



Labor Board Makes It Harder For Employees To Claim Their Complaints Are Protected

Insights

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In a 3-1 ruling that should be hailed by employers across the country, the National Labor Relations Board just made it harder for employees to successfully claim that their workplace gripes constitute protected concerted activity. The January 11 decision (*Alstate Maintenance, LLC*) reverses a 2011 Obama-era decision that was widely derided as tilting the playing field too far in favor of employees. Under that precedent, essentially any employee complaint made to management in the presence of coworkers was sufficient to qualify as protected concerted activity under the National Labor Relations Act (NLRA). Under *Alstate Maintenance*, however, the NLRB has returned to the more stringent standard whereby only those complaints that seek to initiate group action, or that involve truly “group” complaints, will be considered protected concerted activity.

Skycap Complains About Getting Stiffed By French Soccer Team

Trevor Greenidge was a skycap for Alstate Maintenance at New York’s JFK Airport. Part of a skycap’s job is to assist airline passengers with their luggage outside of the terminals. The bulk of their compensation comes from passenger tips. Greenidge testified that he could earn up to \$150 per day in tips, far exceeding what he earned in hourly wages.

In July 2013, an Alstate supervisor approached Greenidge and several other skycaps and informed them that a French soccer team was coming through the airport, and their airline had requested four skycaps to handle the 50 to 70 bags of equipment that would be accompanying them. Greenidge balked; in front of his coworkers, he remarked to his supervisor, “We did a similar job a year prior and we didn’t receive a tip for it.”

When the equipment arrived to be handled, Greenidge and the other skycaps walked away, despite being waved over by a manager for the airline and a manager for the terminal. The supervisor was compelled to explain to the managers that the skycaps did not want to do the job because they were anticipating a small tip. The managers then sought assistance from baggage handlers inside the terminal, who completed most of the work before Greenidge and the other skycaps returned and helped them finish the job. Despite offering only minimal assistance, the soccer team gave the skycaps an \$83 tip to be split among the four of them.

That evening, the terminal manager emailed the skycaps’ manager and expressed her dismay about the situation, reporting that the skycaps provided subpar service to a VIP client and exclaiming that she had “never been this embarrassed in front of a customer” in her professional career. As a result

of the incident, Alstate terminated all four skycaps. Their termination letters indicated that they were being discharged for their “indifference to the customer” and for “verbally making comments about the job stating you get no tip or it is a very small tip.”

Greenidge filed an unfair labor practice charge against Alstate claiming that his comment about the tipping habits of soccer players was concerted activity undertaken for the purpose of mutual aid and protection, which would make it protected by the NLRA. An administrative law judge dismissed Greenidge’s claim, but he requested review by the National Labor Relations Board (NLRB).

Brief History Of Shifting Standard

In the mid-1980’s, the Reagan-era NLRB established the standard for determining whether an activity is “concerted” under the NLRA in a series of cases known as the *Meyers Industries* decisions. The Board held that, to be concerted, an employee’s activity must be engaged in with or on the authority of other employees, and not solely by and on behalf of himself, and that concerted activity encompasses only those circumstances where individual employees seek to initiate or to induce or to prepare for group action or where individual employees bring truly group complaints to the attention of management. Personal gripes or grievances would not suffice under *Meyers Industries*; instead, they had to have truly been group complaints.

In 2011, however, the Obama-era NLRB departed from this standard in *WorldMark by Wyndham*, finding that an employee who lodged a complaint in a group setting—without the employees having previously agreed to act in concert with each other—was protected by the NLRA simply because of the group nature of the activity. Specifically, the NLRB in that case held that an employee who protests publically in a group meeting is engaged in initiating group action as a matter of law.

NLRB Reverses 2011 Decision And Tightens “Concerted Activity” Definition

In last week’s *Alstate* decision, the Trump-era NLRB tossed the *WorldMark* standard onto the scrap heap and resurrected the *Meyers Industries* test. The majority explained, “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.” Contrary to the NLRB’s finding in *WorldMark*, the majority continued, “the 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.”

Applying the newly revived standard to the case at hand, the majority agreed with the administrative law judge and found Greenidge’s discharge was not unlawful. The majority noted the lack of evidence suggesting that Greenidge’s comment about poor tips was part of a “group activity.” Moreover, the majority observed, his statement did not demonstrate that he was seeking to initiate or induce any sort of group activity among the skycaps. Indeed, the majority pointed out, even Greenidge acknowledged that his remark “was just a comment” and not aimed at changing the employer’s policies or practices. The majority also observed that, in cases pre-dating *WorldMark*, an employee’s individual complaints were generally only found to constitute protected concerted activity when they were made during a group meeting called by management to announce a change

activity when they were made during a group meeting called by management to announce a change to a term or condition of employment, and the meeting was the first opportunity the employees had to comment on or protest the change.

The *Alstate* majority went on to find that even if Greenidge's comment was concerted activity under the *Meyers Industries* standard, it was not protected under the Act because it was not for the purpose of mutual aid or protection. Specifically, the majority opined, Greenidge was not seeking mutual aid or protection because the issue of customer tipping habits is a concern between workers and customers, not between workers and their employer, as employers have no ability to control the amount customers choose to tip. The majority distinguished the situation from one in which an employee complains about a tipping arrangement, which would involve a term and condition of employment subject to the employer's control.

The sole dissenting NLRB member in *Alstate* disagreed with the majority's understanding of *WorldMark* as establishing a per se rule that "concerted activity" is established where an employee's protest occurs in any group context. She also accused the majority of announcing a new set of factors—including that a complaint must be raised in a group meeting called to announce a change to a term or condition of employment in order to be concerted—that threaten to substantially narrow the situations in which statements made by individual employees in front of their coworkers will be found concerted. Finally, the dissenting member disagreed with the majority's determination that Greenidge's statement was not for the purpose of mutual aid or protection. According to her, Greenidge's goal in making the comment was obviously to ensure that skycaps were compensated fairly for work performed.

What Does This Mean For Employers?

The *Alstate* decision is certainly a welcome step towards a level playing field for employers who have been patiently waiting for the current NLRB to overturn a decade of pro-labor precedent. By tightening the critical "concerted activity" standard, the Board has restored a measure of balance to the equation.

However, employers should still be cautious when disciplining employees for activities carried out in a group setting, particularly where those activities occur during group meetings at which management is announcing changes to terms and conditions of employment. Depending on what is said and how it is communicated, some particular matters could still be protected by federal labor law. We recommend consulting with your Fisher Phillips attorney or any member of our [Labor Relations Practice Group](#) before taking any such action, or if you have questions about applying this new standard.

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