Sharing Posts and Photos of Storming the Castle[1] Part II: What Kind of Speech Is Protected, Concerted Activity?*

By Genevieve Ng

Introduction

We feel the need to share everything. All the time. To everyone and anyone who might be out there. It is our modern way of connecting. Obviously, social media began long before COVID-19 and shelter-in-place, but social media has provided all of us with a way to stay connected when we can't see one another in person. While social media may have started out as a platform to reconnect with friends and family and share our important life experiences with them, it has also become a place to get news, self-promote, and provide instant reactions. Opinions you may have shared with your friends and family are now publicly and permanently available for everyone to see – including law enforcement and your employer.

In the first part of this two-part series, we focused on the First Amendment's protection against employer retaliation for those employees wishing to express themselves. This article focuses on labor law protections related to speech for both public and private sector employees. The speech discussed here is not the same variety of speech that includes participation in political rallies or matters of public concern. This speech is specific to labor law and, as such, it is focused on working conditions. Working conditions may include, but are not limited to, workplace health and safety, workload, wages, benefits, workplace policies, and unfair treatment.

Under the National Labor Relations Act[2] (NLRA) and the various labor relations statutes that cover public agency employers in California, such as the Educational Employment Relations Act (EERA),[3] the Meyers-Milias Brown Act (MMBA),[4] and the Trial Court Employment Protection and Governance Act[5] to name a few, private sector and public agency employees are free to "engage in other *concerted* activities for the purpose of . . . mutual aid or protection . . . ."[6] Concerted activity is activity engaged in by two or more employees or activity engaged in by one employee on behalf of other employees over working conditions.[7]

It is an unfair labor practice for an employer to engage in adverse action against an employee because of this protected activity.[8] However, in order for such activity to be protected, it must be concerted and for the purpose of

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[1] *See* The Princess Bride (Act III Communications) 1987.

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[2] 29 U.S.C. § 151 et seq.

[3] Cal. Gov't Code § 3543 states in relevant part:

Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, an employee in that unit shall not meet and negotiate with the public school employer.

[4] Cal. Gov't Code § 3500 et seq.

[5] Cal. Gov't Code § 71600 et seq.

[6] 209 U.S.C. § 157 (emphasis added). The Public Employment Relations Board (PERB), the California analog to the NLRB for public sector employees, has held:

The only difference we find between the right to engage in concerted action for mutual aid and protection and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process.

Modesto City Schools, PERB Decision No. 291 (1983).

[7] *Meyers Industries* 268 N.L.R.B. 493 (1984) (*Meyers I*) ("[T]he statute requires that the activities in question be 'concerted' before they can be 'protected.'"), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

[8] 29 U.S.C. § 158(a)(1); *see also NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12-14 (1962).

"mutual aid or protection."[9] The NLRB analyzes each of these points separately – whether the activity is for mutual aid or protection and whether it was concerted.[10]

Concerted Activity – An Individual Employee's Speech at Work

When more than one employee is involved, this analysis is fairly straightforward. When only one employee is involved, it gets trickier. The NLRB has found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees."[11] Concerted activity does not include activities of a purely personal nature that do not envision group action.[12]

A single employee may engage in protected concerted activity if they are acting on the authority of other employees, bringing group complaints to the employer's attention, or trying to initiate, induce, or prepare for group action.[13] However, an employee's "mere talk" must be "talk looking toward group action."[14] If not, it is "more than likely to be mere 'griping.'"[15]

The NLRB has found that an individual's concerted objective may be inferred by the circumstances.[16] In analyzing whether a single employee is engaged in concerted activities, the NLRB will look at several factors, such as:

- Whether the speech occurred in a forum suggestive of group activity, such as a group meeting to discuss wages, hours, or some other terms or conditions of employment;
- Whether the speech related to a matter affecting multiple employees;
- Whether the objective of the speech was to complain or protest, or merely to seek information;
- Whether any complaint or protest related to the workforce generally or some portion of the workforce, not solely the employee; and
- Whether the speech occurred at the first opportunity to address the issue so that the individual had no opportunity to discuss it with other employees beforehand.[17]

Not all factors must be present to find protected, concerted activity.[18] The NLRB will also review any other evidence to determine whether the statement was made to initiate, induce, or prepare for group action. It is a fact intensive analysis based on the totality of the circumstances.[19]

Where an employee complains about an individual issue, such as their own wages or how a co-worker is not qualified for a promotion that the complaining employee should have received, the employee will not be found to be seeking, initiating, or preparing for group action.[20]

In *Alstate Maintenance LLC*,[21] Trevor Greenidge, a skycap at JFK International Airport, complained about the lack of tips from a repeat customer in front of other skycaps.[22] When the manager asked for assistance with the customer, no skycaps assisted and were later terminated. Greenidge filed an unfair practice charge with the National Labor Relations Board (NLRB) alleging he was terminated in retaliation for engaging in concerted, protected activity. The NLRB held that an individual's complaint to his manager about the possibility of not getting a tip was not protected, concerted activity even though the complaint was made in front of others.[23] Despite using "we" in his

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[9] *Meyers I*, 268 N.L.R.B. at 494.

[10] *Fresh & Easy Neighborhood Market*, No. 28–CA–064411, 361 NLRB No. 12, slip op. at 3 (2014).

[11] *Anco Insulations, Inc.*, 247 N.L.R.B. 612, 613 (1980); *Mike Yurosek & Son, Inc.*, 306 N.L.R.B. 1037, 1038 (1992) (citing *Every Woman's Place*, 282 N.L.R.B. 413 (1986)).

[12] *Plumbers Local 412*, 328 N.L.R.B. 1079 (1999) (employee's discussion of her own pension eligibility with coworkers and with members of the Union's executive board did not constitute protected concerted activity); *Hospital of St. Raphael*, 273 N.L.R.B. 46, 47 (1984) (employee's challenge of a written warning directed at herself alone was not protected concerted activity).

[13] *See Alstate Maintenance LLC*, 367 NLRB No. 68 (2019), *available at* https://www.laborrelationsupdate.com/wp-content/uploads/sites/20/2019/01/Alstate-Maintenance-LLC-367-NLRB-No.-68-January-11-2019.pdf.

[14] *Meyers I*, 281 N.L.R.B. at 887.

[15] *Alstate Maintenance*, 367 NLRB No. 68, slip. op. at 3 (internal citations omitted).

[16] 367 NLRB No. 68, slip. op. at 4 (quoting Whittaker Corp., 289 NLRB 933, 934 (1988)).

[17] *Alstate Maintenance*, 367 NLRB No. 68, slip. op. at 7 (citing *Whittaker Corp.*, 289 NLRB 933 (1988); *Caval Tool Division, Chromalloy Gas Turbine Corp.*, 331 NLRB 858 (2000), *enfd*. 262 F.3d 184 (2d Cir. 2001); and *WorldMark by Wyndham*, 356 NLRB 765 (2011)).

[18] *Alstate Maintenance*, 367 NLRB No. 68, slip. op. at 7 n. 45.

[19] 367 NLRB No. 68, slip. op. at 7 n. 45.

[20] 367 NLRB No. 68, slip. op. at 8 n. 45.

[21] 367 NLRB No. 68, slip. op. at 3.

[22] 367 NLRB No. 68, slip. op. at 1-2.

[23] 367 NLRB No. 68, slip. op. at 3-4.

statements, the Board found that Greenidge's complaint was a "mere gripe" and not an attempt to induce collective action.[24]

Interestingly, the NLRB did not find that Greenidge's complaint was over wages. According to the NLRB, the amount of tips received by skycaps, who rely on tips to supplement their hourly wage, is a matter between the skycap and the customer. The Board also indicated that there was no evidence that the employee wanted to modify the current tipping arrangement from customers generally, instead, this was a complaint about the tipping practices of a particular customer.

More significantly, *Alstate* clarified prior NLRB precedent that held a single employee's activity is not concerted unless the activity was authorized by other employees.[25] Additionally, *Alstate* overruled an earlier NLRB case which held that a single employee's statement in a group meeting was *per se* concerted activity.[26]

Concerted Activity – An Individual Employee Tweeting into the Ether

Alstate concerned a more traditional workplace interaction, but given the omni-presence of social media and the remote working arrangements due to COVID-19, social media has become a hot bed of employee activity. In *Chipotle Mexican Grill*,[27] Chipotle learned through social media monitoring by its corporate communications groups that one of its employees posted negative comments about the company on Twitter.[28] The employee retweeted an article about hourly employees having to work on snow days and directed the retweet at Chris Arnold, Chipotle's Communications Director with a criticism of whether Arnold, an executive, would be eligible to take a snow day. The employee's other tweets were in response to customer comments about the price of guacamole ("it's extra not like #Qdoba, enjoy the extra $2"[29]) or a Chipotle giveaway ("nothing is free, only cheap #labor. Crew members only make $8.50hr how much is that steak bowl really?"[30]). The manager asked that the employee remove the tweets, which he did. The union filed an unfair labor practice charge, alleging that Chipotle's request to remove the tweets violated the employee's right to engage in protected, concerted activity and that Chipotle's social media and employee handbook policies were unlawful.

The tweets clearly concerned working conditions, namely wages. The administrative law judge (ALJ) acknowledged that the tweets did not relate to any current dispute between Chipotle and its employees, nor did the employee confer with others about his intention to post the tweet or act on anyone's behalf. Nevertheless, the ALJ found that these tweets were not individual complaints, but were messages "visible to others and, because the complaints were related to working conditions - wages, and, oddly enough, the cost of guacamole as an extra – they were concerted and protected as "truly group complaints."[31] The ALJ determined that the tweets had the effect of "educating the public and creating sympathy and support for hourly workers in general and Chipotle's workers in specific."[32]

The NLRB disagreed with the ALJ, finding that these messages were not directed towards fellow employees. The Board did not articulate any rationale for its reversal, but it may be obvious that tweets out into the ether - read by friends, followers, bots of the employee's Twitter account, and Chipotle's corporate communications department – were not evidence that the employee was speaking out for more than himself. This decision prevented the NLRB from sliding down a slippery slope where any post to social media about work could be construed as protected, concerted activity. But what about those situations where an individual tweets or posts something on Instagram or creates a TikTok about workplace safety or a bad manager that is "liked" by co-workers? Is this evidence that the tweeter was acting on behalf of employees or trying to induce group action? It is possible such posts could be considered concerted activity.

The Board's decision in Chipotle was a positive outcome for employers because taking the administrative law judge's reasoning to its logical conclusion, nearly all posts by non-management employees on publicly available social media related to the terms or conditions of employment would be "concerted" and, therefore, subject to protection under the NLRA.

Mutual Aid and Protection

The second prong of the analysis is whether the individual speech was for the purposes of "mutual aid or protection."

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[24] 367 NLRB No. 68, slip. op. at 4.

[25] *Meyers I*, 268 N.L.R.B. at 497; *Meyers Industries*, 281 N.L.R.B. 882, 886 (1986) (*Meyers II*), *affd. sub nom*. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

[26] *See Worldmark by Wyndham*, 356 N.L.R.B. 765 (2011).

[27] *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 2016 NLRB LEXIS 599, 364 NLRB No. 72 (2016), *rev. denied*, 690 Fed. Appx. 277 (5th Cir. 2017).

[28] 2016 NLRB LEXIS 599, at *14.

[29] 2016 NLRB LEXIS 599, at *14.

[30] 2016 NLRB LEXIS 599, at *14.

[31] 2016 NLRB LEXIS 599, at *38.

[32] 2016 NLRB LEXIS 599, at *38.

In *Chipotle*, the employee tweeted his feelings about his employer, but what would have happened if he had taken his concerns to the media or a government entity.

In *Eastex, Inc. v. NLRB*,[33] an employee wrote an article about minimum wages for the union's newsletter. The Court found that although the article was not about a current or ongoing economic dispute between the employees and employer, it was reasonably related to jobs and employee working conditions and, therefore, was for "mutual aid or protection."[34] The Court explained that mutual aid or protection focuses on the goal of the concerted activity, which was to improve terms and conditions of employment.[35] In analyzing whether individual speech is for the purpose of "mutual aid or protection," the focus is on the link between the activity and matters concerning working conditions.[36]

The NLRB has found statements to the media, on websites, and on flyers to be protected activity.[37] Letters or missives to governmental bodies and elected officials have also been found to be protected activity.[38]

The NLRB has held that employees have some leeway when engaged in Section 7 activities because the protections would be "meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses."[39] Once the activity crosses the line into serious misconduct, however, it may no longer be protected.[40] Even if the conduct starts out as being protected or is a mixed bag, it may lose protection if the comments are egregiously offensive, knowingly maliciously, false, or publicly disparaging of an employer's products or services without any relation back to a labor issue (hello, guacamole!).[41] Offensive language or tirades may not necessarily lose protection of the NLRA, but violent, profane, sexually or racially offensive, or unlawful statements, such as incitement to violence, are likely to shed any labor law protection.[42]

Conclusion

As employees' use of social media continues to evolve and expand, employers will continue to be forced to engage more and more in these difficult analyses in determining whether to take adverse employment actions against their employees. And difficult decisions regarding whether social media policies can be enforced against employees posting about work-related topics will become increasingly frequent and complex.

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[33] 437 U.S. 556 (1978).

[34] 437 U.S. at 570.

[35] *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)

[36] *See Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3.

[37] *Valley Hospital Medical Center, Inc.*, 351 N.L.R.B. 1250 (2007) (nurse engaged in protected activity when she made statements in a newspaper article, and posted on the union's website and in a flyer about an ongoing labor dispute over staffing levels).

[38] *Richboro Community Mental Health Council*, 242 N.L.R.B. 1267 (1979) (letter sent to the federal funding source of employer, as well as United States Congressperson, found to be protected activity).

[39] *Consumers Power Co.*, 282 N.L.R.B. 130, 132 (1986).

[40] *General Motors* LLC, 369 NLRB No. 127 (2020) (articulate standards overruling years of NLRB precedent on "setting specific" standards on when an employee's abusive conduct loses protection of the Act).

[41] *See Dresseer-Rand Company*, 358 NLRB No. 32 (2012); *Three D LLC d/b/a Triple Play Sports Bar and Grille v NLRB*, Nos. 14-3284, 14-3814, 2015 U.S. App. LEXIS 18493 (2d Cir. Oct. 21, 2015).

[42] *See Dresseer-Rand Company*, 358 NLRB No. 32 (2012); *Three D LLC d/b/a Triple Play Sports Bar and Grille v NLRB*, Nos. 14-3284, 14-3814, 2015 U.S. App. LEXIS 18493 (2d Cir. Oct. 21, 2015); *Kiewit*, 355 NLRB 708 (2010) (Board found that employees protesting against enforcement of policy angrily told their supervisor that if they were laid off, "'it's going to get ugly and you better bring your boxing gloves"' were not "unambiguous or 'outright'. . . threats of physical violence."), *enf.*, 652 F.3d 22 (D.C. Cir. 2011).