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NLRB Hits Ceiling In Continual Push To Expand Scope Of Protected Concerted Activity

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Whether the National Labor Relations Board (NLRB) is issuing rulings invalidating employee handbook policies that encourage civil behavior among employees or attempting to get discharged employees reinstated after profanity-laced Facebook rants against their supervisors, the board seems determined to push the limits of what can be considered "protected concerted activity" under the National Labor Relations Act (NLRA). Regardless of whether an employer is a union shop or not, under the NLRA employers may not take adverse action if the employee's conduct qualifies as protected concerted activity, which has traditionally been defined as when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. In a recent case brought by the NLRB, the board claimed that an employer's discharge of a skycap (luggage porter) at New York's John F. Kennedy International Airport for refusing to assist a French soccer club with their bags because he claimed they were "poor tippers" ran afoul of the NLRA. The board argued that the skycap should be reinstated because his complaint about the Frenchmen's tipping habits and his refusal to help the team with their luggage (a primary duty of his job) constituted protected concerted activity regarding his wages. Disagreeing with the NLRB's seemingly tortured interpretation, the administrative law judge hearing the matter dismissed the case. The judge noted, "For better or worse, the custom of tipping in the United States puts the onus on the customer and not the employee's employer. If a customer refuses to tip (or gives an inadequate tip), this is not a matter that is addressable between the employee and his or her employer." In other words, the skycap's refusal to carry the luggage was not protected activity that arose out of some attempt to protest wages, but rather stemmed from his frustration with the customer. While this result may seem obvious to most employers, we'll keep tabs to see whether the NLRB is truly beginning to reach the boundaries of what might be considered protected concerted activity, or whether this ruling was simply a blip in the ever-expanding definition of such activity.

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