THE
NATIONAL LAW REVIEW

NLRB Issues Important Decision Narrowing What Constitutes "Protected Concerted Activity" (US)

SQUIRE PATTON BOGGS

Article By
Daniel B. Pasternak
Squire Patton Boggs (US) LLP
Employment Law Worldview

Litigation / Trial Practice
Labor & Employment
All Federal

Wednesday, January 16, 2019

Majority Rules That Skycap's Complaint About Bad Tipping Was Not Protected Concerted Activity

The National Labor Relations Board ("NLRB" or "Board") kicked off 2019 with an important decision that significantly narrowed the standard for when an individual employee's conduct will be found to be "protected concerted activity" under the National Labor Relations Act ("NLRA" or "Act"). In so doing, the Republican-majority Board took another step towards restoring the pre-Obama era conservativism to the NLRB's interpretation and application of the Act. In *Alstate Maintenance, LLC*, the Board held that an individual employee's complaint to his manager about customer tipping was not protected concerted activity under the Act even though the complaint was made in front of other employees. In reaching this decision, the Board overruled prior case law and significantly narrowed the category of behaviors regarded as "concerted activity" protected under the NLRA.

The core guarantee of rights in the NLRA is in Section 7, which provides employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid and protection." Generally speaking, "concerted activity" is considered to be action taken: 1) by a group of employees together; 2) by one individual who is authorized to act on behalf of other employees; or 3) by an individual who is attempting to induce other employees to engage in group activity.

In *Alstate*, when asked by management to assist a traveling international soccer team with their luggage, skycap Greenidge complained – in front of co-workers – to his supervisor that the skycaps had performed a similar job the prior year for the team but had received no tip. The supervisor promised to raise Greenidge's concern with airline and airport management, and did subsequently did so. After raising his complaint, Greenidge and his co-workers delayed, but ultimately acquiesced, in assisting the soccer team with its luggage and equipment. However, upon review of the incident, Alstate, Greenidge's employer, terminated Greenidge's employment because he was "indifferent to the customer" and made "verbal comments in front of other skycaps" about the job, complaining about the possibility of not getting a tip.

Despite the fact that it occurred in a group setting, a three-member Board majority (Chairman Ring and Members Emanuel and Kaplan) found that Greenidge's complaint about the possibility of not getting a tip was not NLRA-protected concerted activity because it was a "mere gripe," not a complaint made on behalf of, or to induce action by, his co-workers. As part of its analysis, the Board expressly overruled its 2011 decision in *WorldMark by Wyndham*. In *WorldMark*, a two-member Democrat-majority Board found (over the dissent of Republican Member Hayes) that an individual employee's comments made during a meeting about a new dress code policy were protected concerted activity because "an employee who protests publicly in a group meeting is engaged in initiating group action." The majority in *Alstate* rejected this "*per se* rule" that protests in group settings are always protected concerted activity, explaining that it "conflate[s] the concepts of group setting and group complaints." It reemphasized that simply making a complaint in the presence of others does not, standing alone, define the character of the activity, and that determining whether an employee has engaged in protected concerted activity requires consideration of all of the surrounding facts.

The *Alstate* Board identified the following factors that it stated would tend to support an inference that an

employee's protest was intended to induce group action and therefore is concerted: 1) the statement was made in an employee meeting called by the employer to announce a decision affecting a 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 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 work force generally or some portion of the work force, not solely him or herself; and 5) the meeting was the first opportunity to address the decision (i.e., there was no opportunity to discuss with co-workers beforehand). In a footnote, the Board explained that not all of these factors are required to support an inference that an employee is seeking to initiate or induce group action, and that the question remains "a factual one based on the totality of the circumstances."

In reaching its decision that Greenidge's protest was not "for the purpose of mutual aid or protection," the Board majority relied heavily on the fact that his complaint was not about his employer's tipping policy or practices, but rather the amount of a single tip received the year prior, which the Board noted, the employer had no control over.

The Board's majority decision was harshly criticized by Board Member Lauren McFerran (D), who delivered a scathing dissent that called the decision "an excess of zeal" to "roll back existing precedent." The dissent concluded that because Greenidge's complaint took place in front of other employees, and because the employer clearly regarded the complaint as inducing action by others (which the dissent states was evidenced by the fact that Alstate blamed Greenidge's comment for the skycaps' "indifference" to the soccer team customer), Greenidge's complaint "objectively" induced action by other employees. The dissent further found that because "tips are regarded as wages, even when the employer is not the sources of those tips," an employee's complaint about tips constitutes a complaint about the terms and conditions of employment and, in Greenidge's case, where (among other factors) the tip was shared, the comment was made for the mutual benefit and protection of his coworkers.

Ultimately, both the majority decision and the dissent in *Alstate* focused heavily on an analysis of the specific facts at issue, however, there is no doubt that, despite its factual nuances, the broader implication of this decision is its part in a series of actions withdrawing from the prior Board's liberal application of the NLRA (see our prior post here). Under the analytical framework applied by the prior Democrat-majority Obama NLRB, it appeared that nearly any action by an individual worker that had any relation to a work-related matter that *could* be of interest to other employees was considered protected concerted activity, i.e., the now-overruled *WorldMark by Wyndham* standard. *Alstate* signals that the Republican-majority Trump-appointed NLRB is taking a harder line and will not be equally liberal in its interpretations.