

NLRB Expands Definition of “Protected Activity”

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Margaret Elias, a cashier at the grocery store chain, sought to file an internal sexual harassment complaint after a note she wrote on a whiteboard in the employee breakroom was altered with some offensive comments and illustrations. In preparing her complaint, Elias drew a copy of the whiteboard alterations and asked her manager and two of her coworkers to sign the illustration. Elias told each of the individuals she asked to sign the drawing that she was planning on filing a complaint with management. After obtaining the signatures, Elias added comments to the paper stating that she considered the whiteboard alterations to constitute sexual harassment. Elias admitted that she never intended to file a joint complaint on behalf of any other employees, but that she believed that other female employees would also be offended by the conduct and wanted to stop it from happening again.

A company human resources representative investigated the incident (and ultimately disciplined the person responsible for the whiteboard alterations). During the investigation, the individuals who had signed Elias’s copy of the drawing all stated that they did not want to participate in the complaint but were only verifying that the drawing was accurate. They also all stated that they felt pressured to sign the document. Because of these comments, when the HR representative questioned Elias, she asked, among other things, why she had solicited the coworker signatures. She also directed Elias not to obtain any further employee statements related to the incident so that she could complete her investigation. However, Elias was told that she could talk to other employees and ask them to be witnesses for her.

At issue before the Board was whether Elias’s conduct constituted protected activity under Section 7 of the National Labor Relations Act and whether the employer violated Section 8(a)(1) of the Act by questioning Elias about why she obtained the witness statements and telling her to refrain from gathering statements from other employees regarding the incident.

The Board initially noted that to be protected under Section 7 of the NLRA, employee conduct must be both “concerted” and for the purpose of “mutual aid or protection.” The fact that Elias may have had personal motivations for her actions was irrelevant to the analysis, because both elements are judged from an objective perspective. The Board concluded that Elias’s conduct in seeking her coworkers’ assistance in raising a sexual

harassment complaint to management was concerted activity even if she did not intend to file a joint complaint, because (1) concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed, (2) Board precedent establishes that concerted activity includes not only true group complaints, but also cases "where individual employees seek to initiate or to induce or to prepare for group action," and thus includes preliminary individual discussions, as long as it is not solely by and on behalf of the employee himself," and (3) it is well established that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity."

The Board also found that Elias's conduct was "for the purpose of mutual aid or protection," because that concept includes efforts to invoke the protection of statutes benefitting employees generally. The fact that in this case Elias was confronting misconduct that was directed at her alone did not change that it was for mutual aid or protection, because a bedrock principle of Section 7 is that it protects employees who seek to "band together" in solidarity to address the terms and conditions of their employment. Therefore, even if only one employee is immediately benefitted by the action, by soliciting assistance from coworkers to raise issues to management, an employee is requesting that his coworkers exercise vigilance against the employer's perceived unjust practices, and thus benefits all employees by creating solidarity among employees.

Even though Elias's conduct was protected, and the Act generally prohibits employers from questioning employees about their protected activity, in this case it was not unlawful for the human resources representative to question Elias about her solicitation of statements from other employees because (1) an employer can lawfully question employees if necessary to conduct a full and fair investigation, even if it involves the exercise of Section 7 rights and (2) the questioning in this case was narrowly tailored to enabling the store to conduct a legitimate investigation. Finally, the employer directing Elias not to solicit statements from other employees during the investigation was lawful because although employees have a Section 7 right to discuss with one another ongoing employer investigations into alleged employee misconduct, employers can prohibit such conduct if a legitimate business justification outweighs the Section 7 right. And in this case, the direction to Elias was in response to her coworkers expressing concern that Elias had altered the statement after they signed it, and it was narrowly tailored and given to ensure an impartial and thorough investigation. Moreover, Elias was not prohibited from discussing the incident with coworkers or soliciting witnesses.

The Board's decision in this case reiterates that a broad range of individual employee conduct can still be protected under the NLRA as long as it could, broadly speaking, seek to improve the terms and conditions of employment generally. Also, employers must be very careful if they seek to constrain employee discussions regarding an on-going investigation, but limitations may be permissible if they are narrowly tailored and necessary to ensure an impartial investigation.

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