NLRB Narrows the Scope of NLRA Section 7 Protection for Employee Complaints

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On January 11, 2019, the National Labor Relations Board issued an employer-friendly decision in *Alstate Maintenance LLC*, 367 NLRB 68 (2019), narrowing the scope of protection for employee complaints. In doing so, it reversed an Obama-era Board decision that had expanded employee protections, and clarified that even if an employee states a gripe referencing coworkers through the plural pronoun "we," it is not necessarily protected and may be a valid basis for discipline or discharge. The Board also declared that an individual complaint is not elevated to protected status simply because it is made to a manager and in the presence of other employees. This decision narrows the Board's definition of "protected concerted activity" and distinguishes group complaints from individual gripes in the workplace. The three Board members appointed by President Trump joined in the ruling, while the one member appointed by President Obama penned a very critical dissent.

Background

Alstate Maintenance provides ground services at John F. Kennedy International Airport. Employee Trevor Greenidge was employed as a skycap. Skycaps assist the arriving airline passengers with their luggage outside the terminal and generally accept tips, which constitute the largest part of their compensation.

In July 2013, Greenidge was working with three other skycaps when a manager directed them to assist with a soccer team's equipment. Greenidge remarked, "We did a similar job a year prior and we didn't receive a tip for it." When the van with the team's equipment arrived, a manager waved the skycaps over to the van to assist, but Greenidge and the other skycaps walked away. Baggage handlers from inside the terminal began assisting with the equipment before Greenidge and the other skycaps helped finish the job. Following this incident, a manager informed the skycaps' supervisor of the subpar customer service, and the employer fired Greenidge and the other three skycaps.

A regional office of the Board issued a complaint on behalf of Greenidge, alleging that he had been discharged for engaging in protected concerted activity in violation of the National Labor Relations Act (NLRA). An administrative law judge (ALJ) dismissed the complaint, finding that the gripe regarding the tipping habits of the soccer team was neither concerted activity nor undertaken for mutual aid or protection, and was thus a valid basis for the firing. The general counsel appealed to Board.

The Decision

The 3–1 Board majority affirmed the ALJ and upheld the firing. In doing so, the Board overruled *Wyndham Vacation Ownership dba WorldMark by Wyndham*, 356 NLRB 765 (2011), and reconfirmed Board precedent from the 1980s in the *Meyers Industries* line of cases. In *WorldMark*, the Obama-era Board concluded that an employee had engaged in concerted activity when he protested publicly in a group setting, even though he had not previously consorted with coworkers regarding workplace issues. This ruling conflicted with the holdings in the *Meyers Industries* cases, in which the Board held that an employee's activity is concerted only if he is engaged with other employees and does

not solely act on behalf of himself. Unable to reconcile the two cases, the Board in the present case overruled *WorldMark* and proceeded with the standard set forth in the *Meyers Industries* cases.

In *Alstate Maintenance,* the Board explained that "to 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 the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action." Applying the standard to the issue presented, the Board affirmed the ALJ's ruling that Greenidge had not engaged in concerted activity and, even if he had, Greenidge did not make his remark about the soccer team's tipping habits for the purpose of mutual aid or protection of the collective group of employees. The Board expressly rejected the general counsel's argument that Greenidge's use of the plural pronoun "we" in his gripe necessarily made his complaint protected activity.

The decision spells out relevant factors to consider in deciding whether an employee's statement made in a group context is protected concerted activity:

- whether "the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment";
- whether "the decision affects multiple employees attending the meeting";
- whether "the employee who speaks up at the meeting did so to protest or complain about the decision, not merely . . . to ask questions about how the decision has been or will be implemented";
- whether "the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself"; and
- whether "the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand."

Although not all of these factors must be present to support a reasonable inference that an employee is seeking to initiate a group action, they can help employers understand when employees who speak out have engaged in protected concerted activity.

Key Takeaways

The decision in *Alstate Maintenance* narrowed the definition of "concerted activity" under the NLRA. In doing so, the Board clarified the difference between group actions and individual complaints, even if made in the group context—two ideas that were easily conflated under the overturned *WorldMark* holding. As a result of *Alstate Maintenance*,employers generally have more leeway to use discipline to regulate an individual employee's statement, even if that statement is a work-related complaint that references "we" or "us." Unions and individuals alike may find it more difficult to assert that an individual employee's statement is concerted activity that is protected by Section 7 of the NLRA.

The Board may not be done reshaping Section 7 analysis yet. It also indicated interest in reconsidering other cases that "arguably conflict" with the standard set out in the *Meyers Industries* cases.