

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

Advice Memorandum

DATE: November 14, 2011

TO : Wayne Gold, Regional Director
Region 5

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 506-0170
506-2001-5000

SUBJECT: Children's National Medical Center
Case 05-CA-036658

This case was submitted for advice on whether the Employer violated Section 8(a)(1) by discharging the Charging Party over her comments on Facebook. We conclude that the Employer did not violate the Act because the Charging Party was not engaged in protected concerted activity.

FACTS

The Employer operates a children's hospital in Washington, D.C. The Charging Party is a respiratory therapist and, in addition to her usual duties, is assigned to the Transport Team, which transports patients to the hospital by ambulance, mostly from other hospitals.

On the evening of Jan. 11, 2011,¹ the Charging Party was assigned to work Transport and she was traveling by ambulance with the rest of the team to pick up a patient and bring her to the hospital. She was sitting in the back of the ambulance with a co-worker, a paramedic (the Co-worker), who was sucking his teeth during the ride to pick up the patient. The Charging Party found this practice irritating.

During the ride to pick up the patient, the Charging Party used her iPhone to post the following message on Facebook:

REALLY!!!! Must you suck your teeth every 30 seconds.
It is driving me nuts.

Two of her Facebook friends, who were not employees of the hospital, responded with supporting comments and, in reply, the Charging Party wrote:

¹ All dates are in 2011.

Actually they are about to get, beat senseless with a ventilator. (sic) It's in the back of an ambulance and I can't get away from them. UGH!!!

Once the Transport team picked up the patient and her mother, the Charging Party was seated in the ambulance facing the mother. After noticing behaviors of the patient similar to those of the Charging Party's stepson, she asked the mother whether anyone had ever told her that her daughter was autistic. The mother and Charging Party had a conversation about their children and their special needs. The Co-worker was disturbed by the Charging Party's behavior, thinking it was unprofessional for her to suggest to the mother that her child is autistic. He states that he was intending to say something to the Charging Party about it the next day.

Before the Co-worker could say anything to the Charging Party about her conduct in the ambulance, one of his colleagues showed him the Facebook post. He thought it was vulgar and personally threatening and, instead of raising it with the Charging Party, he sent an email to management the next day complaining about her comments on Facebook and her conduct during the transport. As a result, later on January 12, management called the Charging Party into a meeting and informed her that her conduct on the transport and on Facebook had been reported, and that they were removing her from the Transport Team pending further investigation.

The Employer conducted an investigation and, on January 13, suspended the Charging Party for two days because of her negative and threatening Facebook comments about her Co-worker. The Charging Party returned to work after her two day suspension, though she could no longer work in Transport. On January 25, she had another meeting with management and was given a corrective action form to explain the two-day suspension. In addition to the January 11 threat to smack a co-worker with a ventilator, the form referred to the unprofessional conversation she had with the patient's mother that day, and another Facebook comment the Employer had become aware of that she had posted on December 20, 2010. That post stated,

UGH!!!!!! This night sucks. can I just say !!!!
(sic) Apparently RT's don't know what they are talking about again.

The Charging Party explained that this was a sarcastic comment that she wrote to express frustration over the lack of respect a doctor had shown her. She stated that she had tried to explain something to the doctor but he would not listen to her. Instead, he degraded her and made her feel that, as a respiratory technician, she did not know what she was talking about. The Employer claimed that the comment was disparaging of her co-workers because it suggested that her fellow respiratory therapists do not know what they are doing.

ACTION

We agree with the Region that the Charging Party was not engaged in protected concerted activity when she posted any of her comments on Facebook, and therefore the Employer did not violate the Act by discharging her.

The Charging Party's January 11 post was not protected because it did not concern terms and conditions of employment. She was merely complaining about the irritating sounds her coworker was making during the transport that evening, and was not even suggesting that the Employer should do anything about it. Therefore, her complaint about the co-worker's noises, and her alleged threat to hit him with a ventilator to stop them, is not Section 7 protected.

To the extent that the Charging Party was also disciplined for her December 20 Facebook posting, that comment could arguably relate to terms and conditions of employment because it pertains to her view that she is not respected on the job. But, even if her comment concerned a protected subject, there is no evidence to establish concert. The Charging Party did not discuss her Facebook post with any of her fellow employees, and none of her coworkers responded to the posts. Moreover, the Charging Party was not seeking to induce or prepare for group action, and her activity was not an outgrowth of the employees' collective concerns. The Charging Party was merely airing a personal complaint about something that had happened on her shift. Accordingly, the Employer did not violate Section 8(a)(1) by discharging her, and the Region should dismiss the charge, absent withdrawal.

B.J.K.