Proskauer

Employee's Complaint About Low Tippers Not Protected Concerted Activity, NLRB Majority Rules

Labor Relations Update on **February 1, 2019**

The right of employees to band together for purposes of bringing grievances to their employer is at the very core of the National Labor Relations Act, as embodied in Section 7. This right is called protected concerted activity. In order to determine whether an employee is, in fact, engaged in protected concerted activity, it is necessary to evaluate the factual circumstances surrounding the conduct. As we've discussed, a single employee's actions could be deemed to fall within the definition of protected concerted activity. In other cases, we've seen actions that are not protected (see here, here, and here).

In Alstate Maintenance, LLC, 367 NLRB No. 68 (January 11, 2019), a divided (is there any other?) NLRB considered the actions of a single employee who eventually was terminated for his conduct.

It Started With A Gripe

The charging party employee was a skycap working for a contractor at JFK International Airport. The bulk of a skycap's income comes from customers tipping for assistance with their luggage.

On the day in question, a supervisor told four skycaps at the terminal that an airline had requested skycap assistance with a soccer team's equipment. The employee stated, in front of the other skycaps, "We did a similar job a year prior and we didn't receive a tip for it." When the soccer team arrived, the skycaps walked away. When a manager questioned the employee, he stated that the skycaps did not want to do the job because of the anticipated small tip. Other skycaps were summoned and they started helping the soccer team. When the skycaps who walked away saw this, they and the employee who complained, returned to help. The tip for the effort was $83.

The airline complained about the treatment of the soccer team by the skycaps. The contractor fired all four of the skycaps.

The employee who made the comment about tipping filed charges.

Administrative Law Judge Dismisses Complaint – Finds No Protected Concerted Activity

The narrow allegation in the complaint probably proved fatal to the charging party's case. The complaint alleged the only protected concerted activity was the skycap's comment about poor tipping. There was no allegation that the four skycaps were engaged in group action. The ALJ confirmed the narrowness of the theory on the record at the beginning of the case. After hearing testimony, the ALJ found the employee's statement was not protected concerted activity, ruling:

> This single statement by [the employee] did not call for or request the other skycaps to engage in any type of concerted action or to otherwise make any kind of concerted complaint to their employer about their wages. In my opinion, this was simply an offhand gripe about his belief that French soccer players were poor tippers.

Board Upholds Dismissal on Appeal – Concludes Complaint Not Protected Concerted Activity

The Board majority (Ring, Emanuel, Kaplan) started their decision by setting forth the general analysis of whether certain employee conduct is protected concerted activity as found in the decisions commonly known as *Meyers I and II*. *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882((*Meyers II*), enf'd 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1204 (1988). The principles of these decisions were summarized by the Board:

- "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."
- Concerted activity could be found where an individual, not a designated spokesman, brought a group complaint. "*Meyers I* recognizes that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. When the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise,

we shall find the conduct concerted."

- A single employee's effort to "induce group action" is also considered to be concerted activity.

The Board majority then applied these principles to the case and concluded that the charging party did not engage in concerted activity. The Board noted that the case was not about group action,–the General Counsel had advanced in its complaint that the concerted activity occurred when the employee made the remark about tipping.

Turning to the statement itself, the Board stated, "we easily find [the employee] did not engage in concerted activity." The Board's rationale was that the General Counsel did not contend the employee was bringing a group complaint and the record was "devoid of evidence" of group activities upon which to base such a finding. The Board concluded the employee's use of the pronoun "we" in his remark did not "supply the missing 'group activities' evidence." Rather, the use of "we" showed only that the skycaps had been stiffed as a group by a soccer team in the prior year.

Also, there was nothing in the employee's statement that suggested he was seeking to initiate group action. In fact, the employee himself did not claim his remark was aimed at inducing group action. The employee testified at trial that his remark was "'just a comment' and was not aimed at changing [the employer's] policies or practices." The ALJ credited the employee's testimony.

The Board addressed the contention of the General Counsel that the employee's remark was concerted because it took place in a group setting, that is, because the remark was made in front of other employees. The Board distinguished cases cited by the General Counsel as having earmarks of group activity. In two of the cases, the remarks by the employee occurred in a context that clearly indicated group activity, such as when the employer called a meeting to announce a negative change to a term or condition of employment, and an employee in attendance expressed a complaint of the group. By contrast, the Board noted, "Here, there was no meeting, no announcement by management regarding wages, hours or other terms and conditions of employment, and absent such an announcement, no protest, that under the totality of the circumstances, would support an inference that an individual employee was seeking to initiate or induce a group action."

The Board noted there was only one case that was contrary to the existing law, *WorldMark by Wyndham*, 356 NLRB 765 (2011), where the Board, over dissent, deviated from the law by concluding that "an employee who protests publicly in a group meeting is engaged in initiating group action." The Board concluded that *WorldMark* was unsupported by past precedent and overruled that decision.

The Board reiterated the standard for finding concerted activity as:

> [T]o be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action.

Finally, the Board noted that even if the employee's statement constituted concerted activity, the statement still would not be protected because it was not for the "mutual aid or protection" of the employees. In this regard, the Board agreed with the judge that the employee's statement concerned a customer's tipping habits as opposed to the wages, hours, or other terms and conditions of employment of the skycaps.

Dissent Takes Issue With Majority Overturning Decision

Member McFerran dissented to the Board's ruling, and in an extensive opinion, took issue with the majority's analysis of the employee's statement in relation to the tipping. McFerran also objected to the circumstances under which the Board undertook to overrule *WorldMark:*

> In order *not* to find concerted activity here, the majority chooses, without any request by a party or invitation for briefing, to unnecessarily overrule a recent Board decision….and to improperly recast settled Board precedent.

Takeaways

The Board's decision is not really a change in the law. The principles of *Meyers I and II* are now three decades old, and those cases contemplated a case-by-case analysis of whether the conduct at issue was protected concerted activity. The Board overruled a decision, *WorldMark*, a case issued over dissent, which expanded the definition of protected concerted activity to include activity occurring *in front* of other employees, regardless of whether there was any real attempt to induce, initiate or inspire group action.

The fact the charging party employee himself stated under oath at trial that his comment was "just a comment" and was not intended to spur group action or make a change to employer policy made this case somewhat easy to decide. Even if the charging party had asserted his intention was to spur group action, the case would have had issues. The skycaps who walked away from a work assignment were not engaged in protected activity because employees cannot pick and choose which tasks to perform. Indeed, the other skycaps who were fired as part of this event apparently did not contest their terminations by filing NLRB charges. There was no evidence to support any group action.

Finally, the dissent's complaint about precedent being overruled without being asked by a party or without an invitation for briefing is certainly a curious statement. There are plenty of examples of longstanding Board precedent, some 50 years or older, being overruled in the last few years with little or no notice. See here, here, here and here.

View Original

Related Professionals

- **Mark Theodore**
  Partner