

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

DATE: October 19, 2012

TO: Daniel L. Hubbel, Regional Director
Region 17

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

SUBJECT: Cox Communications, Inc.
Case 17-CA-087612

The Region submitted this Section 8(a)(1) case for advice as to whether the Employer 1) maintained a facially unlawful social media policy, or 2) unlawfully discharged the Charging Party because of comments he made on his social media account. We conclude that the Employer's social media policy was not overly broad and did not violate Section 8(a)(1). Further, the Employer did not unlawfully discharge the Charging Party because his communications were not protected by Section 7.

FACTS

The Employer is a broadband communications company that offers television, telephone, and internet services to residential and business customers in markets across the United States. The Employer maintains a call center in Oklahoma City, Oklahoma, which provides technical support to customers.

The Employer maintains a social media policy that contains the following provisions:

Nothing in Cox's social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment. Cox Employees have the right to engage in or refrain from such activities. . . .

DO NOT make comments or otherwise communicate about customers, coworkers, supervisors, the Company, or Cox vendors or suppliers in a manner that is vulgar, obscene, threatening, intimidating, harassing, libelous, or discriminatory on the basis of age, race, religion, sex, sexual orientation, gender identity or expression, genetic information, disability, national origin, ethnicity, citizenship,

marital status, or any other legally recognized protected basis under federal, state, or local laws, regulations, or ordinances. Those communications are disrespectful and unprofessional and will not be tolerated by the Company. . .

DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on Cox logos, brand names, taglines, slogans, or other trademarks.

The Charging Party was employed as a technical support representative. In that capacity he was responsible for troubleshooting customer concerns and complaints regarding the Employer's services.

The Charging Party maintains a "Google+" account. The account lists his affiliation with Cox under his profile page, which is publicly accessible to all Google+ users, including customers of the Company.

On July 25, the Charging Party fielded a call from a customer experiencing problems with his cable television service. The Charging Party ascertained that the problem was caused by a scheduled maintenance outage and assured the customer that his troubles would shortly resolve when the testing was completed. The customer was not pleased and allegedly called the Charging Party a "faggot" before hanging up.

The Charging Party, using his cell phone, immediately accessed his Google+ account and made the following post:

Just because you are having problems with your tv service does not mean you should call me a faggot! FUCK YOU!

One co-worker responded as follows:

Doesn't it? I thought that entertainment was the single most important thing ever! How can anyone take away someone's Jersey Shore and Real Housewives of vomits loudly without being a raging bassoon?

A supervisor who saw the Charging Party's post reported it to management. The following day, as the Charging Party reported for work, the Technical Services director met him and escorted him to a conference room where the HR manager was waiting. The Technical Services director read the social media policy aloud and then told the Charging Party that his post the previous day violated the policy. The managers then put the Charging Party on paid suspension pending a determination of the appropriate discipline. The HR staff commenced an investigation that disclosed various previous posts, made on the Charging Party's Google+ account, containing

lewd language which disparaged customers. On July 30, the Technical Services director notified the Charging Party that he was terminated immediately for violating the social media policy.

ACTION

We conclude that the Employer's social media policy was not overly broad, and that the Employer did not unlawfully discharge the Charging Party because his communications were not protected by Section 7.

The Social Media Policy was Lawful

An employer violates Section 8(a)(1) of the Act through the maintenance of a rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights."¹ The Board has developed a two-step inquiry to determine if a work rule would have such an effect.² 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 nevertheless 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."³ The Board will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.⁴ 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.⁵ In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, so that they would not reasonably be construed to cover protected activity, are not unlawful.⁶

¹ *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

² *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 646-47 (2004).

³ *Id.* at 647.

⁴ *Id.*

⁵ *See University Medical Center*, 335 NLRB 1318, 1320-1322 (2001) (work rule that prohibited "disrespectful conduct" towards supervisors and other individuals 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).

⁶ *See Tradesmen International*, 338 NLRB 460, 460-461 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging" conduct would not be reasonably

The challenged provisions of the Employer's social media policy do not explicitly restrict Section 7 activity. Moreover, there is no indication that the Employer promulgated its policy in response to union activity or that the policy has been applied to restrict protected activity. Thus, the issue here is whether employees would reasonably construe the cited policy language to prohibit Section 7 activity. We conclude that they would not.

As to the provision prohibiting employees from communicating "about customers, coworkers, supervisors, the Company, or Cox vendors or suppliers in a manner that is vulgar, obscene, threatening, intimidating, harassing, libelous, or discriminatory on the basis of" any "legally recognized protected basis," the Board has indicated that a rule's context provides the key to the "reasonableness" of a particular construction. For example, a rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity.⁷ On the other hand, the Board found that a rule forbidding "statements which are slanderous or detrimental to the company" that appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not be reasonably understood to restrict Section 7 activity.⁸ In that context, employees would not reasonably believe that the rule applies to statements protected by the Act because it was listed alongside examples of egregious misconduct.⁹ Applying that reasoning here, the above provision, which consists of a long list of plainly egregious conduct, clearly would not be reasonably understood to restrict Section 7 activity.

We further find lawful the provision directing employees to "respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights"; and to "not infringe on Cox logos, brand names, taglines, slogans, or other trademarks." The Employer has a proprietary interest in its trademarks, including its logo if trademarked. Unlike other cases where employers maintained rules that unlawfully prohibited employees from using copyrighted material in their online

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).

⁷ *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005).

⁸ *Tradesmen International*, 338 NLRB at 462.

⁹ *Id.*

communications,¹⁰ this rule does not prohibit the use, but merely urges employees to respect the laws. Thus, the provision in context would not reasonably be understood to pertain to or restrict Section 7 activity.

Finally, the social media policy's savings clause, which provides that "[n]othing in Cox's social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment," further ensures that employees would not reasonably interpret any potentially ambiguous provision in a way that would restrict Section 7 activity.

The discharge was lawful

We conclude that the Employer lawfully discharged the Charging Party because his post on Google+ was not concerted activity for mutual aid and protection within the meaning of Section 7. The Board's test for such concerted activity is whether it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."¹¹ Concerted activity includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action," including where employees discuss shared concerns among themselves prior to any specific plan to engage in group action.¹² On the other hand, comments made "solely by and on behalf of the employee himself" are not concerted.¹³ Here, the Charging Party's posting was directed at a customer, not his co-workers, and vented in vulgar terms his anger at the customer. It contained no language suggesting that the

¹⁰ See, e.g., *General Motors*, Case 7-CA-53570, Advice Memorandum dated December 20, 2011, at 7-8.

¹¹ *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).

¹² *Id.*, 281 NLRB at 887 (employees' discussion of shared concerns about terms and conditions of employment, even when "*in its inception* [it] *involves only a speaker and a listener* . . . is an indispensable preliminary step to employee self-organization") (emphasis added). We do not interpret the Board's adoption in *Meyers II* of certain language from *Mushroom Transportation v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), to preclude a finding that employees are engaged in concerted activity for mutual aid and protection when they discuss shared concerns about terms and conditions of employment even in the absence of a discussion of specific planned action. See, e.g., *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (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; "it is obvious that discussions of this kind usually precede group action"), *enforced*, 519 F.3d 373 (7th Cir. 2008).

¹³ *Meyers Indus.*, 268 NLRB 493, 496 (1984) (*Meyers I*), *rev'd sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985).

Charging Party sought to initiate or induce coworkers to engage in group action in support of his complaint. The only coworker who responded to the post responded with a sarcastic comment and did not treat it as a discussion about mutual concerns. The Charging Party states that he had previously talked with employees about their treatment by customers. However, his post was not a continuation of those discussions amongst employees; rather, it was a rant aimed at a customer, not coworkers, and was not intended to further any group action. Moreover, the Employer did not take action immediately, but conducted an investigation and found further evidence of personal rants by the Charging Party directed at customers, which violated its lawful social media policy. In these circumstances, we conclude that the Employer lawfully discharged the Charging Party for conduct that was not concerted activity for mutual aid and protection.

Accordingly, we conclude that the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.