in 45 chance of a union "activist" being terminated.

Union Election Context?

Our second objection to Schmitt and Zipperer's methodology concerns their assumption that 51 percent of reinstatements remedy unlawful firings that occurred in the context of a union election campaign. This assumption is derived from a 52-year-old and a 27-year-old sample of NLRB adjudications. Specifically, LaLonde and Meltzer (for their 1991 research) surveyed 204 cases from 1955 and 202 cases from 1980, and found that 51 percent of those cases involved illegal terminations in the organizational context.[17] While Schmitt and Zipperer found this statistic handy, its reliability is clearly problematic. First, LaLonde and Meltzer surveyed only those cases that were adjudicated by the NLRB, yet Schmitt and Zipperer purport to apply it to every unfair labor practice charge, adjudicated or settled. Second, Schmitt and Zipperer's use of the 51 percent statistic assumes no change in the last 25 or 50 years in the fraction of discharge cases arising during organizing campaigns.

Perhaps more to the point, Schmitt and Zipper's reliance on the 51 percent statistic is unnecessary, as the NLRB now maintains statistics that distinguish categories of discharge cases. The NLRB maintains a database called the Case Activity Tracking System, or "CATS." In this system, the NLRB records which unfair labor practice charges are associated with union election campaigns. Using this CATS information, the Center for Union Facts (the "Center"), recently examined the number of reinstatement cases that the NLRB had coded as occurring during union campaigns.[18] In 2005, for example, the Center determined that only 62 reinstatement cases related to union election campaigns. This is just 12 percent of the 521 reinstatement cases assumed to be campaign related by Schmitt and Zipperer.[19] Although we have not personally examined the CATS data, and therefore cannot vouch for the Center's conclusions, the point is that Schmitt and Zipperer's conclusions rest on assumptions that could have been confirmed or refuted had they but turned to additional data maintained by the NLRB.

Schmitt and Zipperer's 51 percent assumption significantly affects their conclusions. If Schmitt and Zipperer had used the CATS database (rather than their 51 percent assumption), as interpreted by the Center, to determine the percentage of reinstatement cases related to organizing campaigns, they would have found only a 0.16-0.2 percent chance of a given union supporter being illegally terminated instead of the 1.4-1.8 percent statistic reported in their paper. Likewise, Schmitt and Zipperer's statistic that 1 in 5 union activities are illegally terminated would be reduced to 1 in 50.

Making Both Adjustments

The dubiousness of Schmitt and Zipperer's conclusions is magnified even further by adjusting both the number of unlawful firings, as administratively or judicially determined, and the fraction of such cases arising during organizing campaigns. Of the 62 cases involving terminations in election campaigns in 2005, as interpreted by the Center, 23 were resolved by settlements, i.e. without any finding or admission of guilt on the part of the employer. If we exclude these voluntary settlements, and then employ Schmitt and Zipperer's 2.2 multiplier, the number of employees determined to have been illegally fired during an election campaign in 2005 was approximately 86, rather than the 521 they assume.

To complete the analysis, we divide that number by the total number of pro-union voters (65,551) and arrive at a 0.13 percent probability that a pro-union worker is terminated during a union

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17 LaLonde and Meltzer at 985-990.

18 *Analysis: Few Employees Fired During Union Organizing Campaigns*, available online from the Center for Union Facts at www.unionfacts.org/articles/nlrbStat.cfm. The authors would like to thank J. Justin Wilson of the Center for Union Facts for sharing his findings with them.

19 The Center found that there were illegal firings in 2.3 percent of 2004 election campaigns, and 2.1 percent of 2003 election campaigns. To reach these numbers, Union Facts divided the number of reinstatement cases by the number of election petitions filed, not the number of elections held. This is an improvement because a sizeable portion of union election campaigns end with the union withdrawing the election petition rather than proceeding to an election. Schmitt and Zipperer acknowledge this problem in their paper at page 6.

campaign. Making Schmitt and Zipperer's adjustment for the prevalence of card checks, that probability drops to 0.1 percent. Thus, making both corrections, Schmitt and Zipperer would have reported a 1 in 769 chance of a pro-union employee being illegally fired, which translates to a 1 in 77 chance of an "activist" being illegally fired, assuming that all those fired were activists and activists are 10 percent of pro-union voters.

III. JUST ASK THE UNIONS

The AFL-CIO and other Employee Free Choice Act advocates have cited other studies, as well. Most prominent among them are Kate Bronfenbrenner's *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing* published in 2000, and Chirag Mehta and Nik Theodore's *Undermining the Right To Organize: Employer Behavior During Union Representation Campaigns* published in 2005. However, both of these studies are irreparably biased by their research methodologies.

Bronfenbrenner's *Uneasy Terrain* was her submission to the U.S. Trade Deficit Review Commission in September of 2000. While the paper focused mostly on alleged employer plant closings and threats of plant closings, two sentences were devoted to illegal discharges of union activists: "Although most of the findings regarding employer behavior are consistent with earlier research, we find that there has been a drop in percentage points for some of the most egregious employer actions. Most notable of these is the percentage of campaigns where employers discharged workers for union activity, which dropped from 32 percent in 1993-1995 to 25 percent in the 1998-1999 study."[20]

This "25 percent" statistic has been used by many proponents of the EFCA, from the New York Times editorial page to Senator' Kennedy's speeches in favor of the Act. However, these same EFCA proponents would be well served to check the basis for this number. Bronfenbrenner, rather than rely on any objective measure, simply surveyed union organizers as to whether employers illegally terminate union supporters.[21] Her research methodology explains that she took a random sample of 600 NLRB certification elections from 1998 to 1999, and mailed surveys to the lead union organizer in each of the campaigns. The surveys asked these organizers "about plant closings and threats of plant closings along with data on election background, organizing environment, bargaining unit demographics, company characteristics *and tactics*, labor board charges and determinations, union characteristics and tactics, and election and first contract outcomes."[22] Apparently, these lead organizers claimed that employers illegally terminated union supporters in 25 percent of these elections.

Of course, relying on lead union organizers to answer this question is akin to asking an NBA basketball player how many personal fouls he was wrongfully charged with this season. Surely, proponents of the EFCA would rightly howl if anti-EFCA advocates surveyed employers asking, "Do you illegally fire union supporters, yes or no?" Those who cite this 25 percent statistic are doing no better.

Mehta and Theodore's, *Undermining The Right To Organize* is equally flawed. The study was commissioned by American Rights At Work, a group whose "vision is a nation where the freedom of workers to organize unions and bargain collectively with employers is guaranteed and promoted."[23] The study concluded that 30 percent of employers fired workers when they engaged in union activities.

However, Mehta and Theodore's study suffers from the same flaw as the Bronfenbrenner report. In fact, Mehta and Theodore begin their paper by thanking Bronfenbrenner for "reviewing the design of the research methodology used for this study."[24] Appendix A to their paper explains their research methodology. They began with every union election petition filed in 2002 in the Chicago metropolitan area. "Investigators [then] approached leaders of all union locals to recruit them to participate in the survey. Data were collected for 62 out of the 179 campaigns included in the universe."[25] Thus, Mehta and Theodore went to the same source as Bronfenbrenner for their findings — unions themselves.

To state the obvious, surveys of self-interested parties are notoriously unreliable and lend no weight to the case for the EFCA.

IV. CONCLUSION

We do not claim to know with any degree of confidence the true rate of unlawful discharges among union activists. However, we are quite confident that neither do Schmitt, Zipperer, Bronfenbrenner, Mehta, or Theodore.

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20 Bronfenbrenner, at 44.
21 *Id*. at 12-13.
22 *Id*. at 13 (emphasis added).
23 http://www.americanrightsatwork.com/about/.
24 Mehta and Theodore at 2.
25 *Id*. at 27.

Schmitt and Zipperer's findings are based on an incorrect claim that they analyzed only reinstatements ordered by the Board, and a series of assumptions that are unsubstantiated and arbitrary. These assumptions are at odds with other data collected by the NLRB, and lie at one extreme along a wide range of possibilities. Even worse, Bronfenbrenner, Mehta, and Theodore's work is based on plainly biased survey responses of union leadership.

Given the importance of the current debate regarding the Employee Free Choice Act, we believe it is critically important to distinguish speculative conclusions from research findings that are empirically sound. For the reasons explained above, the statistical research being cited by supporters of the EFCA falls squarely in the former category.