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## RECENT ADJUDICATION

LABOR LAW — SEXUAL HARASSMENT AND COLLECTIVE ACTION — NLRB HOLDS THAT THE NLRA PROTECTS WORKERS SEEKING COLLEAGUES' ASSISTANCE IN FILING SEXUAL HARASSMENT COMPLAINTS. — *Fresh & Easy Neighborhood Market, Inc.*, 361 N.L.R.B. No. 12 (Aug. 11, 2014).

Labor law, which provides an avenue for the collective action of employees, and employment law, which allows persons to bring individual grievances against their employers, both govern the American workplace but often are seen as antagonistic to each other.<sup>1</sup> Section 8(a)(1) of labor law's foundational statute, the National Labor Relations Act<sup>2</sup> (NLRA), prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees"<sup>3</sup> in their exercise of Section 7 rights to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection."<sup>4</sup> In 2004, the National Labor Relations Board (the Board or NLRB<sup>5</sup>) ruled that the NLRA's protections did not cover an employee seeking aid from coworkers when pursuing an individual sexual harassment complaint.<sup>6</sup> Recently, in *Fresh & Easy Neighborhood Market, Inc.*,<sup>7</sup> the Board overruled this holding,<sup>8</sup> opening up NLRA protection to cover the collective action of employees asserting their individual rights under Title VII of the Civil Rights Act of 1964<sup>9</sup> and other employment law statutes. In so doing, the Board partially mended weaknesses in employment law's individual-rights regime and provided an avenue for employees to take a more active role in shaping their companies' discrimination policies.

In August 2011, Margaret Elias, a cashier at Fresh & Easy Neighborhood Market, left a message on a breakroom whiteboard asking her supervisor if she could be trained in TIPS, a program related to alcohol

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<sup>1</sup> See, e.g., James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1564–71 (1996) (noting that employment law has "subordinated" the role of collective action, *id.* at 1564, and describing how unions came to be viewed as "part of the problem" of workplace discrimination, *id.* at 1568).

<sup>2</sup> 29 U.S.C. §§ 151–169 (2012).

<sup>3</sup> *Id.* § 158(a)(1).

<sup>4</sup> *Id.* § 157.

<sup>5</sup> This comment uses "NLRB" to refer to the agency as a whole and "the Board" to refer to the agency's final adjudicatory body.

<sup>6</sup> *Holling Press, Inc.*, 343 N.L.R.B. 301, 302 (2004).

<sup>7</sup> 361 N.L.R.B. No. 12 (Aug. 11, 2014).

<sup>8</sup> *Id.* at 1.

<sup>9</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2012). In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court upheld the Equal Employment Opportunity Commission's interpretation of Title VII as creating employer liability for hostile work environments where employees are sexually harassed by other employees. *Id.* at 66–67.

sales.<sup>10</sup> The next day, Elias found the message defaced by a coworker who had changed “TIPS” to “TITS” and drawn a worm or peanut-shaped cartoon urinating on her name.<sup>11</sup> In response, Elias notified her supervisor and filed an internal sexual harassment complaint with the company’s employee-relations department.<sup>12</sup> To support her claim, Elias sketched a picture of the whiteboard drawing and had two female coworkers sign it.<sup>13</sup> One coworker subsequently stated that she signed the document in response to Elias’s “bullying,”<sup>14</sup> while the other felt “intimidated” by Elias.<sup>15</sup> The company’s employee-relations manager investigated the incident, asking Elias why she felt the need to obtain coworker signatures and instructing her to refrain from obtaining further statements while the manager completed the investigation.<sup>16</sup> The company disciplined the employee who had altered the whiteboard message and took no adverse action against Elias in response to complaints filed against her by coworkers.<sup>17</sup> The month after the incident, Elias filed an unfair labor practice charge against her employer, alleging that the employee-relations manager infringed on her Section 7 rights by interrogating her about her statements to coworkers and asking her to refrain from obtaining witness statements.<sup>18</sup>

The administrative law judge (ALJ) found that the manager’s statements to Elias did not violate the NLRA.<sup>19</sup> Following Board precedent articulated in *Holling Press, Inc.*,<sup>20</sup> the ALJ stated that Section 7 did not protect Elias’s actions because he saw “Elias’[s] outrage . . . [as] personal and . . . not shared by the other employees,” failing to satisfy the requirement that protected actions be concerted and undertaken for mutual aid or protection.<sup>21</sup> Since Elias’s gathering of signatures was not covered by the Act, the manager’s request that Elias refrain from such activity “was not meant to deprive her of her right to engage in concerted activities” in violation of the Act.<sup>22</sup> The acting General Counsel of the NLRB appealed the ruling.<sup>23</sup>

<sup>10</sup> *Fresh & Easy*, 361 N.L.R.B. No. 12, at 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1–2.

<sup>13</sup> *Id.* at 1. Elias’s male supervisor also signed the document. *Id.*

<sup>14</sup> *Id.* at 2 (internal quotation marks omitted).

<sup>15</sup> *Id.* at 12 (Member Miscimarra, concurring in part and dissenting in part).

<sup>16</sup> *Id.* at 2 (majority opinion).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* app. at 29 (decision of A.L.J. Biblowitz).

<sup>19</sup> *Id.* at 35. The complaint also charged that the employee handbook’s confidentiality provisions were overly broad. *See id.* at 29. The ALJ sustained this charge. *Id.* at 35. The Board did not review this determination because neither party excepted to it. *Id.* at 9 (majority opinion).

<sup>20</sup> *Holling Press, Inc.*, 343 N.L.R.B. 301 (2004).

<sup>21</sup> *Fresh & Easy*, 361 N.L.R.B. No. 12, app. at 35 (decision of A.L.J. Biblowitz).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1 (majority opinion).

The Board affirmed the ALJ's ruling that the employer did not violate the NLRA but reversed his ruling that Section 7 did not protect Elias's actions taken in response to the alleged sexual harassment.<sup>24</sup> In reaching its holding on the Section 7 question, the Board engaged in a two-pronged analysis, considering whether Elias's activity was "concerted" in nature *and* undertaken for "mutual aid or protection."<sup>25</sup> To qualify as "concerted" activity, the Board noted that the activity "must be engaged in with the object of initiating or inducing group action," and can include mere "preliminary discussion" among employees, as well as a single employee's seeking the aid of other employees.<sup>26</sup> It sufficed that Elias enlisted the aid of her coworkers in raising a sexual harassment complaint with management, regardless of whether her coworkers sought to file a joint complaint.<sup>27</sup>

Turning to the "mutual aid or protection" prong, the Board explained that the term is best understood under the "solidarity" principle, a "bedrock principle" of American labor law that sees one employee asking another for aid in raising an issue with management as a tacit request that a "coworker[] exercise vigilance against the employer's perceived unjust practices" that affect the workplace as a whole.<sup>28</sup> Under this principle, the Board found that Elias's asking coworkers to corroborate her sexual harassment allegation satisfied the "mutual aid or protection" prong.<sup>29</sup> The Board reasoned that Elias's actions sought not just to address this individual instance of alleged sexual harassment but also to "prevent similar conduct in the future" that might extend to other employees.<sup>30</sup> In reaching its decision, the Board overturned *Holling Press*, which had held that the actions of a sole victim of sexual harassment in seeking support from other employees did not satisfy the "mutual aid or protection" prong.<sup>31</sup> The Board explained that *Holling Press* "seemed to create a special exception [to the solidarity principle] for sexual harassment claims" and was inconsistent with applicable precedent.<sup>32</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 3. The Board noted that both inquiries operate under an "objective standard," unconcerned with an employee's subjective motivations. *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 3-4.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 6 n.17.

<sup>31</sup> *Id.* at 6-7. In *Holling Press, Inc.*, the Board had stressed that sexual harassment complaints could constitute Section 7 activity if they involved more than one victim but determined that because sexual harassment is "not a common everyday occurrence," 343 N.L.R.B. 301, 304 (2004), nonvictim employees could not expect reciprocal protection from an individual complaint. *Id.* at 303.

<sup>32</sup> *Fresh & Easy*, 361 N.L.R.B. No. 12, at 6. The Board justified its decision to overrule *Holling Press* by calling the case an "outlier, having departed from established Board and court precedent without providing a coherent reason for doing so." *Id.* at 7.

But despite its impassioned defense of Elias's Section 7 right to seek help from coworkers in pursuing her sexual harassment claim, the Board found her employer's actions had not violated this right.<sup>33</sup> Because the manager's request that Elias not obtain additional coworker statements was "narrowly tailored" to the manager's legitimate interest in conducting an investigation into the alleged sexual harassment, the manager's actions did not violate the Act.<sup>34</sup> Additionally, the manager's questioning about why Elias felt the need to obtain witness statements was permissible because the questioning was in response to coworkers' complaints about Elias's actions.<sup>35</sup>

Board Member Miscimarra concurred in part and dissented in part. Although he agreed that Fresh & Easy Neighborhood Market had not violated the NLRA, he disagreed that Elias's activities were protected by Section 7, finding that her conduct failed both prongs of the test.<sup>36</sup> Member Miscimarra further contended that the Board majority had mischaracterized *Holling Press*, which he believed was faithful to both NLRA and Board precedent in requiring evidence that an employee's concerted actions serve the interests of her coworkers for the purpose of mutual aid or protection.<sup>37</sup> Additionally, Member Miscimarra expressed serious reservations about the policy implications of the majority decision. He stated that it would lead to "an unprecedented expansion in Section 7 coverage" to virtually all claims under employment law statutes.<sup>38</sup> This expansion, he argued, would "undermine the many important non-NLRA statutes and regulations that afford individual protection to employees" by subjecting these statutes to process restrictions uniquely tailored to the NLRA's group-rights schema.<sup>39</sup> He noted, for example, that Board precedent prohibiting an employer from questioning an employee about protected Section 7 activities or

<sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.* In finding the employer's actions "narrowly tailored," the Board considered that the manager did not instruct Elias to refrain from discussing the incident with her coworkers, asking coworkers to serve as witnesses, or bringing future complaints. *Id.*

<sup>35</sup> *Id.* at 9.

<sup>36</sup> *See id.* at 12 (Member Miscimarra, concurring in part and dissenting in part). Regarding the "concerted activity" inquiry, Member Miscimarra believed that the Board had misconstrued its precedent, which he understood as requiring an individual to solicit group action from fellow employees. *Id.* at 16. Pointing to indications in the record that Elias and the employees who signed the paper operated under the assumption that Elias was filing an *individual* — as opposed to group — complaint, he found that these actions failed to qualify as concerted activity. *Id.* Turning to the second prong, he found that the conduct failed to prove "mutual aid or protection" because the evidence showed neither that Elias's coworkers acted for the purpose of supporting Elias nor that Elias acted to protect other employees. *Id.* at 18.

<sup>37</sup> *Id.* at 18–19.

<sup>38</sup> *Id.* at 20.

<sup>39</sup> *Id.* (emphasis omitted); *see also id.* at 21–22.

surveilling such activities would interfere with an employer's ability to meet its obligation to remedy Title VII violations.<sup>40</sup>

Member Johnson also concurred in part and dissented in part. He agreed with the Board majority that Elias's conduct fell under Section 7 because the conduct she sought to remedy created a hostile work environment for all female employees.<sup>41</sup> He disagreed, however, with the conclusion that one employee's asking another employee for help in filing a complaint would automatically fall under Section 7, noting that some forms of discrimination may affect only one employee.<sup>42</sup> Member Johnson concluded by joining Member Miscimarra's critique that the Board's holding would damage an employer's ability to investigate potential violations of other employment statutes.<sup>43</sup>

Because of their focus on perceived hard divisions between employment law and labor law,<sup>44</sup> Members Miscimarra and Johnson did not account for the ways in which *Fresh & Easy* may allow employees to use labor law to compensate for employment law's shortcomings.<sup>45</sup> Their opinions share three flaws: First, they ignore Supreme Court precedent that has reduced the efficacy of individual employment law claims as a means of regulation. Second, they fail to see how labor law might add value to employment law by bolstering employee leverage and providing employees an additional avenue to assert greater voice in company policies. Finally, they overstate possible negative effects created by applying NLRA restrictions in a Title VII context.

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<sup>40</sup> *Id.* at 21.

<sup>41</sup> *See id.* at 24 (Member Johnson, concurring in part and dissenting in part).

<sup>42</sup> *Id.* at 25–26. All Board members subscribed to Judge Learned Hand's articulation of the solidarity principle, that employees striking in support of an aggrieved coworker act with the understanding that in doing so they assure for themselves the support of the aggrieved coworker should they in the future face similar circumstances. *See id.* at 6 n.15 (majority opinion) (quoting *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–06 (2d Cir. 1942)); *id.* at 17, n.58 (Member Miscimarra, concurring in part and dissenting in part) (citing same); *id.* at 26 (Member Johnson, concurring in part and dissenting in part) (quoting same). Member Johnson disagreed with the majority, however, on how one proves solidarity: he argued the central question was whether a nonaggrieved party joined forces with the aggrieved party, rather than whether the aggrieved party merely solicited aid. *Id.*

<sup>43</sup> *Id.* at 27 (Member Johnson, concurring in part and dissenting in part).

<sup>44</sup> Members Miscimarra and Johnson are not alone in this conception. A number of scholars have noted theoretical differences between collective action and individual rights as well as doctrinal dissonance between the two areas of law. *See* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685, 2701–05 (2008) (surveying scholarly literature on the antagonism between employment law and labor law).

<sup>45</sup> Professor Katherine Van Wezel Stone has noted that the individual-rights regime of employment law provides no means by which individual employees can act collectively to play a part in corporate decisionmaking — an acute problem made worse by the difficulties the government has had in enforcing its wide-ranging workplace regulations. *See* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 *U. CHI. L. REV.* 575, 636–38 (1992).

Persons asserting their individual Title VII employment rights to improve their workplaces face increasingly difficult legal obstacles. Central to employment law's efficacy has been the "litigation threat" posed by individual employees, which "has driven much internal workplace reform."<sup>46</sup> However, Supreme Court decisions in the 1990s diminished the ability of this threat to protect the rights of workers by providing employers with an affirmative defense to charges of discriminatory hostile work environments if they could show that they took reasonable care to prevent such environments.<sup>47</sup> In 2013, the Court made it still more difficult for an individual to prevail in a Title VII claim against his employer, holding that employees alleging retaliation in response to their filing a Title VII complaint must prove "but-for" causation in order for such claims to succeed — a standard that requires plaintiffs to prove that any legitimate reason offered by the employer for taking the adverse action would not have actually resulted in the adverse action absent the protected Title VII activity.<sup>48</sup>

Meeting these higher legal standards is difficult in practice. For example, employers sometimes act to protect favored employees who have allegedly violated employment law statutes over disfavored victims of such individuals.<sup>49</sup> Such employer behavior might convince a judge in a sexual harassment lawsuit to find but-for causation in the employee's termination, but another judge might weigh such employer behavior against alleged misconduct by the complaining employee and find that the employer's termination decision was justified. Even if an employee *did* have a legally cognizable Title VII claim, her ability to obtain redress would depend on her knowing her rights and having sufficient resources to pursue her claim. Depending on differing work cultures and knowledge bases, aggrieved employees may at times seek the protections of labor law before taking Title VII-prescribed ac-

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<sup>46</sup> Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 337 (2005).

<sup>47</sup> See *id.* at 336–37 (discussing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); and *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)). Professor Cynthia Estlund also noted that the Court in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), cut back on punitive damages for adverse-action discrimination by allowing a defense of demonstrating "good faith efforts" at compliance with Title VII. Estlund, *supra* note 46, at 337 (quoting *Kolstad*, 527 U.S. at 544).

<sup>48</sup> *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013). In her dissent, Justice Ginsburg called this "strict but-for test . . . particularly ill suited to employment discrimination cases" and apparently "driven by a zeal to reduce the number of retaliation claims filed against employers." *Id.* at 2547 (Ginsburg, J., dissenting).

<sup>49</sup> For example, in *Holling Press*, an employer terminated an employee for forcefully trying to enlist the aid of coworkers in her sexual harassment complaint. 343 N.L.R.B. 301, 301 (2004). The ALJ determined that the employer, after receiving information regarding the employee's sexual harassment complaint, "rushed to conduct an investigation of [the complaining employee], not [the alleged harasser]." *Id.* at 312 n.8 (decision of A.L.J. Evans).

tion.<sup>50</sup> In such instances, employees should not be denied or delayed relief because they did not choose the option — preferred by the dissenters — to pursue claims that, though overlapping with Title VII, could permissibly be adjudicated by the NLRB.

In light of these legal developments and practical realities, protecting group efforts to vindicate individual rights might provide positive value in advancing employment law's goals of creating safe and healthy work environments. Because of the Supreme Court's evolving employment law jurisprudence, Title VII rights might be further abridged by employer-drafted policies that provide a "mere pretense of internal process," which may result in "a disguised form of [workplace] deregulation."<sup>51</sup> To prevent this from happening, workers likely must play a greater role in internal regulation.<sup>52</sup> Although one individual's Title VII complaint may seem removed from the collective action of seeking greater workplace-policy input, requesting aid from coworkers can be seen as a first stage of collective activity, triggering the solidarity principle identified by the Board. Protecting this nascent collective action is important because worker participation in early rounds is likely to increase participation at later stages — not only by the initial participants, but also by other coworkers.<sup>53</sup> Additionally, a failure to protect nascent activity would likely decrease the probability of future collective action.<sup>54</sup>

Moreover, because employers may resist employee input on company policies as an intrusion into management rights or as an attempt to form a proto-union,<sup>55</sup> Section 7's protection of collective action would create a new kind of litigation threat to make employers more receptive to employee input. Faced with the possibility of a protracted unfair labor practice proceeding<sup>56</sup> and unwanted attention from union organizers as a result of such a proceeding,<sup>57</sup> an employer may determine that the costs of resisting nonunion employees' desire for a great-

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<sup>50</sup> See, e.g., Sachs, *supra* note 44, at 2715–21 (describing the actions of Mexican workers protesting discrimination based on national origin through "collective action," *id.* at 2716, and unsuccessfully filing retaliation charges before the NLRB, *id.* at 2719, before successfully filing Title VII charges, *id.* at 2720).

<sup>51</sup> Estlund, *supra* note 46, at 337.

<sup>52</sup> See *id.* at 324 ("The movement of employment law and its enforcement inside firms creates . . . the need . . . to revive employees' voice inside firms.")

<sup>53</sup> See Sachs, *supra* note 44, at 2742–43.

<sup>54</sup> See *id.* at 2743.

<sup>55</sup> See Estlund, *supra* note 46, at 364–65.

<sup>56</sup> See, e.g., Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1795–97 (1983) (describing the many delaying tactics available in unfair labor practice proceedings).

<sup>57</sup> See Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 210–11 (2007) (noting that the mere filing of unfair labor practice complaints can benefit workers by creating public-relations pressure).

er say in company policy outweigh any benefits from retaining exclusive control over such policies.<sup>58</sup>

Contrary to the dissenters' fear, these positive protections likely will not substantially undermine employers' ability to rectify Title VII violations. In reciting a litany of NLRA restrictions on employer conduct, the dissenters ignore longstanding precedent that reflects concern for an employer's ability to investigate employees for wrongdoing. Even absent Title VII concerns, employers may compel employees to answer questions on disciplinary matters. In *Cook Paint & Varnish Co. v. NLRB*,<sup>59</sup> the D.C. Circuit held that an employer could threaten to discipline an employee if the employee, in the context of a grievance-related investigation, refused to answer questions related to a coworker's conduct.<sup>60</sup> Presumably, an employer's actions in conducting an investigation required to escape Title VII liability would receive even greater deference from the Board. Indeed, this presumption appears to have applied in *Fresh & Easy*, where the majority refused to find that the employer violated the NLRA in conducting its investigation.<sup>61</sup> Of course, labor law process restrictions might still weaken employment law if Section 7 protection of an individual's sexual harassment complaint caused an employer to refrain from conducting a thorough investigation in fear of labor law liability. This seems unlikely, however, given an employer's incentive to avoid the greater damage awards available under Title VII.<sup>62</sup>

Because the Board's ruling creates positive value for individuals asserting Title VII rights while imposing no greater burden on employees or employers in pursuing the values behind Title VII, *Fresh & Easy* reinforces a growing trend in which legal protections of employees' individual and collective rights are understood as more harmonious than previously believed. Given the dilution of Title VII's individual-rights protections, the ability of workers to use the two statutes in combination has become increasingly important.

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<sup>58</sup> Cf. *NLRB v. Streamway Div. of the Scott & Fetzer Co.*, 691 F.2d 288, 289 (6th Cir. 1982) (describing how a company created a committee of workers to provide direct input on company policies in the midst of a union organizing campaign).

<sup>59</sup> 648 F.2d 712 (D.C. Cir. 1981).

<sup>60</sup> *Id.* at 722-23. The court relied in part on established Board precedent that an employer may conduct a disciplinary investigation without violating the NLRA. *Id.* (citing *Serv. Tech. Corp.*, 196 N.L.R.B. 845 (1972); and *Primadonna Hotel, Inc.*, 165 N.L.R.B. 111 (1967)).

<sup>61</sup> *Fresh & Easy*, 361 N.L.R.B. No. 12, at 8-9.

<sup>62</sup> See *Sachs*, *supra* note 44, at 2730-31 (comparing the NLRA's merely "compensatory" damages, *id.* at 2730, to Title VII's "punitive" damages, *id.* at 2731).