"Personal" Pizza: Employee's Individual Gripe Not Protected Under The NLRA

Insights
5.30.18

A recent decision by a National Labor Relations Board Administrative Law Judge has re-affirmed that "personal gripes" made by employees are unprotected by federal labor law. This decision comes from the NLRB's regional office in Baltimore, but is in line with the Board's recent commitment to clarify this issue for employers across the country (*Bud's Woodfire Oven d/b/a Ava's Pizzeria*).

Factual Background: Things Get Heated In The Kitchen
On October 15, 2016, the management at Ava's Pizzeria in Maryland conducted a meeting for its kitchen staff. During this meeting, manager Brian Ball expressed frustration with several behaviors of employees, including closing the dessert station early, excessive smoke breaks, and constant use of their cell phones. Ball concluded the meeting by asking if "anyone had anything to say."

At that point, employee Ralph Groves asked how Ball could understand the workplace issues when he "don't [sic] do s---- around here." Ball fired Groves at the end of his shift, specifically citing the "disrespect and poor attitude" demonstrated during the meeting.

Shortly thereafter, Groves filed a charge with the National Labor Relations Board (NLRB), alleging that his comments constituted protected concerted activity. As a result, Groves claimed that the pizzeria violated the NLRA by discharging him for these comments.

Legal Standards: What Counts As Protected Concerted Activity?
In cases where employees allege they were discriminatorily discharged because of concerted activity, the NLRB's General Counsel must prove: (1) that the employee was actually engaged in protected concerted activity; and (2) that the employer administered discipline as a result of this activity. In this case, the evidence "overwhelmingly" established that Groves was discharged because he criticized Ball during the October 15 meeting. The only question to be decided, then, was whether Groves' comments truly constituted protected concerted activity.

To engage in protected concerted activity, an employee must enter into some form of collective action for "mutual aid or protection" of fellow employees. Typically, this involves multiple employees, acting together, to voice concerns about the terms and conditions of their employment. Individual employees can engage in concerted activity, but only when their actions are taken "with or on the

authority of other employees." In other words, the employee must bring "truly group complaints" to the attention of management.

Apart from an action to enforce an individual right under a collective bargaining agreement (which is negotiated for and ratified by fellow employees), the NLRB has long-held that an effort by a single employee for their own personal benefit is not protected concerted activity. Consequently, an employee engaged in activity solely by and on behalf of himself (*i.e.* a personal gripe) is not protected by the NLRA.

Applying The Precedent: The ALJ's Decision

In the May 18 decision, the Administrative Law Judge (ALJ) applied the legal principles above and held that Groves was not engaged in protected concerted activity. While the ALJ credited Groves' testimony that he shared his feelings about Ball to coworkers, these expressions were indeed only his feelings. There was no evidence that any of Groves' co-workers shared his concerns. While employees had joked about Ball's inaction in the past, and occasionally asked him to help out more, this was not enough to establish that Groves was acting on behalf of other employees during the October 15 meeting.

Finally, the ALJ added some strong language in favor of the employer, stating, "It is also difficult to imagine how lashing out at a manager who asks employees for feedback … even begins to lay the foundation for meaningful dialogue about employees' terms and conditions of employment." Groves' actions did not pertain to working conditions of himself or his fellow employees, but were rather "calculated to undermine Ball's managerial authority." As a result, the ALJ concluded that Groves' comments were merely "personal gripes," which left him unprotected by the Act.

What Does This Mean For Employers?

While this decision was not issued by the full Board, there are still several positive takeaways for employers. First, the employer secured a win despite the fact that this case was far from perfect. There was evidence that Groves engaged in true protected concerted just one month before his termination (and that the employer had animus towards this activity), and that Ball himself directed profanity at staff during the October 15 meeting. Nevertheless, the ALJ was able to steer past these distractions and adhere to the Board's long-held precedent—something the NLRB has not always done in recent years.

Second, this decision demonstrates that the NLRB is following the lead of its new General Counsel Peter Robb. Shortly after taking office, Robb issued Memorandum GC 18-02, which urged NLRB judges to "base decisions on extant law, regardless of whether [they] may agree with the legal principles."

One of the many areas Robb showed a specific interest was in cases where judges found that "conduct was for mutual aid and protection where only one employee had an immediate stake in the outcome." The memo cites to *Fresh & Easy Neighborhood Market*, a case in which an employee filing her own sexual harassment complaint was deemed to be engaged in protected concerted activity. By

her own sexual harassment complaint was deemed to be engaged in protected concerted activity. By citing to this case in his memo, Robb signaled a need to return to the Agency's well-established precedent in requiring collective action for protected concerted activity—which was upheld in this most recent decision.

Conclusion

The decision in *Ava's Pizzeria* demonstrates that the NLRB is adhering to the General Counsel's advice in cases involving individual employees and protected concerted activity. Adding this decision to a host of recent NLRB opinions in favor of employers, it appears we were correct in predicting that the tide appears to be turning for the better.

For more information on how this decision might impact your business, contact the author or any member of the Fisher Phillips Labor Relations Practice Group.

This Legal Alert provides an overview of a specific agency decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Service Focus

Labor Relations