

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

DATE: July 24, 2017

TO: Leonard J. Perez, Regional Director
Region 14

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Paycom Payroll, Inc.
Case 14-CA-191636

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The Region submitted this case for advice on whether the Employer violated Section 8(a)(1) by disciplining the Charging Party, a (b) (6), (b) (7)(C) in its legal department, for secretly tape recording conversations relating to (b) (6), (b) (7)(C) race discrimination claims and job performance, and admonishing (b) (6), (b) (7)(C) to not tape record any conversations in the future. We conclude that the Employer did not violate Section 8(a)(1) by disciplining the Charging Party because (b) (6), (b) (7)(C) was not tape recording the conversations in furtherance of protected concerted activity. We further conclude that the Employer's blanket statement that the Charging Party could not tape record any conversations going forward was unlawful because it was not narrowly tailored to protect the Employer's confidentiality interests; however, it would not effectuate the policies and purposes of the Act to issue complaint because the statement was made only to the Charging Party, who was lawfully discharged.

FACTS

Paycom Payroll, LLC (the "Employer") is a publicly-traded company that provides employee-management software to clients. It employs approximately 1,400 employees, mostly in its Oklahoma office. The Charging Party is an (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) who had worked as a (b) (6), (b) (7)(C) in the Employer's Oklahoma in-house legal department until (b) (6), (b) (7)(C) discharge on (b) (6), (b) (7)(C).¹

In (b) (6), (b) (7)(C) the Employer promoted a (b) (6), (b) (7)(C) to the position of (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) instead of the Charging Party. The (b) (6), (b) (7)(C) had less

¹ All dates are in 2016 unless otherwise indicated.

seniority than the Charging Party. On (b) (6), (b) (7)(C), another (b) (6), (b) (7)(C) was promoted to the position of (b) (6), (b) (7)(C) over the Charging Party, despite having less seniority. On (b) (6), (b) (7)(C) the Charging Party asserted to human resources personnel that (b) (6), (b) (7)(C) Department Head had denied (b) (6), (b) (7)(C) both promotions because of (b) (6), (b) (7)(C) discrimination. The Employer began an internal investigation of those claims and hired an independent investigator to conduct a parallel investigation. Around the same time, (b) (6), (b) (7)(C) Department Head began raising concerns about the Charging Party having missed project deadlines. The Charging Party filed (b) (6), (b) (7)(C) discrimination charges with EEOC relating to the promotions, including allegations that the Employer was retaliating against (b) (6), (b) (7)(C) for filing those charges by manufacturing problems concerning (b) (6), (b) (7)(C) job performance. The Charging Party never discussed (b) (6), (b) (7)(C) discrimination allegations or EEOC charges with other employees, and there is no evidence of any other discussions of (b) (6), (b) (7)(C) bias among employees.

On (b) (6), (b) (7)(C), the Charging Party, (b) (6), (b) (7)(C) Department Head, and other management officials met to discuss the Charging Party's (b) (6), (b) (7)(C) discrimination claims, project timeliness, and receptiveness to coaching by (b) (6), (b) (7)(C) supervisor. Following the meeting, the Charging Party met privately with the Employer's COO. The Charging Party told the COO that (b) (6), (b) (7)(C) could prove that the Department Head had not been telling the truth because the Charging Party had been covertly tape recording some of their conversations. (b) (6), (b) (7)(C) did not give the COO copies of the recordings or describe them in great detail.

On (b) (6), (b) (7)(C), the Employer issued a Written Notice of Discipline (the "Disciplinary Notice") to the Charging Party, which included as one of the bases for discipline:

You also have expressed you are recording conversations. Given the nature of you[r] position and access to privileged [sic] and sensitive conversations this is extremely troubling. Additionally, we don't believe recording conversations promotes an environment of trust between you and your leader. As such, we are prohibiting you from recording any conversations going forward.

The Disciplinary Notice further provided that, if "it is determined that considerable progress is not being made, you will be subject to further disciplinary action up to and including termination." After being issued the Disciplinary Notice, the Charging Party was never again disciplined for tape recording conversations. The Disciplinary Notice was not shared with other employees.

On (b) (6), (b) (7)(C) the Charging Party sent the independent investigator eleven audio tape recordings. The Charging Party states that these recordings only encompassed conversations between the Charging Party and (b) (6), (b) (7)(C) Department Head or

the Vice President of Human Resources concerning the Charging Party's performance issues, discipline, and the promotions [REDACTED] did not receive. The Employer claims that it reviewed the tapes and that they contain client names, client processes, and software encryption levels. The Charging Party acknowledges that the recordings could contain some information about upcoming projects, but stated that [REDACTED] typically only recorded when the Department Head spoke specifically about the Charging Party. The Region never received copies of the recordings.

On [REDACTED] (b) (6), (b) (7)(C) the Employer discharged the Charging Party for missing project deadlines. The Region has concluded that the discharge was lawful.

ACTION

We conclude that the Employer did not violate Section 8(a)(1) by disciplining the Charging Party for secretly tape recording conversations because the Charging Party had not been recording them in furtherance of protected concerted activity. We further conclude that the Employer's blanket statement that the Charging Party could not tape record any conversations going forward was unlawful because it was not narrowly tailored to protect the Employer's confidentiality interests; however, it would not effectuate the policies and purposes of the Act to issue complaint because the statement was made only to the Charging Party, who was lawfully discharged.

I. The Employer Did Not Violate Section 8(a)(1) by Disciplining the Charging Party for [REDACTED] Tape Recordings of Conversations with Managers Because They Were Not Made in Furtherance of Protected Concerted Activities

For employee conduct to be protected under Section 7, it must be both concerted and pursued either for collective-bargaining purposes or for other "mutual aid or protection."²

An individual employee's conduct is concerted when it is "engaged in with or on the authority of other employees," or when an individual employee seeks "to initiate or to induce or to prepare for group action" or to bring group complaints to management's attention.³ For example, where employees have discussed shared

² See, e.g., *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

³ *Meyers Indus. (Meyers II)*, 281 NLRB 882, 885, 887 (1986), enforced sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); see also *Churchill's Restaurant*, 276 NLRB 775, 777 (1985) (finding employee statement at company meeting protesting employer's alleged discriminatory treatment against Hispanic employees regarding

concerns regarding working conditions and one employee continues to express such concerns on his or her own, the Board will find concert because the individual's activities are the "logical outgrowth of concerns expressed by the employees collectively."⁴ Concerted activity also encompasses individual communications with third parties "where the communication is related to a legitimate, ongoing labor dispute between the employees and their employer, and where the communication does not constitute a disparagement or vilification of the employer's product or its reputation."⁵

Certain categories of employee discussions are "inherently concerted," meaning that they are "protected regardless of whether they are engaged in with the express object of inducing group action."⁶ The Board has long held that discussions about wages are inherently concerted since wages are a "vital term and condition of employment" and the "grist on which concerted activity feeds."⁷ More recently, the

cuts to dependent insurance coverage was concerted activity); *Vought Corp.*, 273 NLRB 1290, 1294 (1984) (finding employee statements to black co-workers that a white employee might be promoted over a black employee and suggesting that they take up the issue with management was concerted activity), *enforced*, 788 F.2d 1378 (8th Cir. 1986).

⁴ *E.g.*, *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).

⁵ *Dougherty Lumber Co.*, 299 NLRB 295, 297 (1990) (quoting *Allied Aviation Service Co.*, 248 NLRB 229, 230 (1980)) (letter to the editor of a local newspaper related to an ongoing labor dispute and was therefore protected concerted activity), *enforced per curiam*, 941 F.2d 1209 (6th Cir. 1991); *see also Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443-44, 448-49 (1984) (employee discharged for speaking with a reporter about the employees' reasons for striking engaged in protected concerted activity).

⁶ *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 1 n.1 (Apr. 30, 2015) (quoting *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 4, n.10 (Dec. 16, 2014)) (finding discussions regarding job security inherently concerted).

⁷ *See Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992) (discussions of wages are inherently concerted), *enforced mem.*, 977 F.2d 582 (6th Cir. 1992); *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 4 n.10 (same).

Board has applied the same rationale to find discussions of work schedules⁸ and job security⁹ inherently concerted, and Advice has concluded that discussions concerning workplace health and safety¹⁰ and racial discrimination¹¹ are also inherently concerted. Yet, even where topics are “inherently concerted,” the Board still requires that there be a conversation between employees about the relevant topic in order to find concert.¹²

Here, the Charging Party’s tape recordings were made to support (b) (6), (b) (7)(C) discrimination allegations, a topic that we have concluded is inherently concerted. However, there is no evidence indicating that the Charging Party ever discussed (b) (6), (b) (7)(C) discrimination allegations with (b) (6), (b) (7)(C) co-workers, before or after making the tape recordings. Further, there is no evidence that the employees otherwise discussed (b) (6), (b) (7)(C) or that workplace (b) (6), (b) (7)(C) was raised as a matter of concern by anyone other than the Charging Party. Accordingly, the tape recordings were not made in furtherance of protected concerted activity. Nor were they the logical outgrowth of the employees’ collective concerns or part of an ongoing labor dispute between the employees and the Employer.¹³

⁸ See *Aroostook County Regional Ophthalmology Ctr.*, 317 NLRB 218, 220 (1995) (employee discussions of schedules are inherently concerted), *enforcement denied in relevant part*, 81 F.3d 209 (D.C. Cir. 1996).

⁹ See *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 1 & n.1 (employer violated Section 8(a)(1) by discharging employee for discussing another employee’s job security); *Food Services of Am., Inc.*, 360 NLRB 1012, 1014-15 (2014) (same); *Component Bar Products*, 364 NLRB No. 140, slip op. at 1 n.1 (Nov. 8, 2016) (same).

¹⁰ See *North West Rural Electric Cooperative*, Case 18-CA-150605, Advice Memorandum dated September 21, 2015, at 9-12.

¹¹ See *Milford Center*, Case 01-CA-156820, Advice Memorandum dated January 20, 2016, at 9-12.

¹² See *Hoodview Vending Co.*, 359 NLRB 355, 358 n.16 (2012) (“Inherently concerted activity involves a conversation between two or more individuals.”), *incorporated by reference in* 362 NLRB No. 81, slip op. at 1.

¹³ Because we have found that the Charging Party’s recording was not concerted activity, we need not address whether it was for mutual aid or protection.

II. It Would Not Effectuate the Policies and Purposes of the Act to Issue Complaint Alleging That the Employer’s Admonishment Not to Tape Record “Going Forward” Was Unlawfully Overbroad

An employer violates Section 8(a)(1) by prohibiting tape recording at work in response to Section 7 activity.¹⁴ And, even if not made in response to Section 7 activity, the Board has found blanket prohibitions against recording to be unlawful when they are not narrowly tailored. In *Whole Foods*, for instance, although the employer raised significant confidentiality concerns against allowing workplace tape recordings—including that they could impact its internal appeal process for terminations, requests for financial assistances, and votes on whether to add a new member to the team—the Board found the employer’s rules “unqualifiedly prohibit[ing] all workplace recording” unlawful.¹⁵ The Board explained that because the rules were so broad, employees would reasonably interpret them to infringe on their protected concerted activities, and they therefore would chill employees in the free exercise of their Section 7 activities.¹⁶

The Board has also found unlawful blanket rules designed to maintain confidentiality with respect to legal communications. As the Board has explained, an employer has a “strong confidentiality interest” in keeping confidential a communication that is subject to the attorney-client privilege.¹⁷ However, any restriction on employees’ Section 7 rights still must be narrowly tailored, even if made with the object of protecting confidential legal exchanges.¹⁸

¹⁴ See *Gallup, Inc.*, 334 NLRB 366, 366 (2001) (employer unlawfully created a rule banning audio or video taping at work in response to union organizing efforts), *enforced*, 62 F. App’x 557 (5th Cir. 2003).

¹⁵ *Whole Foods Market*, 363 NLRB No. 87, slip op. at 1-2, 4 (Dec. 24, 2015), *enforced mem.*, 2017 WL 2374843 (2d Cir. June 1, 2017).

¹⁶ *Id.* (citing *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 5 (Aug. 27, 2015)); see also *T-Mobile, USA, Inc.*, 363 NLRB No. 171, slip op. at 4 (Apr. 29, 2016) (finding prohibition on recordings unlawful because it was not sufficiently narrowly tailored to protecting employer’s interest, *inter alia*, in “maintaining employee privacy, [and] protecting employee confidential information. . .”).

¹⁷ *BP Exploration, Inc.*, 337 NLRB 887, 889 (2002) (citation omitted).

¹⁸ See, e.g., *Boeing Co.*, 362 NLRB No. 195, slip op. at 2-3 (Aug. 27, 2015) (finding unlawful a confidentiality notice restricting employees from discussing HR investigations in which they were involved because the law department may direct HR to gather “sensitive information,” explaining that, “[w]hile an employer may

The Employer's blanket written statement that "we are prohibiting you from recording any conversation going forward" was unlawful because it broadly encompasses "all" recordings and is therefore not narrowly tailored to protecting the Employer's significant confidentiality interests. The Charging Party therefore would reasonably interpret it to infringe on [REDACTED] Section 7 rights.

However, the Disciplinary Notice containing this unlawful statement was not shared with any employee other than the Charging Party, who was lawfully discharged. Further, there is no evidence indicating that this statement has been applied to other employees or otherwise adopted as applicable to other employees. In these circumstances, it would not effectuate the policies and purposes of the Act to issue complaint alleging that the statement was unlawful.

CONCLUSION

The Region should dismiss, absent withdrawal, the allegations that the Employer violated Section 8(a)(1) by disciplining the Charging Party for covertly tape recording meetings and requiring that [REDACTED] not tape record any workplace conversations going forward.

/s/
J.L.S.

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legitimately require confidentiality in appropriate circumstances, it must also attempt to minimize the impact of such a policy on protected activity.”).