United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 28, 2011

TO: Jane North, Acting Regional Director
Region 11

FROM: Barry J. Kearney, Associate General Counsel 506-0170
Division of Advice 506-2001-5000
512-5024-4167
SUBJECT: Buel, Inc. 512-5024-6300
Case 11-CA-22936 512-5036-6720-4300

The Region submitted this case for advice because it involves allegations that the Employer's response to the Charging Party's Facebook posting violated Section 8(a)(1). Specifically, the Region seeks advice as to whether the Employer engaged in unlawful surveillance by viewing the posting, and whether the Employer unlawfully threatened the Charging Party with adverse action, removed him from leader operator status, and constructively discharged him because of protected concerted activity. We conclude that the Charging Party's Facebook comments did not constitute concerted activity and, accordingly, the charge should be dismissed in its entirety.

FACTS

On December 31, 2010, the Charging Party, a truck driver employed by Buel, Inc. (the Employer), traveled from Kansas to Laramie, Wyoming to make a delivery. When he reached Laramie, he learned that the roads were closed due to snow. He called the Employer's on-call dispatcher several times to report that the roads were closed, but his calls were automatically forwarded to the office phone and then unanswered because of the holiday. He eventually reached another dispatcher and informed him that the roads were closed and the on-call dispatcher was unreachable. The dispatcher said that he would pass on that information.

While in Laramie, the Charging Party spoke to other drivers and discussed that the on-call dispatcher was not answering the phone. He then made several posts on his Facebook page.

The following portion of those postings is alleged to constitute concerted protected activity:

> Charging Party: "Damn!!! I was traveling good till I got to Laramie, WY .....they got cotton pickin road closed!!!!!!"
> Fellow employee: "lol poor baby"
> Charging Party" "Dammit!!!!! I woke up with three inches on my hoody!!!! (that is snow) and the highway is still closed....missing my baby! wish she were here with me. With the wind chill its -33 below zero here!!!!!! Wooooppppie snowball fight!!!! Well now!!!!! How the hell are you suppose to call in to your company dispatch and tell them anything when no one is there and the phone were not forwarded... Well if Im late or any other driver for our company is late it will be your fault for not properly forwarding the phones to the on call dispatch!!!!!! Well what else is new anyway my company is running off all the good hard working drivers and settling for the rejects of trucking.....what a buzz kill!!!!!"

No other employees joined in this "conversation."

The Charging Party is Facebook "friends" with the Employer's [redacted], [redacted]. On January 3, 2011,[1] [redacted] posted a critical response on the Charging Party's Facebook page that led to a Facebook dialogue between the two of them. During that conversation, the Charging Party stated, "I guess I better watch what I post ... I might end up losing my J.O.B. I forgot about those on my facebook with the power!!!!" [redacted] responded, "[You] won't have to worry about what u say any more ... besides I heard a company in Hickory is hiring." In addition, [redacted] engaged in a simultaneous Facebook conversation with [redacted]. [redacted] stated in part, "Hope he's in tomorrow so I can be the true bitch that I am!!!! ... hope he's wearing big girl panties tomorrow. ... u know what I said the last time ... don't let it be the first person I see!!!!"

On January 9, the Charging Party returned to the Employer's facility. The Employer's [redacted] informed him that he was being stripped of his status as a leader operator because of his Facebook comments and unprofessionalism. As a leader operator, he gave assistance to new drivers and was paid an additional $100 per month for his cell phone bill.

He returned to the facility again on January 25 and found that no one there would talk to him. He took three

[1] All dates are in 2011 unless otherwise noted.

days off and then resigned in writing on January 28. He claims that he was forced to resign because of the way the office personnel acted towards him.

The Charging Party alleges that the Employer, through [redacted], unlawfully threatened him with discharge because he posted comments critical of the Employer's treatment of drivers, engaged in unlawful surveillance by monitoring his Facebook page, and removed him from leader operator status and constructively discharged him because he engaged in protected concerted activity.

ACTION

We conclude that the Charging Party did not engage in any concerted activity when he made his Facebook posting. Accordingly, the Employer's actions in response to that posting did not violate Section 8(a)(1).

The Board's test for concerted activity is whether activity is "'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.'"[2] The question is a factual one and the Board will find concert "[w]hen the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise[.]"[3] Thus, individual activities that are the "logical outgrowth of concerns expressed by the employees collectively" are considered concerted.[4] Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention.[5]

Here, there is no evidence of concerted activity. The Charging Party did not discuss his Facebook posts with any of his fellow employees, and none of his coworkers responded

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[2] *Meyers Industries*, 281 NLRB 882, 885 (1986) (*Meyers II*), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied,* 487 U.S. 1205 (1988).

[3] *Id.* at 886.

[4] *See, e.g., Five Star Transportation, Inc.*, 349 NLRB 42, 43-44, 59 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008) (drivers' letters to school committee raising individual concerns over a change in bus contractors were logical outgrowth of concerns expressed at a group meeting).

[5] *Meyers II*, 281 NLRB at 887.

to his complaints about work-related matters. Although he had discussed the fact that the on-call dispatcher was not reachable with other drivers, there is insufficient evidence that his Facebook activity was a continuation of any collective concerns. Moreover, the Charging Party plainly was not seeking to induce or prepare for group action. Instead, he was simply expressing his own frustration and boredom while stranded by the weather, by griping about his inability to reach the on-call dispatcher.

Accordingly, any alleged threats of reprisals contained in [redacted] and [redacted] Facebook comments and the removal of the Charging Party's leader operator status were not unlawful because they were not in retaliation for any protected concerted activity.

Similarly, there was no unlawful surveillance of protected concerted activity. Employer surveillance or creation of an impression of surveillance constitutes unlawful interference with Section 7 rights because employees should feel free to participate in protected activity "without the fear that members of management are peering over their shoulders[.]"[6] An employer creates an impression of surveillance when "the employee would reasonably assume from the [employer's] statement that their [sic] union activities had been placed under surveillance."[7] Here, there were no union or protected concerted activities subject to surveillance.

Moreover, even where employees are engaging in protected activity, there can be no unlawful surveillance if the employer's agent was invited to observe. Thus, in *Donaldson Bros. Ready Mix, Inc.*, the Board held that an employer did not engage in unlawful surveillance where a supervisor attended a union meeting by invitation and subsequently reported back on what occurred there.[8] Further, there was no evidence that the supervisor was acting at the employer's direction or that surveillance was the express purpose for the supervisor's attendance.[9] When

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[6] *See Flexsteel Industries*, 311 NLRB 257, 257 (1993).

[7] *Id.* (violation found where personnel manager informed an employee on two occasions that he had heard a rumor that the employee instigated the union campaign and was passing out authorization cards).

[8] 341 NLRB 958, 960-61 (2004).

[9] *Id.* at 961. *See also Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1275-76 (2005), *enforced* 181 F.App'x 85

the Charging Party here "friended" his supervisor on Facebook, he essentially invited her to view his Facebook page. And as in *Donaldson Bros.*, there is no evidence that [redacted] was acting at the Employer's direction or was on Facebook for the sole purpose of monitoring employee postings.

Finally, the Charging Party also cannot establish the necessary elements of a constructive discharge, that: (1) burdens were imposed that caused, or were intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign; and (2) those burdens were imposed because of the employee's protected activities.[10] Here, the alleged "silent treatment" that the Charging Party driver experienced at the Employer's facility was neither difficult nor unpleasant enough to force a resignation, particularly since most of his work hours are spent away from the facility and on the road.[11] In any event, the alleged "burden" was not imposed because of any protected activity.

Accordingly, the Region should dismiss the instant charge in its entirety, absent withdrawal.

B.J.K.

[redacted]

(2d Cir. 2006) (employer did not unlawfully create impression of surveillance where supervisor mentioned posting on union website that was forwarded to him by an employee, where employees should reasonably have assumed that their postings were subject to public dissemination by another website subscriber).

[10] *See, e.g., Georgia Farm Bureau Mutual Insurance Cos.*, 333 NLRB 850, 851 (2001), *citing Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

[11] *See, e.g., Performance Friction Corp.*, 335 NLRB 1117, 1174 (2001) (three hours of verbal harassment on the work floor does not satisfy the first prong of *Crystal Princeton Refining*).