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

Advice Memorandum

DATE: August 31, 2011

TO : Wanda P. Jones, Regional Director
Region 27

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

SUBJECT: Marco Transportation
Cases 27-CA-21850

506-2001-5000
506-4033-0100
506-4033-5100

This case was submitted for advice on whether the Charging Party engaged in protected concerted activity when he posted a comment on his Facebook page regarding the Employer's failure to pay its employees on the expected payday. We agree with the Region that the Charging Party's Facebook postings were protected concerted activity, and that he was unlawfully discharged for them.

An individual employee's action is concerted if it is a continuation of earlier discussions with coworkers that contemplated group action regarding terms and conditions of employment.[1] Here, the late paychecks caused a great uproar among the employees: the Charging Party and his coworkers exchanged texts and phone calls throughout the day regarding the missing paychecks. In addition to the phone calls and text messages among them, several employees had contacted the Employer's office when they discovered their paychecks

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[1] *Cf., Five Star Transportation, Inc.* 349 NLRB 42, 43-44, 59 (2007) (drivers letters to school committee raising individual concerns over a change in bus contractors were logical outgrowth of concerns expressed at a group meeting), *enforced*, 522 F.3d 46 (1st Cir. 2008); *Needell & McGlone, P.C.*, 311 NLRB 455, 456 (1993) (individual employee's complaint found to be concerted because it was logical outgrowth of discussions with other employees about supervisor giving preferential treatment to a coworker), *enforced mem.* 22 F.3d 303 (3d Cir. 1994); *JMC Transport*, 272 NLRB 545, 545 n.2 (1984) (individual employee's complaint to employer about paycheck protected because "it grew out of the earlier concerted complaint regarding the same subject matter"), *enforced*, 776 F.2d 612 (6th Cir. 1985). *See also, Every Woman's Place,* 282 NLRB 413, 413 (1986)(individual employee's telephone inquiry to federal agency regarding overtime compensation after complaining to employer found to be logical outgrowth of prior group complaints and discussions), *enforced mem.*, 833 F.2d 1012 (6th Cir. 1987).

had not been deposited. The Facebook posts continued that conversation and show the Charging Party's shared concern not only for himself but also for the other employees: "they want *us* to work but they don't want to pay *us*" and "it seems they forgot to pay *everyone*... guess it's just not in the budget." Thus, the Charging Party's Facebook comments were a continuation of the discussion among employees that began earlier in the day.[2]

Moreover, the Charging Party's Facebook postings encouraged one of the Charging Party's coworkers ("Employee A") to approach the Employer about the drivers' collective concerns. After seeing the Charging Party's Facebook postings, Employee A told the Employer, "you've pissed off a lot of drivers, there is even talk about it on Facebook."[3] That the Facebook activity encouraged the Charging Party's co-worker to confront the Employer about the employees' shared concerns demonstrates that the postings were more than mere griping, but rather an activity that induced group action.[4]

The Employer claims that it terminated the Charging Party for making a threat of violence when he wrote on Facebook, "Lol I'll skip the car just want to jump up and down on his head," approximately six minutes after the initial Facebook posting.[5] When the Charging Party wrote that post referring to the Employer, he was responding to a friend who commented after seeing the Charging Party's Facebook posting about employees not getting paid, "That's messed up. Which car is your bosses? ;) just kiddin."[6]

We agree with the Region that *Atlantic Steel*, not *Wright Line*, is the appropriate framework for evaluating the lawfulness of the Charging Party's discharge because this allegedly threatening comment arose from (ie., was part of

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2 FOIA Exs. 5, 6, 7(C), & 7(D) [redacted]

3 FOIA Exs. 5, 6, 7(C), & 7(D) [redacted]

4 *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), *aff'd.* 835 F.2d 1481 (D.C. Cir. 1987). *See also, e.g., Timekeeping Systems, Inc.*, 323 NLRB 244, 244, 247-248 (1997)(finding email to all employees about employer vacation policy protected where "object of inducing group action [was not] express," *citing Whittaker Corp.*, 289 NLRB 933 (1988)).

5 "Lol" is an abbreviation for "laughing out loud."

6 The ;) is an emoticon that represents winking.

the "res gestae of") protected activity and was not a separate and independent basis for discipline.[7] The Charging Party posted the comment just after his initial posting, while waiting to see how his coworkers would respond, and it was part of the conversation that began with the Charging Party's comments about employees not being paid on time.

Applying *Atlantic Steel*,[8] we reject the Employer's claim that the posting, "Lol I'll skip the car just want to jump up and down on his head," was so opprobrious that the Charging Party's activity lost the protection of the Act. The Facebook statements related to payment of wages, a subject clearly protected by Section 7. Further, the comments were posted online during the Charging Party's non-working time and neither disrupted operations nor undermined supervisory authority.[9] As for the nature of the Charging Party's posting, viewed in context, it was not a true threat of violence. In *Kiewit Power Constructors Co.*, two employees told a supervisor that he "better bring [his] boxing gloves" and that the situation could "get ugly" when they received

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[7] *See Goya Foods Inc.*, 356 NLRB No. 73, slip op. at 2 n.8 (2011) (finding "come and take me out" not insubordination but part of employee's protected response to employer's illegal order to leave a union meeting), *citing Tampa Tribune*, 351 NLRB 1324, 1326 n.14 (2007), *enforcement denied sub nom., Media General Operations*, 560 F.3d 181, 187 (2009); *Thor Power Tool Company*, 148 NLRB 1379, 1380-81 (1964)(calling superintendent "horse's ass" following grievance discussion was not independent basis for discharge but "part and parcel" of employee's participation in protected grievance activity), *enforced*, 351 F.2d 584 (7th Cir. 1965). *Compare, Sam's Club*, 349 NLRB 1007, 1008-09 (2007) (suspending employee who told store manager "[t]his is crap" lawful because it was separate from employee's protected request for a witness and the employer considered her too upset to perform her job duties).

[8] The Board considers four factors when determining whether an employee who is engaged in protected, concerted activity has by opprobrious conduct lost protection of the Act: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employees outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979).

[9] *See Noble Metal Processing, Inc.*, 346 NLRB 795, 800 (2006) (Board upheld ALJ finding that employee statements during an employee meeting held in a conference room were outside the employee work area and therefore did not disrupt the work process).

warnings for engaging in protected activity.[10] Nonetheless, the employees did not lose the protection of the Act because the statements were not "unambiguous... threats of physical violence" and were unaccompanied by gestures or movement toward the supervisor.[11] Here, the Charging Party responded to a comment from his friend which ended with "just kiddin" and began the comment with "Lol," indicating the joking nature of the exchange. Further, the Charging Party was hundreds of miles away from the Employer when he posted the comment, had no history of violence, and did not behave in a threatening manner or make any further threats when he returned to the workplace. Under the circumstances, the statements were not "objectively threatening."[12] Finally, although the activity was not provoked by any unfair labor practice committed by the Employer, given that three of the four *Atlantic Steel* factors weigh in favor of protection, we find that the activity was not so opprobrious as to lose the protection of the Act.[13]

We also agree with the Region that, even applying a *Wright Line* analysis, the discharge was unlawful. The Employer's assertion that it fired the Charging Party for making a threatening statement was a pretext to obscure that the real reason for the discharge was his protected concerted activity.[14] Thus, during an unemployment insurance hearing before a state administrative law judge, the Employer's Director of Operations ("Director") stated that he decided to discharge the Charging Party because he was concerned that the Charging Party's Facebook postings made a "public outcry" and were on "public view where others could see it." In other words, notwithstanding his stated concern that the posting threatened violence, his real concern was that the Charging Party's statements about working conditions could be seen by other employees and lead to group action. Pretext is also shown by evidence that the Director of Operations fabricated a story that Employee A made the Director a "friend" on Facebook in order to show

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[10] 355 NLRB No. 150, slip op at 2. (2010), *enforced*, No. 10-1289, slip op at 2. (D.C. Cir. August 3, 2011).

[11] *Id.* at 3.

[12] *Goya Foods*, 356 NLRB No.73, slip op. at 3.

[13] *See Noble Metal Processing,* 346 NLRB at 795 n. 2.

[14] *See Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007) ("where it is shown that the employer's proffered reasons 'are pretextual - that is, either false or not in fact relied upon - the [employer] fails by definition to show that it would have taken the same action for those reasons" (internal citations omitted)).

him the Charging Party's Facebook posts.[15] Contrary to the Director's assertion, the copy of the Facebook page he provided to the Region was obtained through the Facebook account of the Employer's dispatcher, not Employee A, and Employee A refutes that he allowed the Director to become his Facebook friend or that he reported the Facebook activity as a threat. It appears that the Director fabricated his version of events to bolster the Employer's claim that other employees viewed the Charging Party's Facebook posting as threat.[16] Therefore, we reject the Employer's claim that it discharged the Charging Party for posting a threat on Facebook, but conclude instead, that the Charging Party was discharged for engaging in protected concerted activity.

Accordingly, the Region should issue complaint, absent settlement, alleging that the discharge violated Section 8(a)(1) of the Act.

B.J.K.

[redacted]

[15] In order to become a "friend" on Facebook an individual must send someone a request and wait for that person to accept the request or receive an invitation from someone and accept the request.

[16] *See Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)(holding that the trier of fact can infer the employer desires to conceal an improper motive when the stated motive for discharge is proven false).