

Labor Board Narrows What May Be Considered Concerted Activity

By

January 29, 2019

Related Services

Labor Relations

The National Labor Relations Board (NLRB) has narrowed the circumstances under which a complaint made by an individual employee is considered concerted activity under Section 7 of the National Labor Relations Act (NLRA). *Alstate Maintenance, LLC*, 367 NLRB No. 68 (Jan. 11, 2019).

In doing so, the Board reaffirmed and applied the standard set forth in its seminal holdings in *Meyers I* and *Meyers II*, under which “individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun.” *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), and *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*).

The Board also overturned its *WorldMark by Wyndham* decision, which held “as a rule of law” that a complaint made by an employee in a group setting was, *per se*, concerted activity. 356 NLRB 765 (2011). It noted the case had “blurred the distinction between protected group action and unprotected individual action.”

Finally, the Board said decisions that deem statements about certain subjects “inherently” concerted without consideration of whether the individual making the statement was authorized to act on behalf of others or attempting to initiate or induce group action arguably may conflict with *Meyers*.

Facts

Trevor Greenidge was employed as a skycap at JFK International Airport. The bulk of his and his fellow skycaps’ compensation came from passenger tips. On July 17, 2013, Greenidge and other skycaps were working outside the entrance to terminal one. His supervisor informed Greenidge that Lufthansa had requested skycaps to assist with a soccer team’s equipment. In the presence of the other skycaps, Greenidge responded, “We did a similar job a year prior and we didn’t receive a tip for it.” When they were waved over by managers to assist, the skycaps walked away. Subsequently, all of the skycaps were terminated.

Greenidge filed an unfair labor practice charge alleging he was discharged in violation of Section 7 of the NLRA because of his complaint about the tipping habits of the soccer players. After a trial, the Administrative Law Judge (ALJ) dismissed the charge. On appeal, three of the four current NLRB members (John Ring, Marvin Kaplan, and William Emanuel) agreed with the ALJ. Member Lauren McFerran wrote a lengthy dissent.

Meyers I and *II*, According to the *Alstate* Board

The *Alstate* Board took great pains to comprehensively explain the standard that was set forth in the Board’s decisions in *Meyers I* and *II* for evaluating when individual action constitutes concerted activity. *Meyers I* held that an employee’s conduct is not “concerted” unless it is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” The question of whether an employee has engaged in

concerted activity is a factual one based on the totality of the record evidence.

The General Counsel's Argument

The NLRB's General Counsel argued that Greenidge's statement qualified as concerted activity because he made it "in a group setting ... in the presence of his coworkers and [his supervisor]" and he used the first-person plural pronoun 'we.'" The Board rejected this argument, distinguishing the three decisions cited by the General Counsel and overruling one: *WorldMark by Wyndham*.

The Board overruled *WorldMark by Wyndham* because, rather than determining whether, under the totality of the record evidence, concerted activity engaged in with the authority of other employees and not solely by and on behalf of the employee himself had occurred, the *WorldMark by Wyndham* Board decided "as a rule of law" that a protest by an employee in a group meeting is, *per se*, concerted activity.

The *Alstate* Holding

The *Alstate* Board set out the following five-factor test for determining whether there is a reasonable inference that in making a statement at a meeting, in a group setting, or with other employees present, the employee was seeking to initiate, induce, or prepare for group action:

1. 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;
2. The decision affects multiple employees attending the meeting;
3. The employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely (as in *WorldMark*) to ask questions about how the decision has been or will be implemented;
4. The speaker protested or complained about the decision's effect on the workforce generally or some portion of the workforce, not solely about its effect on the speaker him- or herself; and
5. 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.

The Board noted that not all five factors have to be present to support a finding of protected concerted activity.

Limited Decision

The Board wrote that it was "not addressing ... instances where an employee acts with other employees or on their behalf as their authorized representative." It also stated that the decision did not address the situation where an employee who, although not expressly authorized to do so, "brings a truly group complaint to the attention of management." Finally, the Board observed that the case before it did not involve "an employee who addresses one or more coworkers with the object of initiating, inducing, or preparing for group action."

No Mutual Aid or Protection

The Board also found that, even if Greenidge's activity was concerted, it was not protected because customers' tipping habits "did not relate to the skycaps' wages, hours or other terms and conditions of employment." It explained, "The amount of a tip given by an airline passenger to the skycap handling his or her luggage at curbside is a matter between the passenger and the skycap" There also was no evidence that Greenidge "was dissatisfied

with the existing tipping arrangements or wanted them to be modified.”

Implications

A/State is likely the first step toward reining in the expanded scope of what the Obama-era Board considered protected, concerted activity. The Board appears ready to move away from bright-line tests, such as “inherently concerted” topics of discussion, and return to a fact-specific inquiry to determine whether an employee’s actions are truly protected, concerted activities as opposed to unprotected individual concerns or griping.

Despite the Board’s return to the *Meyers* standard, properly identifying protected, concerted activity still requires a thorough and detailed analysis. Employers are well-advised to weigh employment decisions that may involve protected, concerted activity carefully and to consult experienced labor counsel when necessary.

Please contact Jackson Lewis with any questions about this or any other NLRB decision.

©2019 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.