

NLRB Advice Memorandum: Firing Employees Because of Discussions Related to Tip-Pooling Violates Section 8(a)(1)

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In an [Advice Memorandum](#) released Thursday, the NLRB's Division of Advice concluded that employees who discussed an employer's tip-pooling practices engaged in protected concerted activity, such that discharging the employees for this activity violated Section 8(a)(1) of the NLRA.

Employees working at a steakhouse in New York City often complained about the restaurant's tip-pooling system. Under the system, management counted and divided tips among employees regardless of the employees' shift.

The Advice Memorandum noted some employees "objected to the non-transparency and unfairness of the Employer's tip compensation system" during various pre-shift and staff meetings. In response, the Employer repeatedly warned employees "to not complain or talk to each other about the tip issue, and that doing so could endanger their jobs." The Employer repeatedly told employees that continuing to talk about the tip-pooling system would result in adverse consequences, including job losses. The four charging employees were eventually discharged pursuant to the Employer's progressive disciplinary policy, for stated reasons including alleged insubordination and common infractions that were inconsistently disciplined.

The Advice Memorandum concluded that “employee discussions and complaints about employers’ tip policies are ‘undeniably’ protected by Section 7.” The Memorandum compared the issue here to the Board’s recent decision in *Alstate Maintenance*, which we previously discussed [here](#). *Alstate* involved a statement made by a skycap working for a contractor at JFK International Airport. A supervisor told the skycap and three of the skycap’s co-workers that an airline had requested skycap assistance handling a soccer team’s equipment. In front of the other skycaps, the charging party employee stated that they had done a similar job earlier and did not receive a tip for it. When the soccer team arrived and the skycaps walked away, the employee told a manager that the skycaps did not want to complete the job because of the anticipated small tip.

The Board in *Alstate* found that the skycap’s first statement was not intended to induce group action about a workplace concern; rather, it amounted only to a mere gripe. In this case, however, the charging party employees “acted concertedly by repeatedly bringing employees’ concerns” regarding tip-pooling to management.

Also unlike the steakhouse here, the *Alstate* employer had no control over the customer’s tip practice, so the skycap’s statement was not for the purpose of mutual aid or protection. The steakhouse employees’ conduct was protected concerted activity as the Employer controlled the tip-pooling policy.

The Advice Memorandum also concluded there was “a nexus between the Charging Parties’ protected activity and the Employer’s discharge decisions.” The Advice Memorandum pointed to various aspects of the record that showed animus towards the employees’ complaints was a motivating factor for the discharges, such as the Employer’s targeting the employees for discussing the tip-pooling practice, and the Employer’s telling employees that it intended to “clear out” employees talking about tips. The Advice Memorandum concluded the Employer’s stated reasons for discharging the charging party employees were pre-textual. The Advice Memorandum directed that complaint issue in the case.

Takeaways

This is a classic case where an employer's direct threats to quell protected activity of its employees resulted in a complaint being issued. In that regard it is unremarkable; it is fairly easy for the agency to draw a straight line between an explicit threat to terminate over group discussion (which is a separate violation of the Act) and the discharge itself. So why was the case sent to Advice? The likely reason is the *A/state* decision by the Board appeared to be similar and the Region wanted guidance as to how to proceed. In the end the Advice Memorandum and the *A/state* Board Decision are consistent applications of the law. The General Counsel publishes Advice Memoranda from time to time as a guide to the public about its current thinking, and it helps to clarify the difference between a gripe about a particular type of customer, and the employer's policy of taking tips slated for a particular employee and sharing these monies with all employees.

It is also important to note that many state and local laws prohibit punishment for discussion of compensation. Also, tip-pooling has been the subject of many a class action lawsuit alleging that the practice deprives the recipient of monies given to the person.

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