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

Advice Memorandum

DATE: November 16, 2011

TO: Cornele A. Overstreet, Regional Director
Region 28

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

SUBJECT: Laboratory Corporation of America 512-5012-0100
Case 28-CA-23503 512-5012-0125
512-7550-7000

The Region submitted this case for advice as to: (a) whether provisions of the Employer's Communications Systems policy could reasonably be construed to chill Section 7 protected activity in violation of Section 8(a)(1); and, if so, (b) whether discipline issued pursuant to that policy is an independent violation of Section 8(a)(1). We conclude that portions of the disputed policy are unlawfully broad, including provisions that forbid employees to make public statements about the Employer, communicate "confidential, . . . sensitive or non-public" information, use the Employer's name or logo, or post "inflammatory" communications, and that admonish employees to limit themselves to "professional" and "appropriate" comments regarding the Employer or its agents. In addition, we conclude that the provision which prohibits employees from identifying themselves online as employees of the Employer without permission and then, when they are permitted to do, requires that they indicate with every posting that they are not speaking on behalf of the Employer, also is violative. Finally, we find the provision directing employees to discuss work-related concerns first with their supervisors unlawful. We further conclude, however, that the discipline issued pursuant to an unlawful provision of this policy does not violate Section 8(a)(1) because the disciplined employees were not engaged in protected conduct.

FACTS

The Employer is a Delaware corporation operating clinical testing laboratories throughout the United States, including a facility in the Phoenix metropolitan area. In July 2010, the Employer issued a revised Communications Systems policy on its intranet to its approximately 30,000 employees nationwide.

The Employer's Communications Systems Policy

The Employer's Communications Systems policy provides, in relevant part:

> IV. Guidelines
> . . . .
>
> A. Under no circumstances should information of a confidential, . . . sensitive or non-public nature concerning the Company be communicated or disclosed on or through Company property to anyone outside the Company without prior approval of Senior Management or the Law Department.
>
> B. Use of the Company's name or service mark(s) outside the course of LabCorp business without prior approval of the Law Department is prohibited.
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> C. No employee shall publicly publish any representation about the Company without prior approval by Senior Management and the Law Department. This prohibition includes, but is not limited to, statements to the media, media advertisements, electronic bulletin boards, weblogs and voice mail.
> . . . .
>
> V. Social Networkings site (sic) and **WEBLOGS**[1]
>
> A. The Company respects the rights of employees to use social networking sites . . . . While LabCorp encourages open communication both internally and externally in all forms, it is expected that such communication is made in an honest, professional, and appropriate manner and does not contain defamatory or inflammatory comments regarding LabCorp and its subsidiaries, as well as their shareholders, members of the Board of Directors, officers, employees, customers, suppliers, contractors and patients.
> . . . .
>
> C. Employees ordinarily may not identify themselves as employees of LabCorp or its subsidiary companies, absent approval by their Manager. . . . He/She may do so once he/she has received approval from his/her manager. Employees who have identified themselves as LabCorp employees on media site (sic) may post comments but only if they expressly state that their comments are their personal opinions and do not necessarily reflect the opinions of LabCorp. . . .

[1] Emphasis in original.

> D. The Company may request that employees temporarily and/or permanently suspend posted communications if the Company believes it is necessary or advisable to ensure compliance with securities regulations, other laws, or is in the best interests of LabCorp. As explained in the Open Communications policy, employees should first discuss with their supervisor/manager any work-related concerns they may have.
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> Failure to follow these policies may result in corrective action, up to and including termination of employment.

Discipline Pursuant to the Employer's Communications Systems Policy

The Charging Party worked for the Employer as an evening-shift specimen accessioner. At the time of her termination, she maintained a Facebook profile and was connected on Facebook with several people, including current or former employees of the Employer.

On April 8, 2011,[2] a former employee visited the Employer's Phoenix facility to pick up his final paycheck and had a confrontation with a supervisor. Although accounts of the incident differ, the parties agree that the former employee and the supervisor had to be physically separated. The former employee then left the Employer's premises.

In the early morning of April 9, the former employee posted "Better come getcha boy!!" on his Facebook page. The Charging Party and two of her coworkers responded by posting references to the earlier incident with the Employer's supervisor:

> **Coworker 1:** Hey bro… I heard what happen tonight at da shit hole. u should of kicked his ass…they sent me home for talkn back…lol fuckin clowns
>
> **Coworker 2:** Is that what happened? Crazy shit. [C.] was trippin too.[3]
>
> **Charging Party:** Lmfao!! That mf was tripping tonight! He was just bitter cuz he didn't fire [Former Employee] so he felt he needed to be big and bad and talk shit after the fact! What was he gonna do fire u after u quit?! Lol

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

[3] [C.] is another of the Employer's employees.

Charging Party: @ [Coworker 2] what was [C.] trippin on?

Former Employee: I wanted to clock his ass, I got nose to nose with him and was screaming in his face. I was trying to get him to pull the trigger first so I could fuck him up but he just shut up. I can't be going to jail over that dude. He's a low life disrespectful asshole and the universe will take care of him.

Coworker 2: That shit was tooo funny. G[i]rl [C.] was talking to himself and provoking fights with random people. [Another employee] thought he was joking. Lmao. I said no hes crazy, then he was being all nice waving at me.

Coworker 1: [Former Employee] mayb if u did kick his butt we wouldn't have 2 deal with him anymore…lol @ [Coworker 2] who was [C.] tryin 2 fight with…he crazy

Former Employee: I'm gonna have a sit down with [the Employer's Human Resources Manager] and let her known about all the shit he's done before and what happened last night. Maybe you won't have to deal with him anymore anyways

Around the same time on April 9, Coworker 2 wrote about the incident on her Facebook account. This drew a reply from the Charging Party:

Coworker 2: Wtf is going on at labcorp tonite. I almost saw round 2 and muthafukas is wildn out. It must b a full moon.

Charging Party: Shit was off the hook tonight! I was just thinking the same thing! All I know is I need to get the fuck outta there ASAP!!!

On May 3, the Employer terminated the Charging Party and another employee ("Coworker 1") because of their Facebook comments regarding the April 8 incident, as well as earlier comments, which the Employer viewed as violations of Section V(A) of its Communications Systems policy. On May 6, the Employer issued a formal verbal warning to a third employee ("Coworker 2") for comments she had posted on Facebook.[4] The Employer disciplined this employee also for violating Section V(A) of its Communications Systems policy. None of her comments involved the April 8 incident.

[4] Coworker 2 received a verbal warning rather than termination under the Employer's progressive discipline policy because, unlike the other two employees, she had no prior discipline on record.

According to the Employer, the Facebook posts for which it disciplined the three employees were as follows:

Charging Party

- "Happy for u [Former Employee]!! Im happy for anyone who gets the fuck up outta that shithole!! Good luck with everything and if theres any openings where ur at don't forget about us little people!! Lol" (March 31 at 8:09 a.m.)

- "Shit was off the hook tonight! I was just thinking the same thing! All I know is I need to get the fuck outta there ASAP!!!" (April 9 at 6:08 a.m.)

- "Lmfao!! That mf was tripping tonight! He was just bitter cuz he didn't fire [Former Employee] so he felt he needed to be big and bad and talk shit after the fact! What was he gonna do fire u after u quit?! Lol" (April 9 at 6:11 a.m.)

Coworker 1

- "U shouldn't be that hard to decide…better life or labcorp…really! Unless u want ur 5yrs there…lifer. lol" (December 17, 2010 at 2:35 p.m.)

- "I'm happy for u fatty to bad ur not goin get ur 5yrs tattoo that reads lacorp 4 life. . . ." (March 30 at 1:48 p.m.)

- "Hey bro… I heard what happen tonight at da shit hole. u should of kicked his ass…they sent me home for talkn back…lol fuckin clowns" (April 9 at 4:58 a.m.)

- "[Former Employee] mayb if u did kick his butt we wouldn't have 2 deal with him anymore. . . ." (April 9 at 12:52 p.m.)

Coworker 2

- "downloading music to my phone so I can tune your ass out and have a better day at work." (March 15 at 3:09 p.m.)

- [THE SUPERVISOR] AND WHOEVER ELSE WANTS TO FUCK WITH ME. YOU KNOW HOW I AM. I JUST DON'T HAVE PATIENCE FO THA BULLSHIT." (March 15 at 3:12 p.m.)

- "Yeah!!!! Now you can say 'fuck you, fuck you, and fuck you…'" (March 25 at 3:27 p.m.)

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining an unlawfully overbroad Communications Systems policy. Because the Employees who were disciplined pursuant to this policy were not engaged in Section 7 activity, their discipline was not unlawful.

The Employer's Communications Systems Policy is Unlawful

An employer violates Section 8(a)(1) through the mere maintenance of a work rule if the rule "would reasonably tend to chill employees in the exercise of their Section 7 rights."[5] The Board has developed a two-step inquiry to determine if a work rule would have that effect.[6] First, a rule is clearly unlawful if it explicitly restricts Section 7 activities. Second, if it does not, the rule will violate Section 8(a)(1) only 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.[7] In determining how an employee would reasonably construe the rule, particular phrases should not be read in isolation, but rather considered in context.[8]

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.[9] 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.[10] Further,

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

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

[7] *Id.* at 647.

[8] *Id.* at 646.

[9] *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 [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003).

[10] *See Tradesmen International*, 338 NLRB 460, 460-462 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to

any rule that requires employees to secure permission from their employer prior to engaging in protected activity is unlawful.[11]

Applying these standards, we find the following provisions of the Employer's Communications Systems Policy unlawfully overbroad because employees would reasonably construe those provisions to restrict Section 7 activity.

- **IV(A) Under no circumstances should information of a confidential, . . . sensitive or non-public nature concerning the Company be communicated or disclosed on or through Company property to anyone outside the Company without prior approval of Senior Management or the Law Department.**

Employees have a Section 7 right to discuss their wages and other terms and conditions of employment, both amongst themselves and with non-employees.[12] A rule that precludes employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with outside parties, therefore violates Section 8(a)(1).[13]

Employees would reasonably understand this provision to prohibit them from communicating with third parties about Section 7 issues such as wages and working

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cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

[11] *See Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (rule requiring authorization to distribute literature on employee's own time in non-work areas); *Brunswick Corp.*, 282 NLRB 794, 794-95 (1987) (rule requiring permission to engage in solicitation during non-work times in non-work areas).

[12] *See, e.g., Cintas Corp.*, 344 NLRB 943, 943 (2005) (holding unlawful a rule that prohibited the release of any information regarding employees, because it could reasonably be construed to restrict discussion of wages and other terms and conditions of employment among fellow employees and with the union); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-72 (1990) (rule prohibiting employees from discussing the condition of the employer's facilities or terms and conditions of employment with third parties violated Section 8(a)(1)).

[13] *See Bigg's Foods*, 347 NLRB 425, 425 n.4 (2006) (rule prohibiting employees from discussing their own or their "fellow employees'" salaries with "anyone outside the company" violated Section 8(a)(1)).

conditions.[14] The fact that the policy only prohibits communications or disclosures made "on or through Company property" is irrelevant, as employees have the right to engage in Section 7 activities on the Employer's premises during non-work time and in non-work areas.[15] Moreover, the Employer has failed to provide any context or examples of the types of information it deems "confidential . . . sensitive or non-public" in order to clarify that the policy does not prohibit Section 7 activity. This provision therefore violates Section 8(a)(1) under the second prong of the *Lutheran Heritage* test.[16] The policy further violates Section 8(a)(1) to the extent that it requires employees to obtain prior Employer approval before engaging in protected activities.[17]

- **IV(B) Use of the Company's name or service mark(s) outside the course of LabCorp business without prior approval of the Law Department is prohibited.**

Employees have a Section 7 right to use their employer's name or logo in conjunction with protected concerted activity, such as to communicate with fellow employees or the general public about a labor dispute.[18] We conclude that this provision can reasonably be construed to restrict employees' Section 7 rights to use the Employer's name and logo while engaging in protected concerted activity. For example, this provision would prohibit employees from using the Employer's name or logo in electronic or paper leaflets, cartoons, or picket signs in connection with a protest involving the terms and conditions of employment.

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[14] *See, e.g., Cintas Corp.*, 343 NLRB at 943 (rule "protect[ing] the confidentiality of any information concerning the company, its business plans, its partners [i.e. employees], new business efforts, customers, accounting and financial matters" would reasonably be understood to restrict discussion of wages).

[15] *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945).

[16] 343 NLRB at 646-47.

[17] *See Teletech Holdings, Inc.*, 333 NLRB at 403; *Brunswick Corp.*, 282 NLRB at 794-95.

[18] *See, e.g., Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-20 (1991)(finding unlawful prohibition against employees wearing company logo or insignia while engaging in union activity during non-working time away from the plant), *enforced*, 953 F.2d 638 (4th Cir. 1992). *See also Pacific Northwest District of Carpenters*, 339 NLRB 1027, 1029 (2003) (dismissing Section 8(b)(4)(ii)(B) complaint under *Moore Dry Dock* standards that require picket signs to name primary employer).

Although an employer has a proprietary interest in its service marks, and in its name if it has been trademarked or copyrighted, employee use in connection with Section 7 activity would not infringe on that interest. Courts have identified three interests that are protected by the trademark laws: (1) the trademark holder's interest in protecting the good reputation associated with his mark from the possibility of being tarnished by inferior merchandise sold by another entity using the trademark; (2) the trademark holder's interest in being able to enter a related commercial field at some future time and use its well-established trademark; and (3) the public's interest in not being misled as to the source of products offered for sale using confusingly similar marks.[19] These interests are not remotely implicated by employees' non-commercial use of a name, logo, or other trademark to identify the Employer in the course of engaging in Section 7 activity. And the fair use of a copyrighted item "for purposes such as criticism, comment, . . . scholarship, or research" is not copyright infringement.[20] Thus, the Employer has no legitimate basis to prohibit the use of its name or service marks in this manner, and the rule is unlawfully overbroad.

As with the previous rule, this provision further violates Section 8(a)(1) by requiring employees to secure the Employer's permission prior to engaging in protected activity.[21]

- **IV(C) No employee shall publicly publish any representation about the Company without prior approval by Senior Management and the Law Department. This prohibition includes, but is not limited to, statements to the media, media advertisements, electronic bulletin boards, weblogs and voice mail.**

The Board has long recognized that "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute."[22] Any employer rule

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[19] *See Scarves by Vera*, 544 F.2d 1167, 1172 (2d Cir. 1976). *See also Smith v. Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1968) (touchstone of trademark infringement is "likelihood of confusion" that the product sold by the second entity is the product of the trademark holder).

[20] *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-77 (1994), *quoting* Copyright Act of 1976, 17 U.S.C.A. § 107.

[21] *See Teletech Holdings, Inc.*, 333 NLRB at 403; *Brunswick Corp.*, 282 NLRB at 794-95.

[22] *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) (holding nurse's third-party statements regarding

that prohibits employee communications to the media—or, like the policy at issue here, requires prior authorization for such communications—is therefore unlawfully overbroad.[23] The Employer's policy goes further, restricting *all* public statements regarding the company, which would include protected Section 7 communications amongst employees and between employees and a union.[24] This provision violates Section 8(a)(1).

- **V(A) The Company respects the rights of employees to use social networking sites . . . . [I]t is expected that such communication is made in an honest, professional, and appropriate manner and does not contain defamatory or inflammatory comments regarding LabCorp and its subsidiaries, as well as their shareholders, members of the Board of Directors, officers, employees, customers, suppliers, contractors and patients.**

The Board has held that rules which contain vague or ambiguous terms that can reasonably be interpreted to include protected discussion about or criticism of the Employer's labor policies violate Section 8(a)(1).[25] This provision prohibits "inflammatory" communications and admonishes employees to limit themselves to "professional" and "appropriate" comments, broad terms that employees would reasonably construe to prohibit them from communicating on social networking sites with other

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staffing levels and workloads protected where context of statements clearly related to labor dispute and nurses' terms and conditions of employment).

[23] *See Trump Marina Associates*, 355 NLRB No. 107 (2010), incorporating by reference 354 NLRB No. 123, slip op. at 3 (2009) (finding unlawful policy requiring prior authorization before speaking to the news media).

[24] *See, e.g., University Medical Center*, 355 NLRB at 1322 (rule prohibiting disclosure of confidential information about employees or patients); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288, n.3 (1999) (rules prohibiting employees from revealing information about fellow employees, hotel business, or customers).

[25] *See, e.g., Claremont Resort and Spa*, 344 NLRB 832, 832 (2005) (rule prohibiting "negative conversations" about managers unlawful); *Cincinnati Suburban Press*, 289 NLRB 966, 966 n.2, 975 (1988) (rules against "false, vicious, or malicious" statements and "improper or unseeming" conduct unlawful); *Southern Maryland Hospital Center*, 293 NLRB 1209, 1222 (1989) (unlawful rule against "derogatory attacks"), *enforced in pertinent part*, 916 F.2d 932 (4th Cir. 1990).

employees or with third parties about protected concerns. Accordingly, the rule violates Section 8(a)(1).

- **V(C) Employees ordinarily may not identify themselves as employees of LabCorp or its subsidiary companies, absent approval by their Manager. . . . He/she may do so once he/she has received approval from his/her manager. Employees who have identified themselves as LabCorp employees on media site (sic) may post comments but only if they expressly state that their comments are their personal opinions and do not necessarily reflect the opinions of LabCorp. . . .**

Personal profile pages serve an important function in enabling employees to use online social networks to find and communicate with their fellow employees at their own or other locations. Specifically, employees who have listed their employer on their personal profile pages can search for other employees online. This policy therefore is particularly harmful to the Section 7 right to engage in concerted action for mutual aid or protection and is unlawfully overbroad. Moreover, requiring employees to expressly state that their comments are their personal opinions and do not reflect the opinions of LabCorp every time that they post on social media would significantly burden the exercise of employees' Section 7 right to discuss working conditions and criticize the Employer's labor policies, in violation of Section 8(a)(1).

- **V(D) The Company may request that employees temporarily and/or permanently suspend posted communications if the Company believes it is necessary or advisable to ensure compliance with securities regulations, other laws, or is in the best interests of LabCorp. As explained in the Open Communications policy, employees should first discuss with their supervisor/manager any work-related concerns they may have.**

  Failure to follow these policies may result in corrective action, up to and including termination of employment.

The first portion of this provision, unlike those previously cited, does not expressly restrict employee communication and instead merely notes that the Employer may request a suspension of posted communications in the future. But the rule nevertheless restricts Section 7 activity by requiring, on threat of discipline, that employees first bring any "work-related concerns" to the Employer.[26] Accordingly, this rule violates Section 8(a)(1).

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[26] *See, e.g., Valley Hospital Medical Center*, 351 NLRB at 1254 ("an employer may not interfere with an employee's

The Discharges and Discipline Pursuant to Employer's Overly Broad Rule were not Unlawful

The Board has consistently stated that discipline imposed pursuant to an unlawfully overbroad rule violates the Act (the "*Double Eagle* rule").[27] Recently, however, in *The Continental Group, Inc.*, the Board clarified that broad statement of the law and outlined limits to the application of the *Double Eagle* rule.[28] Based on an in-depth examination of the policy rationales underlying the rule, the Board held that discipline imposed pursuant to an unlawfully overbroad rule only violates the Act where an employee violated the rule by (1) engaging in protected conduct; or (2) engaging in conduct that implicates the concerns underlying Section 7 of the Act but is not protected by the Act because it is not concerted.[29] There is no violation of the Act where "the conduct for which the employee is disciplined is wholly distinct from activity that falls within the ambit of Section 7."[30] In addition, an employer can avoid liability for discipline if it can establish that the employee's conduct actually interfered with his own work or that of others or with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline.[31]

In this case, the Employer specifically cited provision V(A) of its Communications Systems Policy as grounds for disciplining the Charging Party and two of her fellow employees for their Facebook postings. We have determined that the cited provision is unlawfully overbroad. But the discipline itself is unlawful only if

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right to engage in Section 7 activity by requiring that the employee take all work-related concerns through a specific internal process"); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990) (unlawful rule instructing employees to first report work-related issues to the employer on threat of discipline).

[27] *See Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Opryland Hotel*, 323 NLRB 723 (1997); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978); *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), *enforced sub nom. NLRB v. Daylin, Inc.*, 496 F.2d 484 (6th Cir. 1974).

[28] *The Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 4 (2011).

[29] *Id.*, slip op. at 3-4.

[30] *Id.* at 4.

[31] *Id.*

the employees' Facebook activity was protected conduct or conduct that implicates Section 7 concerns.

Several of the Facebook posts at issue fail to raise any Section 7 concerns. The Employer cited three of the Charging Party's Facebook comments as violating its Communications Systems policy. The first of these, dated March 31, was directed at the former employee. It apparently celebrated his resignation from the Employer and does not have anything to do with terms or conditions of employment.[32] Likewise, two of the comments for which Coworker 1 was discharged address the former employee's plans to leave the Employer and also fail to raise any Section 7 issues. The first, dated December 17, 2010, teases the former employee for his indecision over whether to pursue a different job or remain in the Employer's employ.[33] The second, dated March 30, celebrates the former employee's decision to accept a new job.[34]

And none of the Facebook posts for which Coworker 2 was disciplined implicate Section 7. The first two posts the Employer cited, both dated March 15, announce that Coworker 2 is downloading music to listen to during work and implicitly warn her supervisor not to object.[35] In addition to being rather intemperate, these comments fail to raise any concerns protected by Section 7. The third comment, dated March 25, does not explicitly refer to the Employer, the workplace, or anything having to do with her job. From context, however, it appears that she is merely cheering on the former employee as he attempted to secure another job.[36] Again, this is not activity protected by Section 7. Because none of Coworker 2's Facebook activity falls within the realm of Section 7, her discipline does not offend the Act under the *Continental Group* doctrine.[37]

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[32] "Happy for u [Former Employee]!! Im happy for anyone who gets the fuck up outta that shithole!! Good luck with everything and if theres any openings where ur at don't forget about us little people!! Lol"

[33] "U shouldn't be that hard to decide…better life or labcorp…really! Unless u want ur 5yrs there…lifer. lol"

[34] "I'm happy for u fatty to bad ur not goin get ur 5yrs tattoo that reads lacorp 4 life. . . ."

[35] "downloading music to my phone so I can tune your ass out and have a better day at work" and "[THE SUPERVISOR] AND WHOEVER ELSE WANTS TO FUCK WITH ME. YOU KNOW HOW I AM. I JUST DON'T HAVE PATIENCE FO THA BULLSHIT."

[36] "Yeah!!!! Now you can say 'fuck you, fuck you, and fuck you…'"

[37] 357 NLRB No. 39, slip op. at 4 (2011).

Finally, we find unprotected the Facebook comments by the Charging Party and Coworker 1 regarding the April 8 conflict between the former employee and the supervisor.[38] The focus of these comments is the altercation between the former employee and the supervisor; Coworker 1's references to having been sent home and to the possibility that if the former employee had "kicked [the supervisor's] butt we wouldn't have 2 deal with him anymore" are at best only a remote suggestion of employees' frustrations with a supervisor's conduct that affects working conditions.[39]

Moreover, applying *Atlantic Steel*,[40] on balance we conclude that the comments lost protection. Under *Atlantic Steel*, the Board must "carefully balance" four factors: (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.[41]

The place and subject matter of the Facebook statements are at best neutral as to whether they retained the protection of the Act. The "place" of the discussion—Facebook—was not the workplace and therefore caused no immediate work disruption. The Facebook audience, however, included several of the Employer's employees, including those under the supervision of the supervisor at issue. The profane and disrespectful nature of the postings had the potential to undermine the supervisor's ability to

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[38] Charging Party: "Shit was off the hook tonight! I was just thinking the same thing! All I know is I need to get the fuck outta there ASAP!!!" and "Lmfao!! That mf was tripping tonight! He was just bitter cuz he didn't fire [Former Employee] so he felt he needed to be big and bad and talk shit after the fact! What was he gonna do fire u after u quit?! Lol";

Coworker 1: "Hey bro… I heard what happen tonight at da shit hole. u should of kicked his ass…they sent me home for talkn back…lol fuckin clowns" and "[Former Employee] mayb if u did kick his butt we wouldn't have 2 deal with him anymore. . . ."

[39] *Compare, e.g., Rhee Brothers, Inc.*, 343 NLRB 695, 695 n.3 (2004) (well-established Board precedent holds that concerted protests of supervisory conduct are protected if the protested conduct affects employees' working conditions); *Needell & McGlone, P.C.*, 311 NLRB 455, 456 (1993) (complaint about supervisor giving preferential treatment to another employee protected), *enforced mem.*, 22 F.3d 303 (3d Cir. 1994).

[40] 245 NLRB 814, 816 (1979).

[41] *Id.* at 816.

effectively supervise them.[42] As for subject matter, the Facebook postings focused more on denigrating the Employer and the supervisor than on communicating a workplace grievance.[43]

The nature of the Facebook comments, however, weighs against their retaining the Act's protection. We cannot characterize the comments as a truly spontaneous outburst, to which the Board tends to give substantial leeway,[44] as they were posted over nearly a 12-hour span.[45] Moreover,

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[42] See *Starbucks Coffee Co.*, 355 NLRB No. 135 (2010), incorporating by reference 354 NLRB No. 99 (2009) (location of conduct weighs against protection when employee engages in "insubordinate or profane conduct toward a supervisor in front of other employees," regardless of whether those employees are on duty); *Verizon Wireless*, 349 NLRB 640, 643 (2007) (employee's profane comments, though not made directly to any supervisor, would reasonably tend to undermine supervisory authority because the comments were made in a work area occupied by employees and supervisors who likely overheard them); *Aluminum Co. of America*, 338 NLRB 20, 21-22 (1998) (employee's profane tirade in break room that could be overheard by coworkers would "reasonably tend to affect workplace discipline by undermining the authority of supervisors subject to his vituperative attacks").

[43] *See Trus Joist MacMillan*, 341 NLRB 369, 370-71 (2004) (subject matter of discussion weighed only slightly in favor of protection, even though meeting concerned assistant manager's unlawful removal of supervisor who refused to violate employees' Section 7 rights, because employee never intended meeting to be a "peaceful but firm demonstration of concern over what had occurred," but rather intended to embarrass assistant manager in front of other managers).

[44] *Cf. Kiewit Power Constructors Co.*, 355 NLRB No. 150, slip op. at 3 (2010) (employees' statements that situation could "get ugly" and that supervisor "better bring [his] boxing gloves" were brief, spontaneous reactions to distribution of warning notices regarding break rule, rather than "premeditated and sustained" threats, and therefore did not weigh against retaining Act's protection).

[45] *Cf. Trus Joist MacMillan*, 341 NLRB at 371 (finding that employee who planned and deliberately launched personal attack on assistant manager that included a series of profane verbal assaults lost Act's protection); *Starbucks Coffee Co.*, 355 NLRB No. 135 (2010), incorporating by reference 354 NLRB No. 99 (2009), slip op. at 3-4 (finding that employee lost the Act's protection when she joined group that insulted, taunted, and threatened manager while off-duty, in part because employee was "not spontaneously

both of Coworker 1's contributions encourage the former employee to engage in violence against the supervisor. Although they were made in a joking manner, her comments were in the context of the former employee's admission that he was trying to incite a physical confrontation with the supervisor.[46] And although it is evident that several of the Employer's employees had conflicts with the supervisor in question, there is no evidence that the cited Facebook comments were provoked by any unfair labor practice.[47]

Based on the above considerations, we conclude that the Charging Party and her coworkers were not disciplined for the kind of activity that the *Double Eagle* rule was designed to protect, i.e., activity that either falls within Section 7 or that touches the concerns animating Section 7.[48] To the extent that their Facebook posts hinted at issues with their terms and conditions of employment, they were sufficiently intemperate to lose the protection of the Act. The remaining Facebook comments were "wholly distinct from activity that falls within the ambit of Section 7."[49] Accordingly, the Employer's discipline of the Charging Party and two of her coworkers did not violate Section 8(a)(1).

In sum, the Region should issue complaint, absent settlement, alleging that portions of the Employer's Communications Systems policy violate Section 8(a)(1). The Region should dismiss, absent withdrawal, the allegations regarding the discipline issued pursuant to that policy, as the conduct for which the affected employees were disciplined was not protected activity.

B.J.K.

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reacting to a stressful situation such as a grievance meeting, disciplinary action, or tense workplace situation").

[46] Former Employee (posted April 9 at 9:05 a.m.): "I wanted to clock his ass, I got nose to nose with him and was screaming in his face. I was trying to get him to pull the trigger first so I could fuck him up but he just shut up. . . ."

[47] *See, e.g., Verizon Wireless*, 349 NLRB at 642-43 (intemperate comments not provoked by unfair labor practice despite manager's Section 8(c) criticism of union).

[48] *The Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 3.

[49] *Id.*, slip op. at 4 (2011).