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NLRA Protection Accorded Class or "Collective" Action Brought By Single-Employee

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The National Labor Relations Board has decided that "a single employee who files a lawsuit *ostensibly* on behalf of himself and other employees is engaged in protected concerted activity." (Emphasis provided.) *Beyoglu*, 362 NLRB No. 152 (July 29, 2015).

Marjan (Mario) Arsovski was discharged after he filed a Fair Labor Standards Act collective action lawsuit. Arsovski then filed an unfair labor practice charge alleging he had been terminated for engaging in protected concerted activities.

At trial, Arsovski testified he told a co-worker he was going to file a lawsuit and asked him to join the case. The co-worker refused. There was *no* evidence Arsovski told anyone else or acted on behalf of any other employee when he filed the lawsuit, purportedly on behalf of himself and others who elected to opt in. The Administrative Law Judge who presided over the trial dismissed the charge, finding, "[c]learly, the evidence in this case does not establish that Arsovski acted in concert with, or on the authority of any of the other employees. His lawsuit was not filed with their consent, or except perhaps in one case, even with their knowledge."

The decision was appealed to the NLRB, which reversed the ALJ, holding, for the first time, that "a single employee who files a lawsuit ostensibly on behalf of himself and other employees is engaged in protected concerted activity." Chairman Mark Pearce and Member Lauren McFerran comprised the Board panel majority.

The Board relied on two recent Board decisions, *D.R. Horton*, 357 NLRB No. 184, slip op. at 3 (2012), where the Board wrote, "[c]learly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7," and *Murphy Oil USA*, 361 NLRB No. 72 (2014), where the agency said it had "rejected . . . the argument that the filing of a class action lawsuit is not protected concerted activity if only one employee is immediately involved."

Thus, despite the absence of any consent, approval, authority, or involvement whatsoever by any other employee, the Board decided the employer had unlawfully discharged Arsovski for engaging in protected concerted activity because, it reasoned [citing *Meyers Industries*, 281 NLRB 882 (1986), a seminal decision on protected concerted activity], the mere filing of "an employment-related class or collective action by an individual employee is an attempt to initiate, to induce or to prepare for group action and is therefore conducted protected by Section 7."

Dissenting, Member Philip Miscimarra argued that Congress intended Arsovski's claim to be redressed under Section 15(a)(3) of the FLSA, which prohibits retaliation against an employee for filing a complaint under that law, and not in this case under the NLRA. Here, there was no evidence of concerted activity necessary to implicate the Board's statute, because such activity is "triggered *only* where the evidence proves that the 'concerted' activities – defined as conduct that, at the least, looks toward '*group* action' – is being undertaken for the 'purpose' of '*mutual* aid or protection'" and a lawsuit filed by single employee – regardless of the procedural label – may or may not be concerted activity depending on the facts.

As the Board continues to expand the scope of protected concerted activity, employers must proceed cautiously. They should conduct thorough investigations when considering discipline for any employee involved in a lawsuit or who raises a complaint about working conditions.

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