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

Advice Memorandum

DATE: May 25, 2017

TO: Terry Morgan, Regional Director
Region 7

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

SUBJECT: JBS USA, LLC
Case 07-CA-192755

506-0170
506-4067-1000-0000
512-5012-0125-0000
512-5012-0133-1100

The Region submitted this case for advice on whether an employee's recording, and insistence upon recording, investigatory meetings with a manager was protected concerted activity; and whether the Employer violated Section 8(a)(1) of the Act under *Continental Group, Inc.*,[1] when it extended the suspension of, and subsequently discharged, the employee based on its application of a rule prohibiting recording in the workplace. We conclude that, although the employee's conduct was not protected concerted activity, (b) (6), (b) conduct nonetheless implicated Section 7 concerns. Accordingly, the Employer violated Section 8(a)(1) when it extended the suspension of, and discharged, the employee pursuant to its overbroad no-recording rule.

FACTS

The Employer operates a beef processing facility in Michigan. Charging Party worked as an (b) (6), (b) (7)(C) in the Employer's Accounting Department from 2014 until (b) (6), (b) termination on (b) (6), (b) (7)(C), 2017. (b) (6), (b) (7 primary job duty was processing cattle-purchasing contracts. (b) (6), (b) (7 had no supervisory or managerial responsibilities. Charging Party was not represented by a union, although United Food and Commercial Workers, Local 951, has represented a large number of workers at the Employer's facility for many years.

On (b) (6), (b) (7)(C), 2017,[2] Charging Party engaged in a verbal altercation at work with another employee over a personal issue. The altercation gained the attention of management, and Charging Party and the other employee were sent to

[1] 357 NLRB 409 (2011).

[2] All dates hereinafter are in 2017 unless otherwise noted.

the Employer's (b) (6), (b) (7)(C). The (b) (6), (b) (7)(C) asked Charging Party several questions and then returned (b) (6), (b) (to work. Charging Party completed (b) (6), (b) shift at 3:00 PM and left for the weekend. During that same afternoon, the Employer interviewed several more employees about the altercation. Based on these interviews, the Employer determined that Charging Party should be suspended pending further investigation.

On the morning of (b) (6), (b) (7)(C), Charging Party reported to work but was quickly directed to meet with a (b) (6), (b) (7)(C) (hereinafter "(b) (6), (b) "). Using the audio recording feature on (b) (6), (b) (cell phone, Charging Party secretly recorded the meeting. (b) (6), (b) (states that (b) (6), (b) recorded the meeting because (b) (6), (b) was not represented by a union and was suspicious of the Employer.[3]

The (b) (6), (b) (7)(C) meeting was short. (b) (6), (b) (7)(C) told Charging Party that (b) (6), (b) was suspended pending investigation because of the altercation that had occurred on the previous Friday. Charging Party was not given an opportunity to tell (b) (6), (b) side of the story. Before leaving, Charging Party stated that the suspension and investigation were ridiculous and that the Employer was breaking the law. (b) (6), (b) took Charging Party's company badge and escorted (b) (6), (b) from the building. At some point that day, (b) (6), (b) (7)(C) learned from an employee that Charging Party had recorded the meeting.

On or around (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) called Charging Party back to the facility to discuss the suspension. When Charging Party arrived at (b) (6), (b) office, (b) (6), (b) (7)(C) immediately ordered Charging Party to set (b) (6), (b) (phone on the table, stating that Charging Party could not record the meeting if they were going to discuss the suspension. Charging Party refused, stating that Michigan law gave (b) (6), (b) the right to record. (b) (6), (b) (7)(C) then asked whether Charging Party had recorded the (b) (6), (b) (7)(C) meeting, and Charging Party admitted that (b) (6), (b) had. Charging Party states that, in response to (b) (6), (b) admission, (b) (6), (b) pointed to the door and stated, "You are further on suspension." The Employer asserts that (b) (6), (b) (7)(C) ended the meeting because Charging Party refused to engage in the meeting without recording it. Charging Party left the facility without further incident.

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[3] In 2016, the Charging Party had made several complaints to coworkers about working conditions, and (b) (6), (b) was fearful of retaliation. Notably, the Region has determined that Charging Party was not terminated because of those instances of ostensibly protected concerted conduct.

On (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) called Charging Party back to the facility to discuss the investigation. (b) (6), (b) (7)(C) initiated the meeting by asking Charging Party if (b) (6), (b) was ready to discuss the (b) (6), (b) (7)(C) altercation. Charging Party stated (b) (6), (b) would be happy to participate but wanted to record the meeting. (b) (6), (b) replied that Charging Party could not record the meeting and handed Charging Party a document titled "Cell Phone Policy." The Policy states that "[t]aking pictures or the recording of video is NOT allowed on company property to include, but not limited to; parking lot, production areas, offices, non-production areas, hallways, locker rooms, cafeteria, smoking areas, etc." The Policy makes no exceptions for Section 7 activity. After reading the Policy, Charging Party pointed out that it did not apply to (b) (6), (b) because it bars video recording but not audio recording. (b) (6), (b) responded that the Policy applied to audio recording as well.

When Charging Party continued to insist that (b) (6), (b) be allowed to record the meeting, (b) (6), (b) (7)(C) called the (b) (6), (b) (7)(C) and told (b) (6), (b) that Charging Party was not complying with the order not to record. After ending the call, (b) (6), (b) (7)(C) repeated the order. Charging Party responded that (b) (6), (b) wanted an audio recording because (b) (6), (b) did not have representation and management was targeting (b) (6), (b) for doing nothing wrong. At this juncture, (b) (6), (b) (7)(C) had Charging Party escorted from the facility. As Charging Party was leaving, (b) (6), (b) told (b) (6), (b) (7)(C) that the Employer was violating (b) (6), (b) rights. The Employer acknowledges that, ultimately, "no meeting was held" on (b) (6), (b) (7)(C)

After being escorted from the Employer's property on (b) (6), (b) (7)(C), Charging Party called and emailed (b) (6), (b) (7)(C) and the (b) (6), (b) (7)(C) several times to get an update on (b) (6), (b) suspension. (b) (6), (b) received no immediate response.

On (b) (6), (b) (7)(C), Charging Party heard from (b) (6), (b) (7)(C), who also worked for the Employer, that Charging Party's name was posted on the Employer's termination list. The list stated that Charging Party was terminated for "harassment."

Also on (b) (6), (b) (7)(C), just after learning about the termination list, Charging Party received a call from (b) (6), (b) (7)(C), who stated that Charging Party was terminated and should have already received a termination letter.[4] (b) (6), (b) stated that Charging Party had been terminated for violating the Employer's no-call/no-show absence policy. The Employer explained that (b) (6), (b) violated

[4] The termination letter is dated (b) (6), (b) (7)(C). It simply states that Charging Party was terminated for "violating company policy."

the no-call/no-show policy for having "more than three" absences between (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C).

In its subsequent position statement to the Region, the Employer contends that Charging Party was terminated for violating the company's insubordination policy. Specifically, the Employer asserts that Charging Party was insubordinate for (b) (6), (b) "refusal to participate in the investigatory meeting."[5]

ACTION

We conclude that, although Charging Party's recording or insistence on recording the meetings with (b) (6), (b) (7)(C) was not protected concerted activity, (b) (6), (b) conduct nonetheless implicated Section 7 concerns. Accordingly, the Employer violated Section 8(a)(1), under *Continental Group*, when it extended the suspension of, and later terminated, Charging Party pursuant to its unlawfully overbroad Cell Phone Policy.

I. Employer's Cell Phone Policy is Unlawfully Overbroad

A work policy is unlawfully overbroad if it would "reasonably tend to chill employees in the exercise of their Section 7 rights."[6] This occurs if the policy explicitly prohibits Section 7 activity or if "(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] The Board applied these standards in *Whole Foods Market, Inc.*, to find unlawful an employer's policies that "unqualifiedly prohibit[ed] all workplace recording."[8] The Board reasoned that Section 7 activity may include, e.g., recording images of protected picketing; documenting unsafe workplace equipment, hazardous working conditions, or inconsistent application of employer rules; documenting and

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[5] The Employer did not specify which particular meeting it was referencing.

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

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

[8] 363 NLRB No. 87, slip op. at 3-4 (Dec. 24, 2015). *See also Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 3-4 (Aug. 27, 2015) (rule prohibiting all workplace recording overbroad); *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 3-4 (Apr. 29, 2016) (same).

publicizing discussions about terms and conditions of employment; or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.[9] Because the employer's rules contained blanket bans on recording at the workplace, the Board concluded that employees would reasonably construe them to ban Section 7-protected recording.[10]

Here, as in *Whole Foods*, the Cell Phone Policy is overbroad. On its face, it prohibits all forms of photography and video recording throughout the Employer's entire facility, and it carves out no exceptions for Section 7 activity. We note that, although the Policy does not specifically mention audio recording, the Employer interprets and enforces it to also prohibit audio recording.[11] Thus, because there is effectively no difference between the blanket recording ban contained in the Employer's Cell Phone Policy and those in *Whole Foods*, we conclude that the Policy is unlawfully overbroad.

II. Employer Violated Section 8(a)(1) Under *Continental Group*

In *Continental Group*, the Board explained that an employer does not violate the Act by disciplining an employee for conduct prohibited by an unlawfully overbroad rule if the conduct is "wholly distinct" from the concerns underlying Section 7.[12] Such discipline will violate the Act, however, if the employee "violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act."[13] The Board also held that, notwithstanding the above, no violation will be found if the employer establishes, as an affirmative defense, that the employee's conduct interfered with, *inter alia*, the

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[9] 363 NLRB No. 87, slip op. at 3.

[10] *Id.*, slip op. at 4.

[11] *See Philips Electronics North America Corp.*, 361 NLRB No. 16, slip op. at 1-3 (Aug. 14, 2014) (finding that employer maintained an unlawful rule even though rule was unwritten and employer denied its existence); *see also Pritchard Indus.*, Case 05-CA-152507, Advice Memorandum dated Dec. 1, 2015, at 5-7 (finding employer maintained overbroad policy despite employer's contention that no such rule existed).

[12] *Continental Group, Inc.*, 357 NLRB at 412.

[13] *Id.*

employer's production or operations, and that the interference, rather than the violation of the rule, was the reason for the discipline.[14]

a. Charging Party Engaged in Conduct that Implicated Section 7 Concerns

Here, Charging Party's conduct did not satisfy the first prong of the *Continental Group* test because (b) (6), (b) did not engage in activity protected by Section 7. An employee's conduct is protected by Section 7 when the conduct is both "concerted" and for "mutual aid or protection."[15] Here, Charging Party's conduct—recording and attempting to record the (b) (6), (b) (7)(C) meetings—was neither concerted nor for mutual aid or protection. The conduct was not concerted because Charging Party acted alone and not on the behalf of other employees.[16] The conduct was not for mutual aid or protection because Charging Party's recording was merely for self protection.[17]

We do conclude, however, that Charging Party's conduct satisfied prong two of *Continental Group* because it implicated the "concerns underlying Section 7." Importantly, the Board has recognized that documenting the inconsistent application of employer policies or perceived violations of workplace rights may constitute Section 7 activity.[18] Here, Charging Party recorded the (b) (6), (b) (7)(C) meeting and sought to

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[14] *Id.*

[15] *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014) ("To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'").

[16] *See generally Meyers Industries*, 281 NLRB 882, 885 (1986) (concerted activity is activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself"), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

[17] *Dana Corp.*, 318 NLRB 312, 316 (1995) (finding employee did not engage in protected concerted activity when attempting to record a meeting because the recording's purpose was self-protection, not mutual protection).

[18] *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3 & nn.7-8 (observing that protected conduct may include, *inter alia*, "documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions"), and cases cited therein; *Hawaii Tribune Herald*, 356 NLRB 661, 661 (2011) (finding employee engaged in Section 7 activity by secretly recording meeting with newspaper editor, in concert with coworkers, in order to document a perceived violation of employee rights under *NLRB*

record the (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) meetings because (b) (6), (b) knew the Employer was investigating potential misconduct and was concerned that it would retaliate against (b) (6), (b) for (b) (6), (b) ostensibly protected concerted activities in 2016. Indeed, at both the (b) (6), (b) (7)(C) and (b) (6), meetings, Charging Party told (b) (6), (b) (7)(C) that the Employer was violating the law, and, at the (b) (6), (b) (7)(C) meeting, Charging Party also told (b) (6), (b) (7)(C) that (b) (6), (b) believed the Employer was targeting (b) (6), (b) (7 This conduct clearly implicated the concerns underlying Section 7, i.e., documenting perceived violations of employee rights or disparate application of workplace policies. Moreover, the Employer has raised no "overriding employer interest"[19] for prohibiting Section 7-protected recording in the present context.[20] Relatedly, Michigan does not have an all-party-consent recording rule that could bar Charging Party's conduct.[21]

Notably, Charging Party's conduct satisfies the second prong of *Continental Group* despite the fact that the conduct was neither concerted activity *nor for the purpose of mutual aid or protection*. As discussed below, the second prong only

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v. J. Weingarten, Inc., 420 U.S. 251 (1975)), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012).

[19] *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3.

[20] *Cf. Flagstaff Medical Center*, 357 NLRB 659, 662-63 (2011) (finding prohibition on use of recording equipment justified because hospital had "weighty" interest in protecting hospital patients' privacy concerns and its nondisclosure obligations under HIPAA), *enforced in part*, 715 F.3d 928 (D.C. Cir. 2013); *Food & Commercial Workers Local 345-50 (Pathmark Stores)*, 339 NLRB 148, 150 (2003) (union violated Section 8(b)(1)(B) by insisting on recording grievance meetings; recording devices would "formalize" grievance meetings and "inhibit the type of spontaneous, informal discussion that is essential to the grievance adjustment process"); *Pennsylvania Telephone Guild (Bell Telephone)*, 277 NLRB 501, 501-02 (1985) (insisting to impasse on use of recording device during grievance meeting is bad faith bargaining, because "[t]he presence of a recording device may have a tendency to inhibit free and open discussions"), *enforced*, 799 F.2d 84 (3d Cir. 1986).

[21] *See Sullivan v. Gray*, 324 N.W.2d 58, 60-61 (Mich. Ct. App. 1982) (per curiam) (finding Michigan Comp. Laws § 750.539c allows unilateral recording because the statutory term "eavesdrop" refers only to overhearing or recording private conversations of *others*).

requires that the conduct relate to a protected subject, e.g., terms and conditions of employment.[22]

First, the test itself only requires "conduct that otherwise implicates the concerns underlying Section 7 of the Act," or, put another way, "conduct that touches the concerns animating Section 7."[23] If the *Continental Group* Board had intended to require second-prong conduct to be "for mutual aid or protection," it could have easily expressed that in the language of the test. Instead, it chose to use the broader language above.

Second, the *Continental Group* Board used the underlying facts of *NLS Group*[24] as a "prime illustration" of second-prong conduct.[25] In *NLS Group*, the employee was discharged for violating an overbroad confidentiality rule by "complaining to a client *about an individual compensation issue* . . . ."[26] This conduct was neither concerted nor for mutual aid or protection. Instead, it was merely an individual problem related to terms and conditions of employment.

Third, this interpretation is consistent with the "chilling effect" rationale that the Board relied upon in *Continental Group*. Specifically, the Board stated that discipline pursuant to an overbroad rule for conduct that is not concerted but otherwise implicates Section 7 concerns creates a "much greater risk that employees would be chilled in the exercise of their Section 7 rights" than such discipline for conduct that is "wholly distinct" from Section 7.[27] In this regard, the Board posited that employees "might have difficulty appreciating the distinction between a discharge based on the discussion of an individual wage dispute with a client, and a discharge based on the discussion of (and appeal for support regarding) a unit-wide compensation grievance

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[22] *See Courthouse Academy*, Cases 5-CA-066761, et al., Advice Memorandum dated Jan. 13, 2012, at 5-6.

[23] *Continental Group, Inc.*, 357 NLRB at 412.

[24] 352 NLRB 744 (2008) (two-member Board), *adopted by* 355 NLRB 1154 (2010), *enforced*, 645 F.3d 475 (1st Cir. 2011).

[25] *Continental Group, Inc.*, 357 NLRB at 412 n.10.

[26] *Id.* (emphasis in original); *NLS Group*, 352 NLRB at 744.

[27] *Continental Group, Inc.*, 357 NLRB at 412.

with a client."[28] In other words, the Board observed that employees have little trouble identifying issues that concern terms and conditions of employment but may have difficulty identifying what is concerted or for mutual aid or protection.

b. Employer Disciplined Charging Party Pursuant to Its Unlawfully Overbroad Policy

In order to find a violation under *Continental Group*, the evidence must show that the discipline at issue was, in fact, pursuant to an overbroad policy.[29] To satisfy this requirement, the rule need not be explicitly invoked by the employer at the time of discipline.[30] Instead, circumstantial evidence may reveal a nexus between the unlawful policy and employee discipline.[31]

Here, the Employer contends that it did not discipline Charging Party pursuant to its Cell Phone Policy, but instead disciplined (b) (6), (b) pursuant to its policies on no-call/no-show absences and insubordination. Additionally, the Employer's termination list stated that Charging Party was terminated for harassment. We reject these contentions.

First, the Employer invoked the Cell Phone Policy against the Charging Party prior to the termination when it twice extended (b) (6), (b) original (b) (6), (b) (7)(C) suspension. At the (b) (6), (b) (7)(C) meeting, (b) (6), (b) (7)(C) implicitly invoked the Cell Phone Policy when (b) (6), (b) (told Charging Party that (b) (6), (b) could not record the meeting, and told Charging Party that (b) (6), (b) was "further suspended" after Charging Party admitted that (b) (6), (b) had recorded the (b) (6), (b) (7)(C) meeting. And, at the (b) (6), (b) (7)(C) meeting, (b) (6), (b)

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[28] *Id.* at 412 n.11.

[29] *Id.* at 412; *Chinook Winds Casino Resort*, Case 36-CA-010931, Advice Memorandum dated June 26, 2012, at 11 n.41.

[30] *See NLS Group*, 352 NLRB at 745 (finding discharge made pursuant to unlawfully overbroad rule where, at time of discharge, employer stated merely that the employee had "not lived up to [his] end of the bargain"); *see also The Big "M" Casino, Inc.*, Case 12-CA-085961, Advice Memorandum dated Jan. 15, 2013, at 15 (finding employer discharged employee pursuant to overbroad rule even though employer did not cite the rule at time of discharge); *ER Solutions, Inc.*, Case 19-CA-032943, Advice Memorandum dated Oct. 12, 2011, at 9-11 (same).

[31] *See Pritchard Indus.*, Case 05-CA-152507, Advice Memorandum dated Dec. 1, 2015, at 7 (finding a nexus between unlawfully overbroad rule and discipline).

(b) (6), (b) (7)(C) explicitly invoked the Policy when (b) (6), (b) denied Charging Party's request to record the meeting, showed (b) (6), (b) the Policy, told (b) (6), (b) that the Policy prohibited audio recording, and had Charging Party escorted off the property when (b) (6), (b) refused to participate in the meeting without recording it.

Second, additional evidence contradicts two of the Employer's stated reasons for Charging Party's termination: harassment and no-call/no-show absences. Charging Party could not have been terminated for harassment because, according to the Employer's position statement, it had essentially completed its investigation of the (b) (6), (b) (7)(C) altercation by (b) (6), (b) (7)(C) and simply needed to meet with Charging Party before returning (b) (6), (b) to work. Additionally, Charging Party could not have been terminated for no-call/no-show absences because Charging Party was never taken off suspension and thus could not have been "absent." In this regard, the Employer suspended Charging Party, pending investigation, on (b) (6), (b) (7)(C); on (b) (6), (b) (7)(C), (b) (6), (b) told (b) (6), (b) that (b) (6), (b) was "further on suspension" for recording the (b) (6), (b) (7)(C) meeting; and, on (b) (6), (b) (7)(C), despite the Employer's contention that it had decided that Charging Party could return to work after meeting with (b) (6), (b), the Employer admits that no meeting occurred due to Charging Party's insistence on recording. Moreover, (b) (6), (b) (7)(C) had Charging Party removed from the Employer's facility. Considering the above, plus the fact that the Employer never informed Charging Party that (b) (6), (b) suspension was over and (b) (6), (b) could return to work, the Employer's claim that it terminated Charging Party for no-call/no-show absences is implausible.

We acknowledge that the Employer terminated Charging Party for refusing to comply with (b) (6), (b) (7)(C) instructions to participate in work-related meetings without recording them; that these instructions generally would be found lawful, and Charging Party's refusal to comply with them generally would be found insubordinate, where the recording would not constitute Section 7 activity; and that Charging Party's conduct on (b) (6), (b) (7)(C) and (b) (6), technically did not even violate the Cell Phone Policy because (b) (6), (b) did not actually record those meetings. Nonetheless, we conclude that Charging Party was disciplined pursuant to the Cell Phone Policy within the meaning of *Continental Group* because Charging Party's "insubordination" was (b) (6), (b) refusal to comply with that overbroad work rule. This creates an inextricable link between Charging Party's "insubordination" and the Cell Phone Policy, making the Employer's termination of Charging Party for insubordination the functional equivalent of terminating (b) (6), (b) for violating the Cell Phone Policy.

c. Employer Cannot Establish an Affirmative Defense

Finally, the Employer has not raised the affirmative defense that Charging Party's conduct interfered with the Employer's production or operations and "that the interference, rather than the violation of the rule, was the reason for the discipline."[32] Moreover, we would reject any argument that Charging Party interfered with its operations by refusing to participate in the (b) (6), (b) (7)(C) and (b) (6), meetings, as the Employer admits that it was able to complete its investigation of the (b) (6), (b) (7)(C) verbal altercation. Nor could the Employer plausibly argue that any such interference was the reason for the discipline.

For the foregoing reasons, the Region should issue complaint, absent settlement.

/s/
B.J.K.

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[32] *Continental Group, Inc.,* 357 NLRB at 412.