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NLRB Precedent Again Proves Malleable As Board Remolds Standard On Protected Concerted Activity in Miller Plastic Products

Labor Relations Update on **September 3, 2023**

Continuing the rapid flow of overturned precedents, in a 3-1 decision released on August 31, the National Labor Relations Board ("NLRB" or "Board") redrew the line on when a single person's individual action could be considered "concerted," and thus, protected, under the National Labor Relations Act ("NLRA"). In *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023), the Board overruled its 2019 decision in *Alstate Maintenance*,which had established a checklist of specific factors to review in order to make this determination. Instead, it returned to a standard under which "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence."

The case involved whether an individual employee was lawfully terminated after raising concerns about the employer's COVID protocols and decision to remain open for business during the early months of the pandemic in an all-hands meeting and in other public ways with co-workers and managers.

The Board's Precedent on "Concerted Activity"

The basic framework for determining whether certain employee conduct is protected concerted activity under the NLRA was set out in a pair of decisions commonly referred to as *Meyers I* and *Meyers II*. In *Meyers I*, the Board held that an employee's activity is concerted when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." In *Meyers II*, the Board clarified that concerted activity "encompasses those circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." In the pair of cases, the Board cautioned that the announced guidelines were not exhaustive and that any question of whether an employee engaged in concerted activity is a factual one based on the totality of the record evidence.

The Board added further context to the "concerted activity" analysis in the 2011 case *WorldMark by Wyndham*, in which it found that an employee engaged in concerted activity when he complained to a supervisor in front of other employees, one of whom then joined in the protest, about a change in dress code that would require employees to tuck in their shirts. The Board's decision indicated that, in general, concerted activity exists when, in front of coworkers, a single employee protests terms and conditions of employment common to all employees.

Without overturning either *Meyers* decision, the Board, in the 2019 case *Alstate Maintenance*, addressed more specifically the kinds of actions that constitute protected concerted activity when they take place in front of other employees. There, an employee working as a skycap at JFK International Airport was terminated after being informed that an airline had requested assistance with a soccer team's equipment and stating, in front of other skycaps: "We did a similar job a year prior and we didn't receive a tip for it." The Board found that the comment did not reflect a group complaint nor an intent to initiate group action. In making its finding, the Board overruled *WorldMark by Wyndham*.

Returning to a "Holistic" Approach

The Board in *Miller Plastic Products* rejected the *Alstate Maintenance* decision as it determined that it "imposed significant and unwarranted restrictions on what constitutes concerted activity." The Board further held that *Alstate Maintenance* misconstrued *WorldMark* by wrongly suggesting that case had announced a *per se* rule that an employee's protest made in any group context is always a concerted inducement to group action. Based on these interpretations, the Board overruled *Alstate Maintenance*, ultimately affirming the ALJ's decision in finding that the employee's conduct was concerted under the *Meyers II* totality of the circumstances test. Going forward, whether an employee's conduct is considered protected activity will depend on whether the employee's actions can be characterized as concerted under the *Meyers* framework based on a review of the "totality of the record evidence," including all surrounding facts and circumstances.

Although concurring in the result, Member Kaplan challenged the majority's decision to overturn *Alstate Maintenance* as unnecessary as all four members of the Board agreed that, even applying *Alstate Maintenance*, the conduct at issue would still be found to be concerted and protected. Member Kaplan further defended the holding in *Alstate Maintenance* as in line with the *Meyers* decisions, that "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."

Takeaways

As with many of the Board's recent decisions, overruling the clear factors set forth in *Alstate Maintenance* means that it will be more difficult to evaluate whether particular actions are or are not protected by the Act. By focusing on a broad facts and circumstances test, it will be harder to state with any degree of certainty whether what appears to be individual conduct or complaints will later be viewed by the Board as activity in concert with others and, thus, protected.

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