

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

DATE: November 22, 2011

TO: Ronald K. Hooks, Regional Director
Region 26

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: TAW, Inc. 506-0170
Case 26-CA-063082 506-2001-5000

This case was submitted for advice on whether the Employer violated Section 8(a)(1) by discharging the Charging Party for refusing to remove a comment she posted on her Facebook page suggesting that the Employer was engaged in fraudulent accounting practices. We conclude that the discharge was not unlawful because it was not for conduct protected under the Act.

FACTS

The Charging Party is one of several accountants for the Employer. During the early part of 2011, the company was going through their annual audit by an outside accounting firm. The Charging Party worked with the outside accountants on the audit, and knew that when it was complete, she would have to sign a letter of representation stating that, to the best of her knowledge, the information is true, accurate, and correct, and that she is not aware of any fraud.

In January, the Charging Party's supervisor confided that she had made a serious accounting error that resulted in a large overstatement of revenue, and that she was concerned it could result in her termination. Shortly after their initial conversation about the error, the supervisor told the Charging Party that she had spoken with the chief operating officer (COO) about the error and that they had decided not to correct it, but rather, to allocate it out over the rest of the year. The Charging Party expressed her concern that contravened accounting principals.

Knowing that she was going to be asked to sign off on the audit, the Charging Party began having conversations with her co-workers about the error, what her supervisor told her about the resolution, about how she felt

about the situation, and how, as a result of all this, she felt she would not be able to sign the letter from the outside auditor based on what she knew. The employees expressed their disbelief at what was going on, and that the Charging Party had been placed in a really bad position.

After those conversations, the Charging Party decided to raise her concerns with the Employer's general counsel. The general counsel promised to look into the issue and assured her that if anything improper was going on it would be corrected.

On April 15, the audit was completed and the general counsel placed the letter of representation on the Charging Party's desk for signature. Upon reviewing the documents, the Charging Party did not see that the error had been corrected, so she expressed to the general counsel that she could not sign the letter. In an attempt to clarify the situation, the general counsel scheduled a meeting with the Charging Party, her supervisor, and the outside auditor for April 18, 2011.

On April 18, just prior to attending the scheduled meeting, the Charging Party posted the following statement on her Facebook page:

I wonder if accounting degrees used to be given out based on different criteria since I am fairly certain GAAP standards have always deemed certain things fraud.

The Employer learned of the post prior to the meeting but did not discuss it with the Charging Party at that time.

The meeting with the outside auditor proceeded as scheduled, and the Charging Party was given the opportunity to share the concerns that led to her refusal to sign the letter of representation. The auditor addressed those concerns, answered some of the Charging Party's additional questions, and assured her that the Employer was not engaged in fraud and that the audit conformed to general accounting principles. The Charging Party signed the letter of representation at the end of the meeting.

On April 21, the Employer's general counsel spoke with the Charging Party and informed her that the Employer was aware of the comment the Charging Party posted on her Facebook page suggesting that the Employer was engaged in accounting fraud. The general counsel did not make any threats, but did ask her to take down the post. The Charging Party did not think she should be required to take down the post, and so she did not. The Employer learned on April 25 that the post was still on Facebook and terminated the Charging Party for refusing to take it down.

ACTION

We agree that the discharge did not violate Section 8(a)(1) because the Charging Party was not engaged in conduct protected by Section 7. Even if the Charging Party initially posted the comment in furtherance of alleged concerted activity for mutual aid and protection, her refusal to remove the comment after the April 18 meeting with the outside auditor was not protected. Prior to the meeting, the Employer was aware of the post but did not ask her to remove it. The Employer first raised the post with her and asked her to remove it on April 21. At that point, whatever concerns the Charging Party had about the Employer's accounting practices should have been assuaged by the auditor's assurances on April 18 that the Employer was not engaged in fraud and that the audit conformed to general accounting principles. Therefore, her comment suggesting that the Employer was engaged in fraud was false and, after April 18, she knew it was false. Her insistence on retaining the post after knowing it was false is not entitled to protection under the Act.¹

Since the Charging Party's Facebook comment did not constitute protected concerted activity, her discharge was not unlawful. The Region should therefore dismiss the charge, absent withdrawal.

B. J. K.



¹ *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) ("Statements are unprotected if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.").