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

Advice Memorandum

DATE: August 9, 2011

TO: Cornele A. Overstreet, Regional Director
Region 28

FROM: Barry J. Kearney, Associate General Counsel 506-0170
Division of Advice 506-2017
506-4033-1200

SUBJECT: Sagepoint Financial, Inc.
Case 28-CA-23441

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by discharging the Charging Party based on his Facebook posts complaining about his supervisor's preferential treatment of his colleagues. The Region has also requested advice as to whether the Employer violated Section 8(a)(1) by maintaining an unlawfully broad rule regarding Facebook postings. We conclude that the Region should dismiss the charge, absent withdrawal, because the Charging Party did not engage in concerted activity for the mutual aid and protection of fellow employees and the Employer did not establish or maintain a generally-applicable rule.

FACTS

The Charging Party was hired by Sagepoint Financial, Inc. (the Employer) as a technical support analyst to work on the Employer's help desk. In 2009, the Employer appointed [redacted] as the manager of his department. The Charging Party had applied for this position and was unhappy about [redacted] selection, as well as her subsequent hiring of two new technical support analysts. He believed that none of these individuals had the requisite computer experience for the positions they received.

During the summer of 2010,[1] the Charging Party took a six-week medical leave of absence. When he returned, he informed his managers and coworkers that during his leave, he had been asked to leave his apartment for fighting, his [redacted]. In late August and September, he had several work disputes with the two new technical support analysts and was dismayed whenever [redacted] left one of them in charge while she travelled for work. He repeatedly e-mailed [redacted] about these issues. In one such message he stated: "I am really, really weary of your abuse [redacted]. You've always had an issue with me, even before

FOIA Exemptions 6 and 7(C)

[1] All dates are in 2010 unless otherwise noted.

taking over this team.... The only solution I can think of ... is one of us has to go[.]" The Charging Party also used Facebook regularly to complain about this situation. His Facebook "friends" included several coworkers and supervisors. Occasionally a coworker would respond to express amusement at his posts or sympathy for his situation. In one Facebook exchange, a friend who was not a coworker asked whether he was "Gunnin for a raise or promotion[.]" He responded, "Kissing up I am not. Gunning? Perhaps[.]"

As a result of these e-mails and postings, on September 16 the Employer issued the Charging Party a written warning for "unacceptable behavior and unprofessional conduct." The accompanying "Action Plan" advised the Charging Party to "conduct [himself] in a professional manner; do not disrespect other employees or your management team or make negative comments."

Despite this warning, the Charging Party continued to post inappropriate comments on Facebook. His postings detailed his dissatisfaction with [redacted], stating, among other things, that he "hate[d] the management" and "my manager is a bitch." He also suggested that she was having affairs with the new technical support analysts.

One of those analysts met with the Employer's Human Resources Manager to complain about the postings and said that he was concerned that these false statements would damage his reputation. On October 7, the HR Manager and one of the Employer's Vice Presidents met with the Charging Party to discuss his use of family and medical leave and brought up his Facebook posts, advising him to stop them. The Charging Party responded that Facebook was one of his last few outlets to vent.

After this meeting, the Charging Party "unfriended" nearly everyone he worked with and then continued to use Facebook to vent throughout October and November. He repeatedly referred to [redacted] as a "bitch," called her lazy, and insinuated that she was having an affair with one of the other analysts. On December 2, he wrote, "I understand the term postal more than I should, except in my case it would be going helpdesk. Anxiety and worthless POS managers don't mix."

At about this same time, the second new support analyst went to the HR Manager to complain that the Charging Party was harassing him. He provided copies of e-mails the Charging Party had written to him and [redacted] criticizing his work performance. He also complained about the Facebook posts alleging that he was having an affair with [redacted].

On December 8, [redacted] recommended that the Employer terminate the Charging Party "due to his unacceptable behavior and unprofessional conduct." The Employer terminated him December 10 for continual behavior problems and his inability to interact with his coworkers and manager, referencing his e-mails and Facebook postings.

ACTION

We conclude that the Employer did not violate Section 8(a)(1) by discharging the Charging Party because he was not engaged in concerted activity for the mutual aid and protection of his fellow employees. We also conclude that the Employer did not promulgate or maintain a rule of general applicability regarding Facebook postings.

An individual's activity is concerted when the individual acts "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] In addition, the Board has found that employee discussions related to shared concerns about terms and conditions of employment constitute concerted activity even if no specific

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[2] *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), *rev'd sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985), *on remand 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] *Meyers II*, 281 NLRB 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.

group action is contemplated because such discussions "usually precede group action."[6]

On the other hand, comments made "solely by and on behalf of the employee himself" are not concerted.[7] Thus, for example, in *Tampa Tribune*, the Board held that when an employee who raised a concern about favoritism was speaking "only for himself" and there was no evidence that his coworkers even shared his belief that favoritism existed, his complaint was "a personal gripe" not protected concerted activity.[8]

Here, the Charging Party's repeated Facebook complaints about his supervisor and what he perceived to be her preferential treatment of two coworkers were made solely on his own behalf and were not designed to advance any cause other than his own. Moreover, he did not evidence any intention of instigating group action or bringing any group concern to management. When coworkers participated in these Facebook "conversations," they did so only to express amusement or sympathy but not because they shared a common concern about the effects of the supervisor's conduct upon their terms and conditions of

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[6] *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 212 (2007) (employee discussions about the effect of a new performance evaluation policy on wages held concerted, despite lack of evidence that employees contemplated group action), *enforced*, 519 F.3d 373 (7th Cir. 2008). *See also Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (employee discussions about scheduling changes found concerted even though no object of initiating group action) *enforcement denied in pertinent part*, 81 F.3d 209 (D.C. Cir. 209 (D.C. Cir. 1996); *Trayco of S.C.*, 297 NLRB 630, 633-34 (1990) (employee discussions with other coworkers about apparent wage differential between new hires and more senior employees constituted concerted activity; object of inducing group action need not be express), *enforcement denied mem.*, 927 F.2d 597 (4th Cir. 1991).

[7] *Meyers I*, 268 NLRB at 497.

[8] *Tampa Tribune*, 346 NLRB 369, 371-72 (2006) (employer did not violate Section 8(a)(1) or (3) by disciplining employee for his conduct during a coaching session). *See also National Wax Company*, 251 NLRB 1064, 1064-65 (1980) (employee who sought merit wage increase solely for himself was not engaged in protected concerted activity).

employment.[9] Thus, we find that the Charging Party's Facebook activity was mere griping, and, therefore, the Employer did not unlawfully discharge him based in part on that activity.

Finally, we do not find that the Employer promulgated an overly broad rule prohibiting employees from making derogatory remarks about their managers on Facebook when it issued the Charging Party's final written warning. Statements made to an individual employee in the course of discipline and in response to specific inappropriate conduct that are not communicated to any other employees are not new "rules."[10]

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

[redacted]

[redacted]

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[9] *Cf. Rhee Bros., Inc.*, 343 NLR 695, n.3 (2004) ("concerted employee protests of supervisory conduct are protected under Section 7 of the Act where such protested conduct affects employees' working conditions") (citation omitted).

[10] *See Arizona Daily Star,* Case 28-CA-23267, Advice Memorandum dated April 21, 2011 at 6-7. We note also that this Employer has a written "Internet Security & Usage Policy" (which it did not cite in discharging the Charging Party), that describes numerous, specific examples of improper conduct. Generally, rules like this that clarify their scope by including examples of clearly illegal or unprotected conduct, so that they could not reasonably be construed to cover protected activity, are not unlawful. *See Tradesmen International*, 338 NLRB 460, 462 (2002) (prohibition against statements that are "slanderous or detrimental" to the employer or its employees would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity, such as sabotage and sexual or racial harassment).