CONCERTED CHANGE: THE NLRB REDEFINES PROTECTED ACTIVITY IN ALSTATE MAINTENANCE

November 22, 2019 | Publications

W ished in **The JSH Reporter** – Fall 2019 Issue

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The National Labor Relations Act (NLRA) grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection." Employers are prohibited from interfering with, restraining, or coercing employees in the exercise of these rights.

Some of these rights and restrictions are straightforward: an employer cannot fire employees who are trying to organize a union, for example. The phrase "other concerted activities for the purpose of…mutual aid or protection," though, is not so straightforward. Courts and the National Labor Relations Board (NLRB) define "concerted" activity as "the activities of employees who have joined together in order to achieve common goals." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984). Even without group action, however, an individual employee's actions can be "concerted" if "the purpose of his acts are to enforce a collective bargaining agreement, seeking to induce group action, or acting on behalf of a group." *Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 211 (4th Cir. 2005). In contrast, mere "griping" is not protected. See, e.g., *Capitol Ornamental Concrete Specialties*, 248 NLRB 851 (1980) (characterizing an employee's complaint about the conditions of a road surrounding the employee parking lot as a personal "gripe" that was not protected under the NLRA).

This definition gave the NLRB wide latitude to deem actions by an individual employee "concerted" under suspect circumstances. For example, in *WorldMark by Wyndham*, the NLRB concluded that an employee had engaged in concerted activity when he asked an executive questions regarding a newly implemented dress code policy in the presence of other employees. 356 NLRB 765 (2011). Reasoning that the employee questioned a "newly announced rule affecting all of his male colleagues…in the presence of several of those colleagues" and the employee used the words "we" and "us" in his conversation with the executive, the NLRB concluded that the employee "intended to induce group action," even if he was unaware of any other employees' displeasure with the dress code policy. Similarly, the NLRB has held that statements about certain subjects (like wages or work schedules) are "inherently" concerted.

See *Alstate Maintenance*, LLC, 367 NLRB No. 68 at *1 (2019). Taken to its logical conclusion, this line of cases arguably makes any employee's "gripes" concerted so long as they concern other employees and are made in the presence of other employees.

No more. In a recent decision and order, *Alstate Maintenance, LLC*, 367 NLRB No. 68 (January 11, 2019), the NLRB reversed course. There, when a skycap at JFK International Airport was asked to help bring a soccer team's equipment into the terminal, he commented in front of other skycaps, "We did a similar job a year prior and we didn't receive a tip for it." The skycap was ultimately terminated for this comment, and the skycap filed a charge with the NLRB, alleging his comment was concerted activity. The NLRB disagreed, holding that this comment was a mere "gripe." The NLRB emphasized that there was no evidence that "the tipping habits of soccer players…had been a conversation among the skycaps" prior to the skycap's statement, nor was there evidence that the skycap's comment was aimed at changing his employer's policies. In holding that this activity was not "concerted," the NLRB expressly overruled *WorldMark by Wyndham*, finding the decision "impermissibly conflat[ed] the concepts of group setting and group complaints" and "reduce[d] to meaninglessness"the distinction between unprotected individual activity and protected concerted activity. Instead, the NLRB maintained that, for a statement

to a supervisor or a manager to be "concerted," it "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." Whether this inference is "reasonable" depends on whether the statement was made in an employee meeting to announce a decision affecting terms and conditions of employment, whether the decision affects multiple employees at the meeting, whether the employee was complaining about the effect of the decision on other employees, and whether the meeting was the first opportunity employees had to address the decision.

There are two major takeaways from *Alstate*. First, the definition of what constitutes "concerted" activities has been altered and may be further altered in the future. In its decision, the NLRB expressly invited future challenges to its prior rulings that discussions about certain topics are "inherently" concerted, and, with this clarified standard, it would not be surprising to see the NLRB hold that complaints about wages are not per se concerted. Second, this decision showcases the NLRB's current willingness to reconsider prior decisions and redefine what is protected under the National Labor Relations Act. Almost two year's ago, the NLRB's decision in *The Boeing Company*, 365 NLRB No. 154 (2017), significantly changed the standard for whether a workplace rule violated the Act. It is clear that the NLRB, as currently configured, is ready and willing to rein in what it perceives to be overreach in prior decisions.

Regardless of what these future developments might hold, the NLRB's decision in *Alstate Maintenance, LLC* helps employers today. Gripes that happen to affect other employees and happen to be made in the presence of other employees are not "concerted," and employers who punish employees for perceived insubordinate gripes are less likely to face the wrath of the National Labor Relations Board going forward.

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