Labor Board Clarifies Standard Regarding Concerted Activity

by Grant S. Gibeau - Thursday, January 31, 2019

In the recent decision of Alstate Maintenance, the National Labor Relations Board (NLRB) overruled their existing standard and narrowed the range of actions that constitute protected concerted activities under the National Labor Relations Act.

Under Section 7 of the National Labor Relations Act, employees have the right to engage in "*concerted activities* for the purpose of . . . *mutual aid or protection*." (emphasis added). It is an unfair labor practice for an employer to take adverse employment action against employees for exercising this right.

In order to receive Section 7 protection, the conduct in question must meet two elements: 1) the action must be "concerted," i.e. undertaken for the benefit of a group, and 2) the action must be undertaken for the purpose of mutual aid or protection, typically meaning an effort to improve bargaining unit employees' terms and conditions of employment. Employees often claim that they speak for their co-workers when they protest or complain, and it is up to the NLRB to determine when such actions are truly concerted.

Stingy Tippers Lead to Employee Complaints

The employees in *Alstate Maintenance* worked as skycaps at New York's JFK International

Airport, primarily assisting passengers with their luggage outside the entrance to the airport terminal. The bulk of a skycap's compensation came from passenger tips. One of the skycaps, Trevor Greenidge, was instructed by his supervisor to assist with an arriving professional soccer team's equipment. In front of his coworkers Greenidge stated "we did a similar job a year prior and we didn't receive a tip for it."

When the soccer team arrived, Greenidge and his three coworkers refused to assist with the team's bags, causing the supervisor to seek assistance from baggage handlers from inside the terminal. The skycaps' actions caused considerable embarrassment to the company, who subsequently terminated Greenidge and his three colleagues.

Greenidge brought an unfair labor practice charge before the NLRB alleging that by complaining to his supervisor while surrounded by other coworkers, he was engaging in protected and concerted activity and therefore could not be fired for doing so.

Greenidge had good reason to believe he would prevail. The NLRB's most recent pronouncement in this sort of case came in 2011 when they ruled in Worldmark by Wyndham that an employee who protests publicly in a group meeting was, as a matter of law, "engaged in initiating group action" and therefore protected, even if that employee was the only protester. Since Greenidge was offering up his protect in front of the other skycaps, it would be considered protected.

New NLRB, New Law

With a new administration and new members, the NLRB overruled their *WorldMark* decision, electing instead to revert back to the standard announced in 1984 in *Meyer Industries* when they announced "[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." To find that a matter was a group concern and not merely a personal protest under this standard, the NLRB looks to the totality of the evidence to determine whether there was evidence of concerted activities including prior or contemporaneous discussion of the concern between members of the workforce.

Applying the *Meyer Industries* standard, the NLRB determined that Greenidge had not engaged in protected concerted activity. There was no evidence that this was a group protest, or that the skycaps had discussed this issue amongst themselves on any prior occasion. Instead, Greenidge was just offering up his personal feelings about his job assignment. Even though his protest was made in front of his colleagues and raised concerns that might have benefited them, the NLRB concluded that Greenidge actions were not concerted and therefore were unprotected under the law.

Bottom Line

This case dramatically limits the opportunities for employee's to claim that their actions are

protected because they claim to be speaking for or on behalf of their co-workers. They will now need to show that they were actually authorized to speak on behalf of their co-workers or produce evidence that their protest is made on their behalf.

In addition, the NLRB indicated that they “would be interested in reconsidering” other previous rulings that conflict with the standards announced in Meyers Industries. Thus, there may be more big changes up ahead.

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220 South 6th St, Suite 2200, Minneapolis, Minnesota 55402 | info@felhaber.com | 612-339-6321 | 800-989-6321