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In Another NLRB Shift, an Employee's Complaint Was a Mere Gripe and Not Protected Concerted Activity Under NLRA

Section 7 of the National Labor Relations Act protects employees—both union and nonunion—who engage in "concerted activities for the purpose of ... mutual aid and protection." However, not all employee complaints are shielded from consequence, and the National Labor Relations Board outlined a clear standard of determining what conduct is protected when it recently upheld the discharge of an airport skycap who commented about the lack of tip from a particular group of travelers.

Skycaps assist passengers with their luggage outside airline terminals and make a majority of their income from tips received from such passengers. One day, an airline requested that skycaps assist with a traveling soccer team's equipment. A skycap, in front of three others, told his supervisor, "We did a similar job a year prior, and we didn't receive a tip for it." When the soccer team arrived, the skycaps walked away, and it was reported they did not want to do the work because they anticipated receiving too small of a tip. Airline baggage handlers completed a majority of the work before the skycaps joined, and the skycaps ultimately received $83 in tips. After the airline complained about subpar service, the skycaps were discharged. The one skycap's discharge letter stated that he made his tip comment in front of other skycaps and his manager. The skycap alleged that his discharge violated the NLRA.

In its *Alstate Maintenance and Trevor Greenidge* decision, a majority of the Board disagreed and overturned a 2011 Board decision that it claimed "blurred the distinction between protected group action and unprotected individual action." The Board held that the skycap's comment was not "concerted activity" just because he complained in front of others and used the pronoun "we." To be concerted activity, either an individual employee's statement to a supervisor must 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 the employee's statement was seeking to initiate, induce or prepare for group action. As such, the Board outlined a "clear standard that can be relied upon" by employers and employees, comprised of five factors to consider in determining whether activity is concerted:

1. whether the statement was made at a meeting called by the employer to announce a decision affecting employees' terms and conditions of work;
2. whether the decision affects multiple employees attending the meeting;
3. whether the employee who speaks up does so to protest the decision, not simply to ask questions about the implementation of the decision;
4. whether the employee protested the decision's effect on the workforce generally or some portion of it, and not simply on his/her employment; and
5. whether the meeting was the first opportunity employees had to address the decision, so the employee could not have discussed it with other employees beforehand.

In this case, the Board held that the skycap's comment did not bring a group complaint to management or attempt to induce group action. The Board stated that "[w]here a statement looks for no action at all, it is more than likely mere griping." It further held that the comment was not made at an employer-called meeting to announce a policy change and there was no subsequent protest—"a supervisor made a work assignment, [the employee] grumbled about it, and that is all."

The Board went a step further and held that, even if it was concerted activity, the comment was not "protected" as having been made for the purpose of mutual aid and protection because it did not relate to the skycaps' wages, hours or other conditions of employment. Rather, the Board noted that a tip is between the passenger and the skycap, a decision in which the "employer is essentially detached." Moreover, relying on the employee's admission that his remark was "just a comment" and not intended to change company policy or practice or induce any action on the part of the employer, the Board concluded that the comment was not aimed at improving the skycaps' working conditions or modifying any existing tipping arrangements.

The lone Democratic Member of the Board dissented, making several arguments that the comment was protected concerted activity, including that 1) the employee objected to his supervisor about taking the job because of a poor tip, lodged a complaint in front of co-workers and prompted his supervisor to notify his superiors; 2) tipping was a matter of interest to all the skycaps, and the comment sought to induce action since the skycaps then refused to take the job; and 3) the "obvious" concern was that the skycaps be compensated fairly for their work, and that by broadly holding that tips are not a matter of mutual aid or protection, the Board "unquestionably curtailed" the NLRA's protections for tipped employees who engage in any concerted activity related to this important component of their job.

The Board's decision in this case should serve to assist employers and employees in determining whether conduct is within the protection of the NLRA. Nevertheless, given the associated dangers, employers should seek advice from legal counsel prior to taking action against employees for comments or other potential concerted activities that relate to their employment.

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