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When Protesting Is Not Protected: NLRB Finds Employees' Off-Duty Participation in Black Lives Matter Protests Not Protected Activity

Labor Relations Update on **September 4, 2024**

On August 21, 2024, the NLRB affirmed an administrative law judge ("ALJ") decision and held in SFR, Inc. d/b/a Parkside Café, 373 N.L.R.B. No. 84, that employees who participated in Black Lives Matter ("BLM") protests outside of work were not constructively discharged when they resigned because they did not engage in protest activity for the purpose of mutual aid or protection.

Employees of the respondent bar attended outside BLM demonstrations during off-duty hours. The manager expressed frustration with the bar needing to close during the Pandemic, linking closures to ongoing protests, and claimed the employees were hypocritical because they attended demonstrations despite also expressing concerns about COVID-19 exposure at work. After the manager stated that the bar should institute a "protest tax" and "any employees that went or are still going [to BLM demonstrations] should resign," three employees stated they were resigning or did not respond to their direct supervisor asking if they had quit. While two of the employees believed they were fired, their supervisor indicated in text to one employee, "I'm not firing anybody."

The Board affirmed the ALJ's ruling that while the employees engaged in concerted activity, their activity was not protected under Section 7 of the NLRA, which "protects employees when they engage in otherwise protected concerted activities in support of employees of employers other than their own." The ALJ concluded that "[t]here is no connection between the BLM protests in this case and any concerns about racial injustice at Parkside Cafe or any other particular employer" because there was no evidence in the record "that the BLM protests focused on any specific workplace issue festering in workplaces generally, *e.g.,* racial discrimination in hiring." The Board expressly agreed with the ALJ's finding on this point: since the employees' protest activity was not for the purpose of mutual aid or protection, they were not constructively discharged in violation of the NLRA.

The Board also affirmed the ALJ's holding that the manager's comments were permissible under Section 8(c) of the NLRA, which provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice," as long as "such expression contains no threat of reprisal or force or promise of benefit." Here, employees' continued employment was not conditioned on them ceasing support for BLM. To the contrary, their direct supervisor expressly stated he was not firing anyone.

In a footnote, NLRB Member Gwynne Wilcox suggested that the ALJ had used an "unduly narrow" standard in determining whether employees' participation in outside BLM protests was for "other mutual aid or protection," noting that the Board recently held in *Home Depot USA, Inc.*, 373 N.L.R.B. No. 25 (2024), that "an employee's concerted actions are protected by Sec. 7 of the Act so long as *an* objective is protected. The fact that the employee's actions may have other objectives, or even that those objectives may predominate, is immaterial." (As we previously reported.) In *Home Depot*, the Board found that an employee was wrongfully terminated for failing to remove BLM-references from their work uniform and required Home Depot to reinstate the employee.

Takeaways:

Parkside Café further clarifies the extent to which employees' participation in protest activity may be protected under the NLRA. The decision highlights that for an employee to show their protest of civil rights issues is protected by Section 7 of the Act, there must be a connection between the protest activity and a particular workplace issue. So while the Board is willing to look at the substance of the protest messaging to find a connection to workplace issues, either with the respondent employer or generally, it is cognizant of not expanding the scope of the Act to protect protest activity concerning issues bearing little relation to the actual workplace.

We will continue to provide updates on this important topic as developments occur.

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