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1 Is NOT The Loneliest Number…At Least At The NLRB

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Sticking to its recent trend of overturning employer-friendly precedent, the NLRB issued a ruling on Monday of this week that greatly expands the definition of "protected activity" under the NLRA. Historically, in order for conduct/activity to be protected under the NLRA, an employee had to show that he or she was engaging in "concerted" activity (i.e., "group action") for "mutual aid and protection" of others rather than solely for the benefit of him or herself. Based on that longstanding principle, employers have had much success in defending against NLRB charges where an employee alleges "retaliation" against a company in relation to activity the employee was pursuing solely for his or her own individual interests. For example, in *Holling Press, Inc.*, 343 NLRB No. 45 (2004) the NLRB dismissed an employee's charge that claimed the company had violated the NLRA for retaliating against her for trying to solicit support from coworkers in support of a sexual harassment claim. In *Holling Press*, the NLRB specifically ruled that the employee's complaint was not "concerted" (i.e., not protected) because "from the outset, [the employee] charted a course of action with only one person in mind – herself." In *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (August 11, 2014), however, the NLRB overruled *Holling Press*. In *Fresh & Easy* an employee again was trying to find support for an individual sexual harassment complaint, and specifically was trying to solicit coworkers to provide evidence on her behalf. The employer was conducting its own investigation in an attempt to remedy the situation and asked that the employee not interfere with the investigation by collecting her own statements from coworkers. The employee was NOT disciplined for attempting to run her own parallel investigation; she was just told to stop. The NLRB, however, ruled that employees generally have the right under the NLRA to engage in this type of conduct. The NLRB found that an employee's subjective intent underlying the action is irrelevant in terms of deciding whether the conduct is "concerted" or "for mutual aid or protection." Rather, the NLRB ruled that inquiry must be "whether there is a link between the activity and matters concerning the workplace or employees' interests as employees." Based on the employee's attempt to get others to assist her in a complaint against the company, the NLRB found that to be sufficient to constitute "group action" protected by the NLRA. It also ruled that the employee's attempt to fend off sexual harassment was enough to show "mutual aid and protection" even though she admittedly only was pursuing the claims on behalf of herself. This NLRB ruling poses yet another challenge for employers when conducting workplace investigations – in both union and non-union environments. The NLRB did not offer a clear roadmap in its ruling for how employers can balance the need to conduct thorough investigations (to remedy harassment claims under Title VII, for instance) against an employee's individual desire to conduct his or her own investigation. Subsequent opinions likely will provide

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more guidance, but NLRA-rights affecting workplace investigations remain a “gray area” for now.