

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

Advice Memorandum

DATE: January 17, 2012

TO: Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: Phenom Hospitality, LLC
Case 04-CA-061044

506-2001-5000
506-4033-1200
512-5036-6720-7500

This case was submitted for advice as to whether the Employer violated the Act by discharging the Charging Party in response to messages (Facebook “status” and “comments”) she posted on an employees-only Facebook page. We conclude that the Charging Party’s Facebook postings were protected concerted activity for mutual aid and protection, and, consequently, that the Employer’s discharge of the Charging Party violated Section 8(a)(1) of the Act.

FACTS

On June 1, 2011,¹ the Employer, an LLC with two co-owners, purchased Character’s Pub, a well-established bar/restaurant. The Charging Party had worked part-time as a hostess at the Pub for seven years. There was no interruption in business operations and the new owners advised the staff that they did not plan to make changes in staffing or the menu. At that time, there were about five kitchen staff employees and approximately 11 servers, including bartenders and two hosts.

Immediately after the purchase of Characters, one of the co-owners (now the head chef) implemented a rule prohibiting the wait staff from discussing the menu with cook staff and instead requiring them to discuss any complaints or comments about the menu directly with the head chef/co-owner.

¹ Hereinafter, all dates are in 2011.

The new owners also discharged two servers. Other staff members quit and the Employer hired a new bartender.

The employees have a private group Facebook page with about 13 members. The members are mostly current employees, with some former employees. All members are visible to the group by a list posted on the page and postings on the group page do not appear anywhere other than on that private page. Only the page administrator, who is also a member of the group, can admit new members to the group. The co-owners are not members of the group. Group members frequently post comments about work, as well as general comments and personal updates. After the co-owners took over, talk about work, including complaints, increased. The Employer has no policy regarding social media.

On June 10, one employee posted on the Facebook page about her last shift: "I never thought it was going to be this bad." In response, the Charging Party posted "I think they [the new co-owners] didn't realize what big personalities were at Characters. Trust me, the [new co-owners'] job is not going to be easy. [The new co-owner/head chef] went home crying last night, cuz none of us are pushovers." On June 11, the Charging Party posted that although she liked the new co-owner/head chef, she did not like the fact that, as head chef, she yelled at staff and pushed all the work on a line chef. On June 14, following the discharge of a coworker, the Charging Party posted in support, "Hang in there." On June 15 & 16, the Charging Party posted additional comments involving the above discharge. She noted that the fired coworker was missed the following evening, that some regular customers were "pissed" over it, and that at their request she gave them the discharged employee's phone number.

On June 18, the Employer sent the Charging Party home because business was slow. She posted the following message: "I just want to cry right now. Depressing ... no regulars, no staff, no fun!! I miss everyone. I didn't think they'd fuck it up this badly!!!!" Two other group members commented on the Charging Party's post. One coworker noted that "the times they are a changen"; and a former employee stated that it was "very upsetting." According to the Charging Party, she posted the comments because she was sad and upset about the changes at work, noting that some people had quit and some had been fired.

On June 22, when the Charging Party reported to work, the two new co-owners met her on the patio outside the restaurant and told her, "We saw

the Facebook Page.”² They said that they didn’t appreciate what the Charging Party had to say on Facebook, they did not believe she was “on board” with them, and they should go their separate ways. The Charging Party started to enter the restaurant to say goodbye to her coworkers, but one of the owners told her not to go in. She also stated that she did not appreciate being called a “fat bitch.” The Charging Party said she never called her that.³

ACTION

We conclude that the Charging Party’s Facebook postings are protected concerted activity for mutual aid and protection. Consequently, the Employer’s discharge of the Charging Party violated Section 8(a)(1) of the Act.

1. Applicable legal principles regarding protected concerted activity for mutual aid and protection

Section 7 expressly protects employees’ right to “self-organization . . . and to engage in other concerted activity . . . for mutual aid and protection.” To fall within the ambit of this protection, an employee’s statements must concern terms and conditions of employment and must be “concerted” in the sense that they “seek to initiate or to induce or to prepare for group action.”⁴ This is most clearly met when an employee group discussion expressly includes the topic of collective action.⁵ But this requirement may also be met

² The record does not disclose how the Employer was able to view this employees-only Facebook page.

³ In fact a different member of the group had posted that comment.

⁴ *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), enfd. 835 F.2d 1481 (D.C. Cir. 1987).

⁵ See, e.g., *Service Employees’ Local 1*, 344 NLRB 1104, 1105-1106, 1108-1110 (2005) (employee’s discussions with fellow employees suggesting that they confront their employer regarding shared concerns about working conditions “clearly constituted concerted activity protected by Section 7 of the Act”); *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951) (conversations with co-workers urging them to unionize protected). Such conduct is protected even if the employee is unsuccessful in persuading other employees to join in group action. See, e.g., *El Gran Combo*, 284 NLRB 1115, 1117 (1987), enfd. 853 F.2d 996 (1st Cir. 1988).

when the discussion does not include a current plan to act to address the employees' concerns. In this regard, the Board has long described concerted activity "in terms of interaction among employees."⁶ Thus, the Board will find concert "[w]hen the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise[.]"⁷ As it has explained in a variety of circumstances, 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."⁸ For example, the Board has found unlawful discipline imposed on employees for their discussions of common concerns about changes in working conditions, such as wages⁹ or work schedules,¹⁰ even when no specific group action was discussed, because "it is obvious that discussions of this kind usually precede group action."¹¹ Particularly relevant here, the Board has also found that a supervisor's attitude or performance that impacts the employee's job is a term and

⁶ *Meyers Industries (Meyers I)*, 268 NLRB 493, 494 (1984), rev'd. 755 F.2d 941 (D.C. Cir. 1985), on remand, *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), enf'd. 835 F.2d 1481 (D.C. Cir. 1987) (emphasis in original); *Meyers II*, 281 NLRB at 887, quoting *Root-Carlin*, 92 NLRB at 1314.

⁷ *Meyers Industries (Meyers II)*, 281 NLRB at 886.

⁸ *Meyers Industries (Meyers II)*, 281 NLRB at 887 quoting *Root-Carlin*, 92 NLRB at 1314..

⁹ *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), enf'd. 519 F.3d 373 (7th Cir. 2008) (employee discussions about the effect of a new performance evaluation policy on wages held concerted, despite lack of evidence that employees contemplated group action). See also *Trayco of S.C.*, 297 NLRB 630, 633-34 (1990), enf. denied mem., 927 F.2d 597 (4th Cir. 1991) (employee discussions with other coworkers about apparent wage differential between new hires and more senior employees constituted concerted activity; object of inducing group action need not be express).

¹⁰ *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied on other grounds, 81 F.3d 209, 214-215 (D.C. Cir. 1996) (employee discussions about scheduling changes found concerted even though no object of initiating group action).

¹¹ *St. Margaret Mercy Healthcare Centers*, 350 NLRB at 212.

condition of employment,¹² and employees' concerted protest of supervisory actions affecting their treatment on the job is protected conduct under Section 7.¹³

2. The Facebook postings were protected concerted activity for mutual aid and protection

Initially, we conclude that the Charging Party was engaged in protected concerted activity when she posted her comments on the employees-only Facebook page. First, the subject of the Charging Party's Facebook postings clearly pertained to terms and conditions of employment and was protected by the Act. Thus, after new owners took over the establishment, made changes in the employees' terms and conditions of employment, and discharged one of the employees, employees expressed their displeasure with these changes. As one employee put it, "I never thought it was going to be this bad." The Charging Party's posts referred to her dissatisfaction with these changes, including the imposition of a new rule prohibiting wait staff from talking directly to cook staff about the menu. The Charging Party also specifically criticized the co-owner/head chef's treatment of staff, complaining that she did not like the fact that she yelled at the staff and pushed all the work on the line chefs. The Charging Party was thus clearly discussing workplace concerns protected by the Act.¹⁴

Second, the Charging Party was engaged in concerted activity. The Charging Party's postings were directed to a group of employees on a private

¹² See, *Avalon-Carver Community Center*, 255 NLRB 1064 , 1070-71 (1981), citing the concurring opinion of Board Member Penello in *Dreis & Krump Manufacturing, Inc.* 221 NLRB 309, 310 (1975)("It is well established that the identity, capabilities and quality of supervision, at least where, as here, the quality of that supervision has an impact upon the employees' job interest and their ability to perform the task for which they were hired, are the legitimate concerns of employees.")

¹³ See, e.g., *Arrow Electric Company, Inc.*, 323 NLRB 968, 970 (1997), *enfd.* 155 F.3d 762 (6th Cir.1998) ("It is well settled that a concerted employee protest of supervisory conduct is protected activity under section 7 of the Act." Citing to *Millcraft Furniture Co* 282 NLRB 593, 595 (1987)); *Datwyler Rubber and Plastics, Inc.*, 350 NLRB 669 (2007); *Groves Truck and Trailer*, 281 NLRB 1194 (1986).

¹⁴ See, e.g., *Arrow Electric Company, Inc.*, *supra*.

employees-only Facebook page, and were part of their continuing discussion of shared workplace concerns revolving around changes in the employees' terms and conditions of employment caused by the new ownership. Thus, in response to a coworker's complaint that "I never thought it was going to be this bad" under the new owners, the Charging Party stated that it wasn't "going to be easy" for the new owners to continue in this manner, "cuz none of us are pushovers." Thereafter, the Charging Party wrote that she did not like that the head chef yelled at staff and overworked the line chef. When their coworker later posted that she had been discharged, a few employees expressed their dismay and the Charging Party wrote her to "[h]ang in there." Thereafter, the Charging Party posted additional comments that the fired coworker was missed the following evening, that some regular customers were "pissed" over it, and that at their request she gave them the discharged employee's phone number. In response to her final expression of dissatisfaction with the working conditions and the loss of coworkers -- that work was "depressing;" there were "no regulars, no staff;" and that she didn't think the owners would "fuck it up this badly"-- a coworker agreed that "the times they are a chang'e'n." Consequently, the evidence demonstrates that the Facebook posts for which the Charging Party was discharged were part of a continuing discussion about shared concerns over terms and conditions of employment. As a result, they fall squarely within the Board's definition of concerted activity, which encompasses employee initiation of group action through the discussion of complaints with fellow employees.

We also agree with the Region that the Charging Party's comment, on a private, employees-only Facebook page, that she "didn't think they'd fuck it up this badly" was not so opprobrious as to lose protection of the Act.¹⁵

Finally, we agree with the Region that the Charging Party was discharged for her protected Facebook posts. Thus, the Charging Party has stated that upon reporting to work after her last post, the Employers met her

¹⁵ See *Atlantic Steel Company*, 245 NLRB at 816-17 (dismissing Section 8(a)(1) and (3) complaint where discharged employee reacted to his supervisor's response to his overtime question in an obscene manner, in a work setting, and without provocation); *Stanford Hotel*, 344 NLRB 558, 558-559 (2005) (calling supervisor a "liar and a bitch" and a "fucking son of a bitch" not so opprobrious as to cost the employee the protection of the Act); *Alcoa Inc.*, 352 NLRB 1222, 1226 (2008) (reference to supervisor as an "egotistical fuck" protected). We note that the Charging Party did not engage in the name-calling which the Employer accused her of, i.e., calling the co-owner/head chef a "big fat bitch."

outside the restaurant and told her they saw the Facebook page. They told her that they didn't "appreciate" her comments; that she was not "on board" with them; and that she had to go her separate way. We reject the Employer's contention that it discharged the Charging Party because she complained about the co-owner's treatment of customers, violated the Employer's rule against talking to the kitchen staff, and stayed at the bar after her shift. The Charging Party was never notified about these other purported reasons, and the Employer does not claim to have even spoken to the Charging Party about any of them. In sum, we conclude that the Charging Party was discharged for engaging in protected concerted activity.

In all these circumstances, we conclude that the Employer's discharge of the Charging Party for her Facebook postings violated Section 8(a)(1) of the Act. Accordingly, the Region should issue complaint, absent settlement.

B.J.K.