THE
NATIONAL LAW REVIEW

Gripe No More: NLRB Reverses Controversial Protected-Activity Precedent

Wednesday, January 23, 2019

On January 11, 2019, the National Labor Relations Board ("Labor Board" or "NLRB") overturned an Obama-era Labor Board decision that held that complaints made in front of colleagues always constitute protected concerted activity. By doing so, the NLRB reverted back to decades-old precedent, which held that employers may discipline employees who "griped" about their working conditions in front of their coworkers, so long as the gripes were not an inducement to unionize or engage in other protected activity.

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In *Alstate Maintenance, LLC*, the Labor Board upheld an Administrative Law Judge's decision that the employer's termination of a skycap at JFK International Airport did not violate Section 8(a)(3) of the National Labor Relations Act (the "Act"). The skycap complained, in front of several coworkers, to his supervisor that he did not want to move a traveling soccer team's equipment because he did not receive any tips when he assisted the same team with their luggage the previous year. Even though he initially refused to perform the work until inside baggage handlers first attended to the large party, he ultimately relented and did his job. Regardless, the employer terminated the skycap, along with three other employees, due to his stated objections about last year's failure to tip.

In a 3-1 decision, the Labor Board held that the employee's griping was not protected concerted activity. Specifically, the Labor Board held that levying complaints in front of colleagues, even if the subject matter of the complaint relates to the terms and conditions of employment (in this case tipping), does not rise to the level of concerted activity if the complainant is not acting on behalf of the group and/or trying to induce group action. Had these complaints been made in a meeting called by the skycap with his colleagues or if the protest affected all of the employees (instead of just the individual skycap), the Labor Board may have found differently. However, these stated objections were personal in nature and not made in furtherance of "mutual aid or protection." Hence, the employer's decision to terminate the employee did not violate the Act, even though the complaints were made in front of others.

In so ruling, the Labor Board overruled its 2011 decision in *Worldmark by Wyndham,* which held that complaints about terms and conditions of employment in a group setting are *per se* protected and concerted activity. Going forward, "[t]he fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity."

With this decision, employers, once again, may be able to discipline employees who make employment-related gripes in front of their coworkers. However, employers should consider carefully whether to do so, as the line between whether a complaint is personal in nature or intended to induce others to action remains a fact-specific inquiry and is based on the totality of circumstances. If the complaint pertains to the terms and conditions of employment, it is recommended that a thorough investigation, including review by a legal professional, be conducted before discipline is imposed.

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activity-precedent