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## NLRB Expands Reach of NLRA by Finding Employee Who Sought Help From Coworkers For Her Sex Harassment Complaint Was Protected

By Jonathan Kaplan

In yet another case that impacts both union and non-union employers, the National Labor Relations Board (NLRB) recently found that an employee who asked coworkers for assistance in preserving evidence for a sex harassment complaint she planned to raise with her employer was engaged in “concerted activities” for “mutual aid and protection” under Section 7 of the National Labor Relations Act (NLRA). *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (Aug. 11, 2014). In so doing, the NLRB broadened the scope of protections under the NLRA to cover employees who pursue claims against their employers under a multitude of other federal and state statutes that regulate the workplace.

### Facts

The complainant, a cashier at a Fresh & Easy grocery store, asked her supervisor if she could participate in training for alcohol sales known as “TIPS.” When the supervisor told the cashier to write him a note on a whiteboard in the break room, she wrote the following message: “Bruce ... Could you please sign me up for TIPS training on 9/10/11?” The next day, the complainant saw that someone had changed the word “TIPS” to “TITS” and had drawn a picture of a worm or a peanut urinating on her name.

Because employees at the cashier’s level were not permitted to have cameras in the facility, the complainant hand-copied the picture and altered message that were on the whiteboard onto a piece of paper and asked her male team leader and two female coworkers to sign the paper, which they did. After the team leader and two coworkers signed the paper, the complainant added the following statement to the paper: “Someone changed the board to ‘TITS’ instead of TIPS and [sic] and put a worm pissing on my name. I take this as sexual harassment [sic]. This has been on the [b]oard since I got here at 2PM.” The complainant testified that while she did not intend this statement she added to the paper to be a joint complaint, “I was offended and I believe that the other girls were offended too. And it just seemed that if we were to file a harassment charge that it wouldn’t happen again.”

Later that same day, when the supervisor spoke with the team leader and two employees about the complainant’s request that they sign her handwritten reproduction of the altered whiteboard message, all three said they believed they were only witnessing that the complainant’s reproduction was correct, that they did not want to help the complainant bring a sex harassment

complaint, and that they felt forced to sign the paper. One of the two female coworkers also made a formal complaint against the complainant for “bullying” her into signing the paper and accused the complainant of altering the paper after she had signed it. The other female coworker testified that the day after she signed the paper she told her supervisor she thought the whiteboard alteration was inappropriate and that she hoped he would “take care of it.”

The company’s employee relations manager investigated the whiteboard incident and the complaints against the cashier. When the manager asked the complainant why she felt she had to get her coworkers to sign the statement, the complainant responded that it was for her own protection. The employee relations manager also instructed the complainant not to obtain any further statements so that she could conduct her investigation of the incident. The manager told the complainant, however, that she could speak with other employees and ask them to be witnesses for her. The complainant was never disciplined or threatened with discipline for her actions. After the investigation was completed and the employee who altered the whiteboard disciplined, the employee relations manager informed the complainant in writing of what had been done and assured the complainant she would be protected against retaliation.

## NLRB’s Decision

The NLRB majority<sup>1</sup> found that the complainant’s actions in soliciting two coworkers to sign her hand-drawn reproduction of the altered whiteboard message were protected under Section 7 of the NLRA. For such activity to be protected under the relevant provisions of Section 7, it must be both “concerted” and engaged in for the purpose of “mutual aid or protection.”

While the “concerted” factor normally requires two or more employees to act together in some joint or cooperative fashion, a single employee’s conduct can be “concerted” if it is engaged in “with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries (Meyers I)*.<sup>2</sup> Circumstances under which a single employee’s actions could be “concerted” include cases where individual employees “seek to initiate or to induce or to prepare for group action” or bring “truly group complaints to the attention of management.” *Meyers Industries (Meyers II)*.<sup>3</sup>

The Board majority concluded that although the complainant did not intend to pursue a joint sex harassment complaint on behalf of her coworkers, her actions in seeking her coworkers’ assistance to be witnesses to “prove” what was written on the whiteboard constituted “concerted” activity under *Meyers II*. Significantly, the Board majority found that the complainant’s mere solicitation of support from her coworkers was “concerted” even if her coworkers did not agree with her or join her cause, did not share her interest in the matter, and regardless of whether they had signed or refused to sign the paper.

Turning to the “mutual aid or protection” requirement, the Board majority relied heavily on the “solidarity” principle<sup>4</sup> in concluding that the complainant’s actions were protected. According to the Board majority, under the “solidarity” principle the solicited coworkers have an interest in helping the aggrieved employee even if that individual is the only one with an immediate stake in the outcome because “next time it could be one of them that is the victim.”<sup>5</sup> While the facts of this case involved a sex harassment complaint, the Board majority noted that its rationale applies whenever an employee solicits the assistance of coworkers to help invoke the protection of any federal or state statute that benefits employees, since such statutes implicate the terms and conditions of their employment.

Interestingly, while the Board majority found that the complainant was engaged in protected concerted activity, the Board held that the company did not violate the NLRA when its employee relations manager questioned the complainant about why she had asked her coworkers to sign the paper, or when she instructed the complainant not to take any other statements from her coworkers. The Board majority concluded that in the particular circumstances of this case, those questions and instructions were narrowly tailored to the company’s need to conduct an impartial and thorough investigation.

1 Chairman Pearce and Members Hirozawa and Schiffer.

2 268 NLRB 493, 496 (1984).

3 281 NLRB 882, 887 (1986).

4 The Board majority referenced “an injury to one is an injury to all” as being one of the oldest maxims in American labor lexicon. 361 NLRB No. 12 at 6.

5 The Board majority overruled the NLRB’s 10-year old precedent in *Holling Press, Inc.*, 343 NLRB 301 (2004), which found that where a single alleged victim of sex harassment seeks support from a coworker, the bare possibility that the second employee may one day suffer similar treatment is far too speculative to support a finding of “mutual aid or protection.”

## Dissenting Opinions

The two Republican Board Members each filed separate opinions in which they dissented from the Board majority's holding that the complainant was engaged in protected concerted activity.<sup>6</sup> Member Miscimarra concluded that the complainant's actions were neither "concerted" activity nor for "mutual aid or protection." He criticized the Board Majority's opinion as having "limitless application" to an enormous array of federal, state, and local statutory rights and obligations that involve the workplace,<sup>7</sup> and noted the admonition in *Meyers II* that the NLRB "was not intended to be a forum in which to rectify all the injustices of the workplace." Member Miscimarra concluded that the net result is that the Board majority has created Section 7 coverage "for every *individual* employee—regarding every *individual* complaint implicating any *individual* non-NLRA right—as soon as the individual seeks the involvement of anyone else who is a statutory employee,"<sup>8</sup> regardless of whether the other coworkers are willing or unwilling to help, whether they believe they have a shared interest in the matter, and whether the complaint has any merit.

In a separate dissenting opinion, Member Johnson contended that the Board majority has vitiated the requirement of proof for the "mutual aid and protection" element by establishing an irrebuttable presumption that an employee who seeks the support or assistance of coworkers in raising a sex harassment complaint is always acting for the purpose of "mutual aid or protection." Member Johnson argued further that the Board majority's misplaced reliance on the "solidarity principle" has created a wholesale legal fiction whereby there is an automatic presumption of Section 7 protection any time an employee requests or demands assistance with his or her own individual employment issue from a coworker. Member Johnson concluded by noting that Section 7 of the Act does not give the Board the authority to act as an "uberagency" without due regard and proper accommodation to the enforcement processes established by these other laws and agencies.

## Practical Impact

Member Miscimarra's dissenting opinion highlights a number of potential difficulties and challenges employers may face as a result of the Board majority's decision to apply Section 7 protections to every case where one employee seeks assistance from a coworker regarding an individual complaint of sex harassment or some other statutory right that benefits employees:

- **Unlawful Interrogation**—While employers are obligated to conduct investigations and take remedial action in cases of sex harassment and other types of prohibited harassment and discrimination under statutes like Title VII, the NLRA prohibits employers from questioning employees (including the employee who presented the complaint) about their "protected" activities.
- **Unlawful Surveillance**—Employee complaints often involve disputes over what occurred or what was communicated by or between employees. However, the NLRA also prohibits employer surveillance of "protected activities." Thus, investigations and fact gathering will become more difficult or even impossible since the NLRA prohibits most video or audio surveillance, e-mail system searches, and similar investigative techniques regarding any "protected" conduct.
- **Right to "Refrain from" Protected Activity**—Employees also have a statutory right under Section 7 to "refrain from" engaging in any "protected" conduct. Accordingly, if an employee's individual complaint involves "protected" conduct, the complaining employee (or a coworker witness) has the NLRA protected right to refrain from answering questions or providing relevant information.
- **Uncertainty as to Which Individual Complaints are Protected**—Employers will not necessarily know which individual employee complaints may be protected (because the complaining employee sought the assistance of a coworker), yet since the NLRA prohibits interrogation about "concerted" activity, employers cannot lawfully make sufficient inquiries to determine which individual complaints are covered by Section 7 and which are not.

6 The dissenting Board Members concurred with that part of the Board majority's decision finding that the company did not violate the NLRA when its employee relations manager questioned the complainant about why she asked her coworkers to sign the paper and instructed her not to take any other statements.

7 Including: (1) minimum wage, overtime, breaks, and meal requirements; (2) occupational safety and health requirements; (3) workers' compensation issues; (4) unemployment insurance issues; (5) complex benefits and tax issues; (6) protections against discrimination or retaliation based on race, sex, religion, color, national origin, age, disability, veteran status, family leave, citizenship, benefits eligibility, and (in certain jurisdictions) sexual orientation, height, weight, marital status and "a near innumerable variety of other protected characteristics."

8 *Fresh & Easy*, 361 NLRB No. 12, at 20 (emphasis in original).

- **Large Number of Individual Complaints Affected**—Since coworkers will be the most frequent source of information about employment-related complaints, nearly every investigation will present difficult questions about whether any of the NLRA process-based restrictions (e.g., unlawful interrogation or surveillance) are triggered.
- **Difficulty in Establishing Standard Complaint Handling Procedures**—Since employers are prohibited from making inquiries about “protected” activities, they will not be able to readily determine whether or when the NLRA applies to individual complaints that invoke non-NLRA rights (e.g., sex harassment, OSHA, etc.). As a result, employers will not be able to adopt a standard process for investigating individual complaints unless they treat every claim as “protected” under the NLRA.

As noted by Member Miscimarra, some of these practical concerns are aptly illustrated by the facts of this case. Because the complainant’s conduct was deemed to be “protected,” the employer was subjected to years of litigation based on two questions that it asked the complainant during its investigation of her sex harassment complaint. And since the employer’s questioning of the complainant was found to be lawful based on the “particular circumstances” and “particular facts” of this case, one cannot determine what other questions in other investigations might be found to be unlawful. As a result, Member Miscimarra worries that the unintended consequences of this decision may undermine important non-NLRA statutes by placing unwarranted impediments to employers’ obligations under those statutes to promptly and effectively investigate and remedy any violations.

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