The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) when it terminated the Charging Party for a Facebook post blaming employee attrition on bad management practices. Initially, we conclude the Charging Party engaged in protected concerted activity because Facebook post elicited support from coworkers over these management practices and employee attrition—issues that had been topics of concern for the employees. In any event, the Charging Party’s Facebook post constituted inherently concerted activity. Alternatively, we conclude that even if the Charging Party’s Facebook post was not protected concerted activity, the Employer violated Section 8(a)(1) under Parexel International\(^1\) for terminating the Charging Party as a preemptive strike against future protected concerted activity. Accordingly, the Region should issue complaint, absent settlement.

FACTS

Johns Creek Surgery (the “Employer”) operates a bariatric surgical practice consisting of [indelible ink] in Suwanee, Georgia. Since 2015, the Charging Party was employed as a [indelible ink] and worked with the Employer’s patients to ensure they followed the necessary criteria and guidelines to be approved for surgery. The Charging Party was supervised by the [b] (6), (b) (7)-(C) who, in turn, reports directly to the [indelible ink].

\(^1\) 356 NLRB 516 (2011).
The (b)(6), (b)(7)(C) began working for the Employer in about . According to the Charging Party and two of coworkers (Employee 1 and Employee 2), many employees had discussed perceived problems with the management. These problems apparently prompted one of the Charging Party’s coworkers to leave the Employer in early 2020. By November, 2020, the Charging Party believed their workload had become unmanageable. spoke to one of the Employer’s about the situation, and the said to take the rest of the day off and that they would discuss the Charging Party’s workload with the (b)(6), (b)(7)(C). At about this same time, the Charging Party learned that Employee 2, a (b)(6), (b)(7)(C), intended to resign. The Charging Party spoke to Employee 2 about why was leaving, and, according to the Charging Party, Employee 2 said was leaving primarily because of the

On the evening of (b)(6), (b)(7)(C), 2020, the Charging Party posted a meme found online to their personal Facebook page, sandwiched between two of the Charging Party’s own statements. The Charging Party’s post first stated: “Just in case someone needed to know,” followed by an emoticon of a shrugging arms. Next, the meme stated: “A bad manager can take a good staff and destroy it, causing the best employees to flee and the remainder to lose all motivation.” After the meme, the Charging Party added: “Employees don’t leave Companies, they leave Managers[.]” The post was “liked” by at least 90 individuals. Employee 1 responded to the Charging Party’s Facebook post with a comment exclaiming: “YESS. Freakin YESSSSSS!![sic]” Employee 2 responded with a comment that was comprised of solely an emoticon showing a face with no mouth. According to the Charging Party, one other coworker also commented on the Facebook post expressing frustration at how employees were treated.3

Later that evening, Employee 1 received a text message from the stating: “someone just sent me a screenshot of your comment you made on [the Charging Party’s] Facebook posting about managers. Just a heads up.” Employee 1 immediately texted a screenshot of the (b)(6), (b)(7)(C) text to the Charging Party. The two employees discussed their concern that the (b)(6), (b)(7)(C) had texted Employee 1 and their shared belief that the conduct led to Employee 2 seeking a new job. During the text exchange, Employee 1 also expressed concern that the (b)(6), (b)(7)(C) would follow up with about a comment on the Facebook post and the

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2 Another employee, Employee 3, had left allegedly because of supervisory conduct.

3 This employee’s comment was deleted before the Charging Party could obtain a screenshot of it.
Charging Party offered that it was post and didn’t necessarily involve Employee 1. The Charging Party also texted Employee 2 that evening and informed text to Employee 1. Employee 2 stated that leaving the new job would be difficult but there was “obviously a lot of bs in the office.” At some point that evening, both Employee 1 and Employee 2 deleted their comments on the Charging Party’s Facebook post.

On the next day the Charging Party and Employee 1 were scheduled to work, the confronted Employee 1 in office and asked to discuss comment on the Charging Party’s Facebook post. Employee 1 told the that comment was not about the or the Employer. The told Employee 1 that the Charging Party’s Facebook post and Employee 1’s comment had been forwarded to one of the then asked whether Employee 1 was happy with job. The concluded questioning of Employee 1 by warning to be careful what posted online so that did not get in trouble.

That same day, the Charging Party worked scheduled shift without incident. At the end of the day, the called the Charging Party into office and handed a piece of paper stating the Charging Party had received 11 patient complaints in the prior month. The told the Charging Party was being terminated due to these complaints. According to the Charging Party, the Employer had not previously informed of any patient complaints. The Employer has not produced any supporting documentation regarding these alleged patient complaints or any prior oral discipline given to the Charging Party.

**ACTION**

Initially, we conclude the Charging Party engaged in protected concerted activity because Facebook post elicited support from coworkers over scheduling, management, and employee attrition, issues that had been topics of concern for employees. In any event, the Charging Party’s Facebook post constituted inherently concerted activity. Alternatively, we conclude that even if the Charging Party’s Facebook post was not protected concerted activity, the Employer violated Section 8(a)(1) under Parexel International for terminating the Charging Party as a preemptive strike against future protected concerted activity. Accordingly, the Region should issue complaint, absent settlement.4

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4 We also conclude the Employer’s alleged threats and interrogation against Employee 1 would violate Section 8(a)(1) irrespective of whether the Charging Party’s Facebook post constituted protected concerted activity. In East Coast Abatement Co., Case 10-CA-252551, Advice Case-closing Email dated Nov. 5, 2020,
To be protected under Section 7 of the Act, employee conduct must be both “concerted” and “for the purpose of . . . mutual aid or protection.”\(^5\) The manner in which an employee’s actions are linked to those of her coworkers determines whether the employee’s activity is concerted, with no particular combination necessary to find the conduct protected.\(^6\) Core concerted activity is that which is “engaged in with or on the authority of other employees,”\(^7\) and peripheral to core group action, but also retaining protection, is individual conduct both in the form of preliminary discussions\(^8\) and where such conduct is the logical outgrowth of earlier collective discussions.\(^9\) It is well-established that concerted activity includes statements by a lone employee addressing her coworkers that seek to initiate, induce, or prepare for group action, or statements directed to management.

Advice concluded an employer’s alleged threats and interrogations were narrowly targeted toward an employee’s unprotected activities and, therefore, would not restrain, coerce, or interfere with its employees’ Section 7 rights. In contrast, here, the Employer’s threats and questions toward Employee 1 targeted knowledge of and participation in the Charging Party’s Facebook post. Even assuming the Facebook post was not protected concerted activity, here, unlike in \textit{East Coast Abatement}, the Employer’s conduct toward Employee 1 was inextricably intertwined with its strategy to prevent potential protected concerted activity from occurring, and would reasonably tend to interfere with, restrain, or coerce such activity.

\(^5\) See, e.g., \textit{Alstate Maintenance, LLC}, 367 NLRB No. 68, slip op. at 2 (Jan. 11, 2019).


\(^8\) See, e.g., \textit{Fresh & Easy Neighborhood Market}, 361 NLRB 151, 153 (2014) (“The requirement that, to be concerted, activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7” and “almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals”).

\(^9\) See, e.g., \textit{Mike Yurosek & Son, Inc.}, 306 NLRB 1037, 1038–39 (1992) (individuals’ uncoordinated refusals to work overtime were logical outgrowth of earlier concerted protest over hour reductions), \textit{enforced}, 53 F.3d 261 (9th Cir. 1995).
communicating a truly group complaint. Protected preliminary communications to coworkers include statements made to elicit support from fellow likeminded coworkers for a personally held view about a working condition. Protection will even attach to communications between employees that do not directly call for group action if they involve “inherently concerted” discussions about vital categories of workplace life such as wages, scheduling, or job security.

Based on these principles, we conclude the Charging Party’s Facebook post constituted protected concerted activity, as it had the object of initiating, inducing, or preparing for group action over the quality of employees’ supervision and employee attrition. The post, as written, objectively sought to elicit support from

10 See Alstate Maintenance, LLC, 367 NLRB No. 68, slip op. at 3 (quoting Meyers II, 281 NLRB at 887); see, e.g., Timekeeping Systems, 323 NLRB 244, 244, 248 (1997) (employee’s unilateral company-wide email to coworkers in response to employer’s email about vacation plan changes constituted concerted activity).

11 See, e.g., Morton International, 315 NLRB 564, 566 (1994) (finding that employee engaged in concerted activity by writing contradictory statements on memo that proposed smoke-free workplace, and posting memo in lunchroom, because the conduct induced support from fellow smokers); Whittaker Corp., 289 NLRB 933, 933 (1988) (“the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity” (quoting Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969))).

12 Meyers I, 268 NLRB at 494 (even a statement that “in its inception involves only a speaker and a listener” may be protected because it is “an indispensable preliminary step to employee self-organization” (quoting Root-Carlin, Inc., 92 NLRB 1313, 1314 (1951))). See also Alternative Energy Applications, 361 NLRB 1203, 1206 n.10 (2014) (stating “employee wage discussions are ‘inherently concerted,’ and as such are protected, regardless of whether they are engaged in with the express object of inducing group action”); Aroostook Cty. Reg’l Ophthalmology Ctr., 317 NLRB 218, 220 (1995) (finding that employee discussions regarding wages and work schedules are inherently concerted because they are both vital elements of employment), enforcement denied in part on other grounds, 81 F.3d 209 (D.C. Cir. 1996); Hoodview Vending Co., 359 NLRB 355, 357 (2012) (stating “employee conversations about job security are inherently concerted”), incorporated by reference, 362 NLRB 690, 690 n.1 (2015).

13 Our analysis here focuses on whether the Charging Party’s Facebook post and the comment it elicited from Employee 1 constituted concerted activity. The Facebook post clearly satisfied the “mutual aid or protection” requirement because the
coworkers and other employees—who were Facebook friends and would therefore see the post—regarding the perceived poor management practices that would lead to employee attrition. This is clearly a subject potentially affecting all the employees. Indeed, Employee 1 responded to the Charging Party’s post by commenting: “YESS. FREAKIN YESSSSSS!![sic],” another employee posted a supportive comment that was deleted before the Charging Party could screenshot it, and Employee 2 responded with an emoticon of a face with no mouth. Thus, at least two of these employees’ responses indicated their support for the Charging Party’s message that bad management practices lead to a loss of employee morale and employee attrition. Regardless of the responses, such discussions represent the type of inchoate activity that often precedes group action for the purpose of improving working conditions. They are covered by Section 7 because “almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals,” and to deny protection “because of lack of fruition” would nullify bedrock Section 7 rights. Moreover, the Charging Party’s post and the comments it elicited were a continuation of the Charging Party’s earlier conversations with numerous other employees about the quality of the Employer’s supervision, including conversation with Employee 2 about decision to leave the Employer.

Charging Party was seeking to address the quality of employees’ supervision and employee attrition. See Trompler, Inc., 335 NLRB 478, 479 (2001) (Section 7 protects employees’ concerted complaints regarding their supervisors where the supervisor’s capability “has a direct impact on the employees’ own job interests and on their performance of the work they are hired to do” (internal quotation marks and citations omitted)), enforced, 338 F.3d 747 (7th Cir. 2003). See also Rhee Bros., Inc., 343 NLRB 695, 695 n.3 (2004); Astro Tool & Die Corp., 320 NLRB 1157, 1161–62 (1996).

It is of no matter that the Charging Party states did not make the post to garner support from coworkers regarding the Practice Administrator. The Board applies an objective standard to determine whether employee activity is concerted. See, e.g., Schuff Steel, 367 NLRB No. 76, slip op. at 7 (2019).

See Fresh & Easy Neighborhood Market, 361 NLRB at 153 (finding employee who asked three coworkers to be witnesses for her workplace sexual harassment complaint engaged in concerted activity); Morton International, 315 NLRB at 566.

We note the Charging Party’s Facebook post did not constitute “mere griping,” because it was connected to employees’ preexisting concerns about the conduct and how it related to employee attrition. We do not rely on the Charging Party’s conversation with Employee 2 as evidence of the reason Employee 2 resigned. Rather, it demonstrates the Charging Party discussed the...
Although we conclude that concert may be proven by traditional means in this case, the Region should also argue that the Charging Party’s Facebook post was inherently concerted. The inherently concerted doctrine emerged in Trayco of South Carolina, Inc., where the Board held that an employee’s discussions with her co-workers about higher wages constituted concerted activity even though the discussions did not contemplate group action. In reaching that decision, the Board observed that the object of inducing group action need not be expressed but can instead be implied from the subject matter of discussion. Because higher wages are a “frequent objective of organizational activity,” the Board reasoned that the employee’s discussions about that subject impliedly were concerted. The doctrine was enlarged in Aroostook County Regional Ophthalmology Center, where the Board decided that discussions about changes in work schedules were inherently concerted activity despite the absence of any talk about the initiation of group action. Like wages, the Board concluded that work schedules are a “vital term and condition of employment” that are “likely to spawn collective action.” Lastly, in Hoodview Vending Co., the Board added the subject of “job security” to the list of vital terms and conditions of employment which, when discussed between two or more employees, will be regarded as inherently concerted activity. Such discussions concern “the very existence of the employment relationship and [will] quickly ripple through, and resonate with, the workforce.”

(b) (6), (b) (7)(C) supervision with Employee 2, a fact about which the Charging Party can testify and furnish direct evidence.


18 297 NLRB 630 (1990), enforcement denied, 927 F.2d 597 (4th Cir. 1991).

19 Id. at 634; accord Automatic Screw Prods., 306 NLRB 1072, 1072 (1992), enforced mem., 977 F.2d 582 (6th Cir. 1992).


21 Id. at 220.


23 Id. at 357.
Here, the post concerned workplace topics that the Board has already found to be inherently concerted, such as—job security and (potentially) scheduling.\textsuperscript{24} The Charging Party’s post connected what she felt was poor management to employee attrition, which is a natural corollary to employees’ job security. This was also tied to her prior discussions with coworkers about the Practice Administrator’s conduct, including conversations with Employee 2 and Employee 3 about seeking other employment opportunities. Additionally, although the meme referenced quality of supervision generally, one of the Charging Party’s main workplace concerns was the Employer’s scheduling practices and her workload—which the Charging Party had individually raised with management.\textsuperscript{25}

The Region should also urge the Board to extend the inherently concerted doctrine to employee discussions about the quality of their supervision generally. As the Charging Party’s post and her coworkers’ responses make clear, employee discussions about the quality of their supervision are often inexorably linked to numerous other issues that directly affect employees’ terms and conditions of employment, constituting a logical and necessary extension of the inherently concerted doctrine.\textsuperscript{26} Few subjects are of more vital concern to employees—supervisory conduct affecting employees’ working conditions lies at the heart of the employer-employee relationship.\textsuperscript{27} Indeed, since 1947, the Act itself has recognized

\textsuperscript{24} See \textit{Hoodview Vending Co.}, 359 NLRB at 357; \textit{Aroostook Cty. Reg’l Ophthalmology Ctr.}, 317 NLRB at 220.

\textsuperscript{25} See, e.g., \textit{Renewal by Andersen LLC KC}, Case 14-CA-262563, Advice Memorandum dated Apr. 9, 2021, at 7–8 (arguing that workplace safety and health issues are inherently concerted); \textit{North West Rural Electric Cooperative}, Case 18-CA-150605, Advice Memorandum dated Sept. 21, 2015, at 9–12 (same).

\textsuperscript{26} See \textit{Trompler, Inc.}, 335 NLRB at 479; \textit{Plastilite Corp.}, 153 NLRB 180, 182 (1965) (finding strike protesting supervisor’s discharge protected because “conditions of employment are involved, and a ‘labor dispute’ exists, if the supervisor’s identity and capability have an impact on the employees’ job interests”), enforced, 375 F.2d 343 (8th Cir. 1967).
the profound impact supervisors can have on employees’ terms and conditions of employment because of their authority “to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them.”28 The Board has long recognized that employees act for their mutual aid or protection when engaging in concerted activity based on discussions about a supervisor’s “capability or lack of it” because it undoubtedly has “a direct impact on the employees’ performance of their daily tasks” and thus is likely to spawn collective action.29

The facts of the present case affirm that concerns about such vital workplace issues have the propensity to “quickly ripple through, and resonate with, the work force,” as confirmed by the quick responses of three employees here.30 Even if the Charging Party and Employees 1 and 2 had not previously discussed workplace issues, the nascent discussions the Charging Party began on Facebook with her coworkers about the Practice Administrator’s supervisory conduct and its effect on employees’ job security and other workplace matters (potentially including work schedules) can and should be regarded as inherently concerted activity.

Additionally, and in the alternative, even assuming the Charging Party’s conduct did not constitute protected concerted activity, the Employer’s termination of the Charging Party for Facebook post violated Section 8(a)(1) under Parexel


29 See Dobbs Houses, Inc., 135 NLRB 885, 887–88 (1962) (employees acted for mutual aid or protection when they engaged in a concerted work stoppage over numerous workplace issues, including employee complaints over supervisor’s “capability or lack of it,” because this had “a direct impact on the employees’ performance of their daily tasks”), enforcement denied, 325 F.2d 531 (5th Cir. 1963). See also Dreis & Krump Mfg., Inc., 221 NLRB 309, 315 (1975) (employee’s discharge violated Section 8(a)(1) where he had given leaflets to other employees describing his grievance concerning alleged negligence and improper supervision by his foreman and other supervisors, because “the identity, capabilities, and quality of supervision ... has an impact upon employees’ job interests and their ability to perform the task for which they were hired”), enforced, 544 F.2d 320 (7th Cir. 1976); Guernsey-Muskingum Electric Cooperative, Inc., 124 NLRB 618, 618 n.1 (1959) (affirming that “it is now well settled that employees have a right to protest by concerted action the appointment of a supervisor”), enforced, 285 F.2d 8 (6th Cir. 1960).

30 Hoodview Vending Co., 359 NLRB at 357.
An employer violates Section 8(a)(1), even in the absence of Section 7 activity, when its actions constitute a “preemptive strike” designed to chill or curtail potential future Section 7 activity. Such conduct “interferes with and restrains the exercise of Section 7 rights and is unlawful without more” because it “erect[s] a dam at the source of supply” of potential, protected activity. The Board also observed that suppression or chilling of future protected activity lies at the heart of most unlawful employer retaliation against past protected activity.

Here, the evidence demonstrates the Employer preemptively terminated the Charging Party to prevent complaints about management from reaching fruition and coalescing into group action among the other employees. Before the Charging Party made Facebook post, had already individually complained to the Employer about workload and the (b) (6), (b) (7)(C) scheduling practices. The same night the Charging Party made Facebook post, the immediately began issuing threats to Employee 1 over comment in support of the Charging Party’s post, first giving Employee 1 a “heads up” text message stating was aware of the post and then warning in person to be careful about what posted to avoid getting in trouble. Predictably, the Practice Administrator’s “heads up” text message to Employee 1 caused both Employee 1 and Employee 2, as well as another employee, to delete their comments responding to the Charging Party’s post. The next workday, the Employer terminated the Charging Party for alleged patient complaints that the Charging Party denied ever being told of and the Employer was unable to document. Thus, the Employer’s termination of the Charging Party for Facebook post evidences the Employer’s clear intent to create a “dam at the source of supply” of future protected concerted activity.

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31 356 NLRB at 518–19 (employer violated Section 8(a)(1) by discharging an employee to prevent her from discussing wages with other employees).

32 Id.

33 Id. at 519.

34 Id.

35 The Region has determined that the Employer will not be able to establish its burden under Wright Line of proving it would have discharged the Charging Party absent Facebook post.

36 Based on the current evidence, the Region should not allege the Employer violated Section 8(a)(1) by terminating the Charging Party based on the mistaken belief was engaged in concerted activity under Monarch Water Systems, 271 NLRB 558 (1984), because the Employer apparently believed Employee 1’s claims
Accordingly, the Region should issue complaint, absent settlement.

/s/
R.A.B.

ADV.10-CA-270348.Response.JohnsCreekSurgery