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

Advice Memorandum

DATE: November 28, 2011

TO: Marlin O. Osthus, Regional Director
Region 18

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

SUBJECT: Wolters Kluwer
Case 18-CA-64873

506-0170
506-2001-5000
512-5036-76720

The Region submitted this case for Advice as to whether the Employer violated Section 8(a)(1) by discharging the Charging Party for a Twitter post criticizing the Employer's choice of software. We conclude that the Employer unlawfully discharged the Charging Party because his post was a continuation of earlier complaints by him and his fellow employees among themselves and to their supervisor regarding the effects of the new software on their working conditions. In addition, the Employer violated Section 8(a)(1) by maintaining an overly broad social media rule that directs employees not to engage "in any conduct that would not be acceptable in the Company's workplace."

FACTS

The Charging Party worked for approximately five years as an interactive marketing specialist for Wolters Kluwer Financial Services, Inc. (the Employer), a firm that provides regulatory compliance solutions to banking, mortgage, lending, insurance, and securities companies. In the spring and early summer of 2010, the Employer decided to transition to a new software content management system produced by Ektron, Inc. The employees experienced a number of issues with the new software. During training sessions on the product, both the Charging Party and one of his coworkers complained to their supervisor about these issues. In addition, as they continued to use the software, the Charging Party and two of his coworkers repeatedly brought complaints about the Ektron software to each other and to their supervisor.

On July 20, 2011,[1] the Charging Party used his nonwork computer to post the following tweet on his personal Twitter account: "10x the horsepower but -10x productivity. suck my ass ektron." None of his coworkers follow his Twitter account, and none commented on this tweet either electronically or in person. Someone at Ektron saw it, however, and notified the Charging Party's supervisor.

On July 21, the Charging Party's supervisor called him into a meeting with a human resources manager. The manager asked the Charging Party why he posted the comment, and the Charging Party said that he was generally frustrated and venting. The HR manager informed the Charging Party that his post violated provisions in the Employer's social media policy that directed employees not to "cite or reference customers, [business] partners or suppliers" and prohibited the use of obscenity. The full text of the "no obscenity" provision reads: **"Don't use ethnic slurs, personal insults, obscenity, or engage in any conduct that would not be acceptable in the Company's workplace."** The following day, the Employer terminated the Charging Party for violation of its social media policy.

ACTION

We conclude that the Employer unlawfully terminated the Charging Party for engaging in protected concerted activity, in violation of Section 8(a)(1). The Employer also violated Section 8(a)(1) by maintaining an overly broad social media rule that essentially prohibits employees from engaging in unacceptable conduct without sufficiently clarifying what such conduct includes.

The Charging Party's Discharge

Section 7 protects employees' right to engage in "concerted activities" that are for "mutual aid and protection." The Board's test for such concerted activity is whether the 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

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

[2] *Meyers Indus.*, 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).

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] The Board will consider such individual activities concerted where "the concerns expressed by the individual are [a] logical outgrowth of the concerns expressed by the group."[5]

Here, the Charging Party and his coworkers repeatedly discussed among themselves problems that they were having working with the new Ektron software and brought these problems to their supervisor. The Charging Party's Twitter post addressed the same shared concerns that the employees had concertedly complained about. His tweet was just another in a series of attempts by the employees to bring attention to the problems that they were experiencing working with the Ektron software in order to improve their working conditions. Regardless of whether this particular complaint resulted in comment from his coworkers, or some other third party who was experiencing similar problems, it was a continuation of earlier complaints expressed by the group.

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[3] *Id.* at 886.

[4] *Five Star Transportation, Inc.*, 349 NLRB 42, 43-44, 59 (2007) (drivers' individual letters to school committee raising individual concerns over a change in bus contractors were "logical outgrowth of concerns expressed by the employees collectively" at a group meeting), *enforced*, 522 F.3d 46 (1st Cir. 2008). *See also Needell & McGlone, P.C.*, 311 NLRB 455, 456 (1993) (employee was engaged in protected concerted activity when she complained about preferential treatment accorded a fellow secretary because her complaint was the logical outgrowth of concerns on the same subject discussed by her and her coworkers among themselves and raised by the employee at a staff meeting), *enforced mem.*, 22 F.3d 303 (3d Cir. 1994); *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (employee's call to Department of Labor over change in lunch hour policy "logically grew out of" employees' complaints among themselves and to their manager).

[5] *C & D Charter Power Systems*, 318 NLRB 798, 798 (1995), *enforced mem.*, 88 F.3d 1278 (D.C. Cir.), *cert. denied*, 519 U.S. 1006 (1996), *quoting Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), *enforced*, 53 F.3d 261 (9th Cir. 1995).

We also conclude that the nature of the Charging Party's communication did not cause him to lose the protection of the Act. In the context of social media, we apply a modified *Atlantic Steel* analysis[6] that incorporates relevant considerations from the *Jefferson Standard* test.[7] *Atlantic Steel* is generally used to analyze communications between employees and supervisors, and specifically focuses on whether those communications would disrupt or undermine shop discipline.[8] Under *Atlantic Steel*, the Board considers four factors in determining whether employee conduct is so "opprobrious" as to forfeit protection under the Act: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."[9] The application of two of the *Atlantic Steel* factors to a social media posting is straight forward: the subject matter and whether the discussion was provoked by an unfair labor practice. The remaining *Atlantic Steel* factors -- the location of the conversation and the nature of the outburst -- must be adapted to reflect the inherent differences in a social media posting from an outburst in the workplace. Given that the conversation may also be viewed by some small number of non-employee members of the public, we must also consider the impact of the posting on the Employer's reputation and business. Therefore, a modified *Atlantic Steel* analysis that considers not only the disruption to workplace discipline, but also borrows from *Jefferson Standard* to analyze the alleged disparagement of the

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[6] *Atlantic Steel Company*, 245 NLRB 814 (1979).

[7] *NLRB v. Electrical Workers Local No. 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

[8] See, e.g., *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005) (sustained profanity against supervisor in and around his cubicle in large open area full of cubicles occupied by both supervisory and nonsupervisory personnel undermined authority of supervisor subject to the attack); *Aluminum Co. of America*, 338 NLRB 20, 21-22 (2002) (employee's profane tirades in break room that could be overheard by coworkers would reasonably tend to affect workplace discipline by undermining the authority of the supervisors subject to his attacks).

[9] 245 NLRB at 816.

employer's products and services, more closely follows the spirit of the Board's jurisprudence regarding the protection afforded to employee speech.

Generally, the Board will find that otherwise protected statements related to a labor dispute or terms and conditions of employment that are made to third parties lose protection if they are either maliciously untrue or otherwise so disloyal and reckless as to warrant a loss of protection.[10] The Board repeatedly has distinguished between unprotected disparagement of an employer's product that is calculated to harm the employer's reputation and reduce the public's patronage and "the airing of what may be highly sensitive issues."[11] For example, in *Professional Porter & Window Cleaning Co.*, the Board found that housekeeping employees' statements about the quality of equipment and supplies provided to them by their employer did not constitute unprotected disparagement.[12] The housekeeping employees sent a letter to their employer's customer, the administrator of the facility that they cleaned, stating that the facility was "deteriorating" because the employer was diluting the cleaning products and the building was not really being cleaned. The Board found that the employees' purpose was to "remedy the various problems they were encountering in their working conditions" and not to "disparage the Respondent's product or undermine its reputation."[13]

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[10] *See, e.g., Mastec Advanced Technologies,* 357 NLRB No. 17, slip op. at 5-6 (July 21, 2011) (technicians' statements on television news program revealing that they had been instructed to mislead customers were not maliciously false and did not constitute unprotected disloyalty or reckless disparagement); *Valley Hospital Medical Center, Inc.,* 351 NLRB 1250, 1252-54 (2007) (employee statements at press conference, on website, and on flyer that related to the parties' ongoing dispute over staffing levels were neither maliciously false nor disloyal), *enforced sub nom. Nevada Service Employees Union, Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009).

[11] *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982), *enforced mem.,* 742 F.2d 1438 (2d Cir. 1983).

[12] *Id.*

[13] *Id.* (finding employer unlawfully discharged the author of the letter).

Applying a modified *Atlantic Steel* analysis here, we find first that the subject matter of the Charging Party's tweet weighs in favor of retaining the protection of the Act. The nature of the discussion, considered in light of the fact that it was not disruptive of the workplace but can be viewed by the public, also weighs in favor of protection. As in *Professional Porter & Window Cleaning Co.*, the Charging Party's purpose was to find a solution to the problems he and his fellow employees were encountering in their working conditions caused by the Employer's choice of suppliers and not to disparage the Employer's products or undermine its reputation. Moreover, his brief use of profanity was not sufficiently egregious to warrant a loss of protection under the traditional *Atlantic Steel* analysis.[14] It is well established that the Act allows employees "some leeway in the use of intemperate language" that is part of the "res gestae" of protected activity.[15] Accordingly, we conclude that on balance that the Charging Party's comments were not so disparaging or opprobrious as to cause him to lose the protection of the Act, even though his tweet was not provoked by an unfair labor practice.[16] Consequently, his discharge violated Section 8(a)(1).

The Employer's Unlawful Social Media Rule

An employer violates Section 8(a)(1) through the maintenance of a rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights."[17] The

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[14] *See, e.g., Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322-23 (2006) (brief outburst of profane language, i.e., telling another employee to "mind [her] f--- ing business," did not tip the balance in favor of finding the conduct unprotected); *Stanford Hotel*, 344 NLRB 558, 559 (2005) (employee's calling manager a "f---ing son of a bitch" weighed against finding outburst protected but was not sufficient to cause him to lose protection).

[15] *Beverly Health & Rehabilitation Services*, 346 NLRB at 1323.

[16] *See, e.g., Noble Metal Processing, Inc.*, 346 NLRB 795, 795 n. 2 (2006) (absence of provocation did not cause loss of protection where fourth factor was clearly outweighed by initial three factors).

[17] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

Board has developed a two-step inquiry to determine if a work rule would have such an effect.[18] First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. Second, if the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[19] Nothing in the Employer's social media policy explicitly restricts Section 7 activity; further, there is no suggestion that the Employer promulgated this policy in response to union activity or that the policy previously has been applied to restrict protected activity. Thus, the issue here is whether employees would reasonably construe the policy language to prohibit Section 7 activity.

The Board will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.[20] Rules that are ambiguous regarding their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that they do not restrict their Section 7 rights, are unlawful.[21] In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.[22] Applying this standard, the Board has found rules that prohibit "disrespectful conduct" or "improper or unseeming" conduct unlawful where, in context, such broad terms could reasonably be read to apply to protected criticism of the

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[18] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

[19] *Id.* at 647.

[20] *Id.*

[21] *See University Medical Center*, 335 NLRB 1318, 1320-1322 (2001) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no ... limiting language which removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003).

[22] *See Tradesmen International*, 338 NLRB 460, 460-461 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging" conduct would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

employer's labor policies, terms and conditions of employment, or treatment of employees.[23]

The Employer here maintains a rule in its social media policy that directs employees as follows: "Don't use ethnic slurs, personal insults, obscenity, or engage in any conduct that would not be acceptable in the Company's workplace." Although the rule prohibits specific conduct such as "ethnic slurs, personal insults, [and] obscenity," it also prohibits, in the alternative, "conduct that would not be acceptable in the Company's workplace." If the rule were phrased differently, so that the "conduct that would not be acceptable" were defined in terms of specific examples, such as ethnic slurs, personal insults, and obscenity, it is unlikely that the rule would reasonably be interpreted by employees to encompass Section 7 activity. But because the rule is phrased in the disjunctive and concludes with the phrase "*or* conduct that would not be acceptable" in the workplace, we find that the rule is unlawfully overbroad. The phrase "conduct that would not be acceptable" could reasonably be construed to encompass protected criticism of the Employer's labor policies, terms and conditions of employment, or treatment of employees.

Accordingly, the Region should issue a Section 8(a)(1) complaint, absent settlement, alleging that the Employer unlawfully discharged the Charging Party and maintained an overly broad social media rule.

B.J.K.

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[23] *Id.*; *Cincinnati Suburban Press*, 289 NLRB 966, 966 n.2, 975 (1988) (rule prohibiting "improper or unseeming conduct on or off the Company premises" found unlawful because it "fails to define the area of permissible conduct in a manner clear to employees"). *See also* *Claremont Resort and Spa*, 344 NLRB 832, 832 (2005) (rule prohibiting "negative conversations" about managers); *Southern Maryland Hospital Center*, 293 NLRB 1209, 1222 (1989) (rule against "derogatory attacks"), *enforced in pertinent part*, 916 F.2d 932 (4th Cir. 1990).