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

Advice Memorandum

DATE: December 20, 2011

TO : Stephen M. Glasser, Regional Director
Region 7

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

SUBJECT: General Motors
Case 7-CA-53570

506-2001-5000
506-4033-5500
512-5036-6720
512-5012-0125

The Region submitted this case for advice as to (1) whether the Employer's policy governing the use of social media would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act; and, if so, (2) whether the Employer's discipline of the Charging Party pursuant to this policy was unlawful.

We conclude that the Employer's social media policy would reasonably be construed to chill the exercise of Section 7 activity and, therefore, violates Section 8(a)(1). However, the Employer's discipline of the Charging Party was not unlawful because his conduct did not constitute protected concerted activity or fall within the ambit of Section 7.

FACTS

I. The Discipline of the Charging Party

The Charging Party is a production and maintenance employee who works the second shift (3:30 p.m. – 10:30 p.m.) at the Employer's Lansing, Michigan facility. On February 1, 2011,[1] the Lansing-Flint area experienced a severe snow storm. Although the Employer cancelled the third shift, employees who worked the second shift were required to work an extra hour. A number of second shift employees became upset when they learned of this decision and complained to the Charging Party that it would make their evening commutes more hazardous. The decision was, in their view, "ridiculous" because so many second shift employees lived in Flint and Saginaw and had very lengthy commutes. As a result, the Charging Party asked one of his colleagues to cover for him while he went to discuss the matter with his supervisor. When the Charging Party

[1] All dates are in 2011.

thereafter asked his supervisor why the second shift was being extended, he was advised that the worst of the storm was not expected until midnight. The Charging Party then pointed out that many of his colleagues would still be on the road at that time.

After arriving home in the early hours of February 2, the Charging Party logged onto the Employer's Facebook page[2] where employees had posted comments critical of the Employer's decision.[3] For example, one employee commented that the plant was closed not because of safety concerns but because of a lack of parts. There were also postings by other employees defending management. For example, one employee defended the Employer's decision and stated that if employees of a particular grocery chain had posted such critical comments they would be discharged the following day. The Charging Party responded to that post with a comment that included the statement, "who the fuck do you think you are?" About ten minutes later he regretted this comment and took it down.

On February 8, the Charging Party was summoned to the shift leader's office and confronted about using foul language on the Employer's Facebook page. The Charging Party admitted that he had "said some things he probably should not have" but explained that he was angry at the time and deleted the comments ten minutes later.

The following morning, the Charging Party again logged onto the Employer's Facebook page and posted the following comment:

> It has come to my attention that someone did not like my "foul language" in my postings last week and decided to report me. Well, I believe I am still an American and have this thing called "the Right to Free Speech." If you are offended at foul language then you have every right not to read what I write. So, to the person who reported me, kiss my ass!

After reporting for work later that day, the Charging Party was summoned by his supervisor and another management official and asked if he had used the phrase "kiss my ass"

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[2] The Employer maintains its own Facebook page "for GM Lansing employees, retirees, and family to gather and share information" and "for employees and retirees to stay connected on current events."

[3] The evidence pertaining to comments posted on the Employer's Facebook was obtained through employee testimony because the Region was unable to obtain copies of the postings themselves.

on the Employer's Facebook page. The Charging Party admitted that he had and further stated that "he would say it again, would say it every time." His supervisor then advised him that the language he used violated the Employer's communications policy and that he had misused the Employer's Lansing Regional Facebook page. He was consequently given a balance of shift and three-day suspension.

The Charging Party's supervisor recorded in his meeting notes that on February 8, the Charging Party had been informed that his posts violated the Employer's communications policy and that further posts using vulgar language should not take place. The notes further stated that "even after" this warning, "on 2/9/11 [the Charging Party] felt it necessary to post another inappropriate statements [sic]." On February 9, the Union filed a grievance over the suspension. In its answer to the grievance, the Employer stated that, "[e]mployee was warned about his inappropriate language the previous day and still did it the next day."[4]

II. The Social Media Policy

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

> USE GOOD JUDGEMENT ABOUT WHAT YOU SHARE AND HOW YOU SHARE
> If you engage in a discussion related to GM, in addition to disclosing that you work for GM and that your views are personal, you must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site. If you are in doubt, review the GM Media (media.gm.com) site. If you are still in doubt, don't post. Non-public information includes:
>
> - Any topic related to the financial performance of the company;
> - Information directly or indirectly related to the safety performance of GM systems or components for vehicles;
> - GM Secret, Confidential or Attorney-Client Privileged information;
> - Information that has not already been disclosed by authorized persons in a public forum; and

[4] The grievance was denied at the first step but is now being held in abeyance for discussion in local negotiations.

- Personal information about another GM employee, such as his or her medical condition, performance, compensation or status in the company.

When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with GM Communications or GM Legal to see if it's a good idea. Failure to stay within these guidelines may lead to disciplinary action.

- Respect proprietary information and content, confidentiality, and the brand, trademark and copyright rights of others. Always cite, and obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally sharable or that you have the owner's permission. If you are unsure, you should not use.
- Get permission before posting photos, video, quotes or personal information of anyone other than you online.
- Do not incorporate GM logos, trademarks or other asserts in your posts.

TREAT EVERYONE WITH RESPECT

Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional. We expect you to abide by the same standards of behavior both in the workplace and in your social media communications.

OTHER GM POLICIES THAT APPLY

Think carefully about "friending" co-workers . . . on external social media sites. Communications with co-workers on such sites that would be inappropriate in the workplace are also inappropriate online, and what you say in your personal social media channels could become a concern in the workplace.

GM, like other employers, is making internal social media tools available to share workplace information within GM. All employees and representatives who use these social media tools must also adhere to the following:

- Report any unusual or inappropriate internal social media activity to the system administrator.

> GM's Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act).

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining an overly broad policy governing the use of social media.

I. Portions of the Social Media Policy Violate the Act

An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that 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 such an effect.[6] First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, it will violate the Act 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]

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.[8] In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such

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

[6] *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004).

[7] *Id*.

[8] See *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003) (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.")

that they could not reasonably be construed to cover protected activity, are not unlawful.[9]

We conclude that although the Employer's social media policy was not promulgated in response to Section 7 activity and does not explicitly prohibit Section 7 activity, various provisions of the policy are unlawful under the second part of the *Lutheran Heritage* test because they would reasonably be construed to prohibit Section 7 activity.

Initially, employees are instructed to be sure that their posts are "completely accurate and not misleading and that they do not reveal non-public information on any public site." The term "completely accurate and not misleading" is overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of, the Employer's labor policies and its treatment of employees that would be protected by the Act so long as they are not maliciously false.[10] Moreover, the policy does not provide any guidance as to the meaning of this term by specific examples or limit the term in any way that would exclude Section 7 activity.

We further find unlawful the second clause of this provision, which instructs employees not to "reveal non-public company information on any public site" and then explains that the term "non-public information" encompasses "[i]nformation that has not already been disclosed by authorized persons in a public forum"; "[a]ny topic related

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[9] See *Tradesmen Intl.*, 338 NLRB 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity); *Sears Holdings*, Case 18-CA-19081, Advice Memorandum dated December 4, 2009 (lone reference to "disparagement" was made in context of prohibition against serious misconduct, such as use of obscenity, illegal drugs, and discriminatory language).

[10] *Mission Foods*,350 NLRB 336, 344 (2007) (adopting ALJ's finding that rule that prohibits and punishes merely false statements is unlawful per se because the Act protects inaccurate employee statements); *Cincinnati Suburban Press*, 289 NLRB 966, 966 n.2 975 (1988) (rule against "false, vicious, or malicious statements" unlawful); *Flagler Hospital*, Case 12-CA-27031, Advice Memorandum dated May 10, 2011 (rule prohibiting "statements which lack . . . truthfulness or which might cause damage to or does damage to the reputation or goodwill of the [employer]" unlawful).

to the financial performance of the company"; and "[p]ersonal information about another GM employee, such as . . . performance [and] compensation[.]" Because the policy's explanation of prohibited "non-public information" specifically encompasses topics related to Section 7 activities,[11] employees would reasonably construe the policy as precluding them from discussing terms and conditions of employment among themselves or with non-employees.[12] Even assuming the Employer has a legitimate interest in preventing the disclosure of certain protected financial and other non-public company information, the language is so broad that employees would reasonably interpret these provisions to prohibit protected activity particularly where, as here, "failure to stay within [the policy's] guidelines may lead to disciplinary action."

The Employer's policy also unlawfully prohibits employees from posting photos, music, videos, and the quotes and personal information of others without obtaining the owner's permission and ensuring that the content can be legally shared, and from using GM logos and trademarks in their posts. Thus, in the absence of any further explanation, employees would reasonably interpret these provisions as proscribing the use of photos and videos of employees engaging in Section 7 activities, including

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[11] See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB at 115 (rule which on its face and on the threat of discipline expressly prohibits the discussion of wages and other terms and conditions of employment "plainly infringes upon Section 7 rights and violates Section 8(a)(1))"); *University Medical Center*, 335 NLRB at 1320, 1322 (unlawful rule prohibiting the release or disclosure of "confidential" information regarding fellow employees); *Freemont Mfg. Co.*, 224 NLRB 597, 603-604 (1976) (rule prohibiting employees from "[m]aking any statement or disclosure regarding company affairs, whether express or implied as being official without proper authorization from the company" unlawful).

[12] *Bigg's Foods*, 347 NLRB 425, 425 n.4 (2006) (rule prohibiting employees from discussing their own or their fellow employee' salaries with "anyone outside the company" violates Section 8(a)(1)); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3, 291-292 (1999) (rule prohibiting employees from revealing confidential information regarding hotel's customers, fellow employees or hotel business unlawful).See also *Albertson's, Inc.*, 351 NLRB 254, 258 (2007) (employer unlawfully used its confidentiality rule to discipline an employee for engaging in protected concerted activity, namely, providing employee names to assist the union's organizing campaign).

photos of picket signs containing the Employer's logo.[13] Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, employees' use of its logo or trademarks while engaging in Section 7 activities 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.[14] These interests are not remotely implicated by employees' non-commercial use of the Employer's name, logo, or other trademarks in the course of engaging in Section 7 activities related to their working conditions.[15]

The Employer's social media policy additionally instructs employees to "[t]hink carefully about 'friending' co-workers." This provision is unlawfully overbroad because it would discourage communications among co-workers and thus necessarily interferes with Section 7 activity. Moreover, there is no limiting language clarifying for employees that it does not restrict Section 7 activity.

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[13] *Cf. Sullivan, Long & Hagerty,* 303 NLRB 1007, 1013 (1991) enfd. 976 F.2d 743 (11th Cir. 1992) (employee tape recording at jobsite to provide evidence in a Department of Labor investigation is protected); *Pepsi-Cola Bottling Co.*, 301 NLRB 1008,1019-20 (1991), *enforced sub nom.*, *Pepsi-Cola Bottling Co. v. NLRB*, 953 F.2d 638 (4th Cir. 1992)(finding unlawful prohibition against employees wearing company logo or insignia while engaging in union activity during non-working time away from the plant).

[14] See *Scarves by Vera*, 544 F.2d 1167, 1172 (2d Cir. 1976).

[15] Even if trademark principles were applicable to this kind of use, there is no unlawful infringement where use of a trademark would not confuse the public regarding the source, identity, or sponsorship of the product. See, e.g., *Smith v. Chanel, Inc.*, 402 F.2d at 565, 569 (use of trademark in an advertisement comparing the alleged infringer's product to the trademark holder's product not unlawful because it did not create a reasonable likelihood that purchasers would be confused as to the source, identity, or sponsorship of the advertiser's product).

We also find unlawful the policy's instruction to employees that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline[.]" Like the provisions discussed above, this provision proscribes a broad spectrum of communications that would include protected criticisms of the Employer's labor policies or treatment of employees.[16] Similarly, the instruction to employees to be aware that "[c]ommunications with co-workers . . . that would be inappropriate in the workplace are also inappropriate online" does not specify which communications the Employer would deem inappropriate at work and, thus, is ambiguous as to its application to Section 7.

The section of the policy that cautions employees that "[w]hen in doubt about whether the information you are considering sharing falls into one of the [prohibited] categories, DO NOT POST. Check with GM Communications or GM legal to see if it's a good idea[,]" is also unlawful. The Board has long held that any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities violates the Act.[17] Here, the requirement that employees "[c]heck with [the Employer] to see if it's a good idea" before sharing information in online communications does not include any language clarifying for employees that it does

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[16] See, e.g., *Claremont Resort and Spa*, 344 832, 832 (2005) (rule prohibiting "negative conversations" about management unlawful); *University Medical Center*, 335 NLRB at 1318 (rule against "disrespectful conduct" toward others unlawful); *Adranz ABB Daimler-Benz*, 331 NLRB 291, 291 n.3 (2000), enf. denied in pertinent part 253 F.3d 19 (D.C. Cir. 2001) (rule against using "abusive or threatening language to anyone on Company premises" unlawful); *Flamingo Hilton-Laughlin*, 330 NLRB at 288 n.3 (prohibition against using "loud, abusive or foul language" unlawful); *American Medical Response of Connecticut, Inc.,* Case 34-CA-12576, Advice Memorandum dated October 5, 2010) (rule prohibiting "[u]se of language or action that is inappropriate . . . or of a general offensive nature" unlawful).

[17] See T*rump Marina Casino Resort*, 354 NLRB No. 123 n.2 (2009) (rules prohibiting employees from releasing statements to news media without prior approval and authorizing only certain representatives to speak to the media unlawful); *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (rule requiring authorization to distribute literature on employee's own time in non-work areas unlawful); *Brunswick Corp.*, 282 NLRB 794, 794-795 (1987) (rule requiring permission to engage in solicitation during non-work times in non-work areas unlawful).

not restrict Section 7 activities. Consequently, it violates the Act.

The policy's instruction that employees "[r]eport any unusual or inappropriate internal social media activity to the system administrator" is also overbroad. An employer violates the Act by encouraging employees to report to management the union activities of other employees.[18] Such statements violate the Act because they have the potential to create a chilling effect thereby discouraging employees from engaging in protected activities.[19] Here, the Employer's instruction that employees report "unusual or inappropriate social media activity" would reasonably be construed by employees as applying to its social media policy. Because certain provisions of that policy are unlawful as set forth above, the reporting requirement is also unlawful.

The "savings clause," which states that "GM's Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the NLRA)," does not cure the ambiguities contained in the policy's overbroad rules. The Board has held that an employer may not prohibit employee activity protected by the Act and then, as here, seek to escape the consequences of the prohibition by a general reference to rights protected by law.[20] As the Board explained, employees may

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[18] See generally *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998) and cases cited at n.6.; *Tawas Industries, Inc.*, 336 NLRB 318, 322 (2001) (employer's statements that employees who harass or pressure other employees in the course of union solicitations should be reported to management violate Section 8(a)(1)).

[19] *Bloomington-Normal Seating Co.*, 339 NLRB 191, 191 n.2 (2003) (employer's invitation to employees that they inform it of protected card solicitation by other employees unlawful because of the potential for chilling legitimate union activity); *Eastern Main Medical Center*, 277 NLRB 1374, 1375 (1985) (statement by employer urging its employees to report to the employer if they have been harassed or pressured into signing cards is overly broad and unlawful because it discourages union card solicitors in their protected organizational activities).

[20] *See Allied Mechanical*, 349 NLRB 1077, 1084 (2007) (employer's unlawful conditioning of the settlement of employee wage claims upon the requirement that employees not engage in protected activity was not saved by clause stating "unless . . . permitted by federal or state law including but not limited to the National Labor Relations Act"); *Ingram Book Co.*, 315 NLRB 515, 516 (1994) (finding

not know what conduct is protected and, "rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected."[21]

We do not, however, find unlawful the policy's prohibitions on discussing online "[i]nformation directly or indirectly related to the safety performance of GM systems or components for vehicles" and "GM secret, confidential or Attorney-Client Privileged information." The provision addressing the safety performance of GM systems does not make any reference to employees and employees would reasonably read the provision as applying to the safety performance of the Employer's automobile systems and components, not to the safety of the workplace. The provision addressing "GM secret, confidential or Attorney-Client privileged information" similarly fails to reference employees, and is clearly intended to protect the Employer's legitimate interest in safeguarding the confidentiality of its proprietary and privileged information. Therefore, employees would not reasonably interpret these provisions to cover discussions about wages and other working conditions.[22]

I. The Employer's Discipline of the Charging Party was Not Unlawful.

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employer maintenance of a disclaimer that "[t]o the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law" did not salvage the employer's overbroad no-distribution policy).

[21] *McDonnell Douglas Corporation*, 240 NLRB 794, 802 (1979) (*citations omitted*). See also *Ingram Book Co.*, 315 NLRB at 516 n.2 ("Rank-and-file employees do not generally carry law books to work or apply legal analysis to company rules . . . and cannot be expected to have the expertise to examine company rules from a legal standpoint").

[22] *Compare Flamingo Hilton-Laughlin,* 330 NLRB at 288 n.3 (finding confidentiality rule unlawful because it referenced "fellow employees") *with Super K-Mart*, 330 NLRB 263, 263-64 (1999) (provision addressing the confidentiality of "company's business and documents" that made no reference to employee information found lawful), *and Baltimore Sun*, Case 5-CA-32186, Advice Memorandum dated June 27, 2005 (rules prohibiting disclosure of confidential information lawful given repeated disclaimers that rules did not apply to discussion of wages and other terms and conditions of employment).

The Board has consistently stated that discipline imposed pursuant to an unlawfully overbroad rule violates the Act (the "*Double Eagle* rule").[23] 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.[24] 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 (e.g., concerted solicitation, distribution, or discussion of terms and conditions of employment); or (2) engaging in conduct that implicates the concerns underlying Section 7 of the Act" (e.g., conduct that seeks higher wages) but is not protected by the Act because it is not concerted.[25] 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 (e.g., sleeping on the Employer's premises when off duty)."[26] In addition, "an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline."[27]

In this case, the Employer specifically cited its communications policy when it gave the Charging Party a three-day suspension. Consequently, there is no dispute that the Charging Party was disciplined pursuant to an unlawful rule. However, applying *The Continental Group,*

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[23] See *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004); *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001); *Opryland Hotel*, 323 NLRB 723 (1997); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978); *Miller's Discount Department Stores*, 198 NLRB 281 (1972).

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

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

[26] *Id*. at 4.

[27] *Id*. citing *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. on other grounds sub nom. *NLRB v. Daylin, Inc.*, 496 F.2d 484 (6th Cir. 1974) (other citations omitted).

Inc., the Employer's suspension of the Charging Party did not violate Section 8(a)(1) because the Charging Party was 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.[28] Thus, it was wholly distinct from activity that falls within the ambit of Section 7.[29]

First, the Charging Party was not engaged in protected, concerted conduct (e.g., concerted solicitation, distribution, or discussion of terms and conditions of employment). Under Board law, an individual employee's conduct is concerted when he or she acts "with or on the authority of other employees,"[30] when the individual activity seeks to initiate, induce, or prepare for group action, or when the employee brings "truly group complaints to the attention of management."[31] Concerted activity includes "'activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization,' so long as what is being articulated goes beyond mere griping."[32] On the other hand, comments made "solely by and on behalf of the employee himself" are not concerted.[33]

Here, the remark the Charging Party posted on the Employer's Facebook page that resulted in his three-day suspension – "to the person who reported me, kiss my ass!" – expressed his personal anger with a co-worker; was made solely on his own behalf; and did not involve shared common concerns. The comment contained no language suggesting that the Charging Party sought to initiate or induce co-

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[28] *Id.*, slip op. at 3.

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

[30] *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd. 755 F.2d 941 (D.C. Cir. 1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987).

[31] *Meyers II*, 281 NLRB at 887.

[32] *Holling Press, Inc.*, 343 NLRB 301, 302 (2004), citing *Meyers II*, 281 NLRB at 887.

[33] *Meyers I*, 268 NLRB at 497. See also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964) ("mere griping" is not protected).

workers to engage in group action. Therefore, the Charging Party's conduct was not concerted, and did not fall within the first prong of the test articulated by the Board in *The Continental Group*. Although the Charging Party's suspension was also linked to his February 2 post in which he and his coworkers discussed their shared safety concerns regarding the Employer's decision to extend the second shift, the suspension was based only on his use of vulgar language, not because he had discussed workplace concerns. As the Employer asserted in response to the grievance, "the [Charging Party] was warned about his inappropriate language" and nevertheless used such language again the following day.

Second, the Charging Party did not engage in conduct that, though not concerted, nonetheless implicated common concerns underlying Section 7 of the Act, i.e., conduct with regard to subjects such as wages that would be protected if it were concerted. In this regard, the comments for which the Charging Party was disciplined did not involve protected subjects, but rather consisted of a personal rant against a co-worker which included vulgar language. Thus, the Charging Party's offensive remark was "wholly distinct from activity that falls within the ambit of Section 7."[34]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining overly broad rules governing the use of social media, and should dismiss, absent withdrawal, the allegation that he was unlawfully disciplined.

B.J.K.

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