

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

Advice Memorandum

DATE: April 21, 2011

TO : Cornele A. Overstreet, Regional Director
Region 28

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

SUBJECT: Lee Enterprises, Inc., d/b/a Arizona Daily Star
Case 28-CA-23267

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by terminating the Charging Party for posting unprofessional and inappropriate tweets to a work-related Twitter account. We conclude that the Charging Party's discharge did not violate Section 8(a)(1) because he was terminated for writing inappropriate and offensive Twitter postings that did not involve protected concerted activity.

FACTS

Lee Enterprises, Inc., d/b/a The Arizona Daily Star ("Employer") owns and publishes regional newspapers throughout the country, including The Arizona Daily Star, a daily newspaper published in Tucson, Arizona. Along with its paper publication, the Daily Star maintains a website www.azstarnet.com.

The Charging Party worked as a reporter for the Daily Star from 1999 until September 30, 2010, when he was terminated based on the content of messages that he was posting on Twitter, a social media network. At the time of his discharge, the Charging Party was assigned to cover the crime and public safety beat.

The Employer has no written social media policy for its employees. It does provide employees with an employee handbook, containing various rules of conduct.¹

In the spring of 2009, the Daily Star began encouraging its reporters to open Twitter accounts and to

¹ The Region has determined that some of the rules in the employee handbook are unlawful. Those rules are not at issue here because they were not cited by the Employer in its termination of the Charging Party, and the Region has not submitted them for advice.

attend a "webinar" about how Twitter and other social network tools could be used to disseminate information to the public. The Daily Star wanted reporters to use social media to get news stories out to people who might not read the newspaper and to drive readers to the Daily Star's website. The Charging Party attended the webinar, and subsequently opened a Twitter account under the screen name "[FOIA Exemptions 6, 7(C)]." The Charging Party then started seeking out coworkers and others who had Twitter accounts, started following them on Twitter, and accumulated a group of his own followers, including coworkers and some of his supervisors.

Although the Employer encouraged reporters to use social media, the Charging Party opened the account, decided his own screen name and password, and controlled the content of his tweets. In the biography section of his Twitter account, the Charging Party stated that he was a reporter for the Daily Star and included a link to the Daily Star's website. In his tweets, he at times referred followers to the Daily Star's website for stories.

The Charging Party tweeted using his work computer, his company provided cell-phone, and his home computer. At various times the Charging Party's Twitter account was open to everyone, and at other times he restricted access to his followers. The Charging Party had linked his Twitter account to his Facebook and MySpace pages. Therefore, whenever he tweeted something, the same message would be posted on Facebook and MySpace. The Charging Party's Twitter account was not linked to the Daily Star's Twitter feed; none of his tweets were posted automatically to the Daily Star's feed.

Sometime in late January or early February of 2010, the Charging Party posted a tweet saying "The Arizona Daily Star's copy editors are the most witty and creative people in the world. Or at least they think they are." The tweet was in response to a series of sports headlines, using play on words, such as "Shuck and Awe," describing the University of Arizona's loss to the University of Nebraska. Before the tweet, the Charging Party had raised his concerns about the sport department's headlines with the Executive Editor. However, there is no evidence that the Charging Party had discussed his concerns about the sports department headlines with any of his coworkers.

About a week after that tweet, the Charging Party was called into a meeting with the Human Resources Director, who asked the Charging Party why he tweeted about the sports department, why he felt the need to post his concerns on Twitter instead of simply speaking to people within the organization, and whether he thought it was

appropriate to be posting these types of tweets. The Charging Party asked if the Daily Star had a social media policy. The Human Resources Director replied that the policy was being worked on.

About a week after the meeting with the Human Resources Director, the Charging Party was called into a meeting with the Managing Editor, the Executive Editor, and the City Editor, concerning his tweet. During the meeting the Managing Editor told the Charging Party that he was prohibited from airing his grievances or commenting about the Daily Star in any public forum. The Charging Party replied that he understood the directive and left the meeting.

The Charging Party continued tweeting, but refrained from making public comments about the Daily Star. He tweeted, and used other social media, to post about various matters he found interesting, including matters occurring in Tucson relating to his beat as a public safety reporter. Some tweets were simply factual, and others included commentary. Between August 27 and September 19, the Charging Party's tweets included the following:

- August 27 - "You stay homicidal, Tucson. See Star Net for the bloody deets."
- August 30 - "What?!?!? No overnight homicide? WTF? You're slacking Tucson."
- September 10 - "Suggestion for new Tucson-area theme song: Droening [sic] pool's 'let the bodies hit the floor'."
- September 10 - "I'd root for daily death if it always happened in close proximity to Gus Balon's."
- September 10 - "Hope everyone's having a good Homicide Friday, as one Tucson police officer called it."
- September 14 - "[FOIA Exemptions 6, 7(C)
]."
- September 15 - "[FOIA Exemptions 6, 7(C)
]."
- September 19 - "My discovery of the Red Zone channel is like an adolescent boy's discovery of his ...let's just hope I don't end up going blind."

On September 21, Tucson area television news station KOLD posted the following tweet on its Twitter feed: "Drug smuggler tries to peddle his way into the U.S." The Charging Party saw the tweet, reposted it on his Twitter

site, and tweeted the following: "Um, I believe that's PEDAL. Stupid TV people."

A KOLD Web Producer took issue with the Charging Party's tweet, particularly with him calling TV people "stupid." On September 22, the Web Producer emailed the Daily Star Reader Advocate regarding the Charging Party's tweet. The email reads, in part, as follows:

What I take issue with is calling TV people stupid. Clearly [he] is entitled to his opinion, but I feel since this particular account is affiliated with the Star, a tweet like that becomes unprofessional. I felt compelled to send this letter to the reader advocate and metro editor so key members were aware of this.

Again, not a big deal for us over here. And, considering [he] reaches an audience of less than 200, the impact is minimal. I just wanted to foster an environment of mutual respect as we both move forward and evolve on the social media scene.

The Daily Star's Reader Advocate replied to the KOLD Web Producer on the same day, thanking him for bringing this to her attention. The Reader Advocate copied the Charging Party and the City Editor on her email. Thereafter, the Charging Party emailed the KOLD Web Producer apologizing for the tweet.

During the afternoon of September 22, shortly after he arrived at work, the Charging Party was called into a meeting with the Managing Editor, the City Editor, and his team leader. The meeting started with the Managing Editor making a short reference to the KOLD tweet, and then asking the Charging Party why he was tweeting about homicides. The Managing Editor started reading the Charging Party's various tweets about homicides in Tucson, asking him what he was thinking when he posted these tweets. She then told him that it was not OK for him to be making these types of tweets and asked how he would feel if this was his family (who had been victims of a homicide). The Charging Party said he was sorry if the tweets offended anyone, because his intent was not to offend but to relay information. The Managing Editor told the Charging Party there were other ways of relaying information, and that because the Executive Editor and the Human Resources Director were not in the office, she could not fully discuss everything with him, and they would have another meeting about his tweets. Until then, she told the Charging Party that he was not allowed to tweet. The Charging Party replied "excuse me?" and the Managing Editor said that he was not allowed to tweet about anything work-related. The Managing Editor

told the Charging Party that, because his Twitter screen name was "[FOIA Exemptions 6, 7(C)]" and his Twitter biography referenced that he worked at the Daily Star and had a link to the Daily Star's website, the Employer considered this to be a work Twitter account, and that he was drawing negative attention to the Daily Star when he made the various tweets about homicides in Tucson. The Charging Party asked whether the Daily Star had a social media policy. The Managing Editor replied that it had not yet been established, that it was almost complete, and that the policy would include the phrase "common sense." The Charging Party then asked whether he would still be working at the Daily Star. The Managing Editor replied that she did not know the status of his job, but that he should complete his assignment for the day, which included a late-night ride along with the Tucson police department.

After the meeting, the Charging Party returned to his desk, and changed his Twitter screen name to "[FOIA Exemptions 6, 7(C)]." He also removed some of his supervisors from his list of followers and changed his account settings so that he had to approve anyone before they could view his tweets. The Charging Party then warned a couple of his coworkers about what had occurred, and told them to be careful about what they write on Facebook and Twitter.

On September 24, the Charging Party arrived at work to begin his regular shift at 7:00 a.m. About four hours into his shift, he was called into a meeting with the Managing Editor, the Assistant Managing Editor, and the City Editor. During the meeting, the Managing Editor told the Charging Party that he would be suspended for three days without pay, returning to work the following Thursday. During his time off, the Managing Editor told the Charging Party to think about what he wanted to do, because the Managing Editor had no confidence in his ability to comply with the Employer's respectful workplace policies. The Managing Editor then discussed the Charging Party's tweets about homicides in Tucson, and asked him whether he felt he had done anything wrong. The Charging Party replied that he understood how someone could consider the tweets to be offensive or inappropriate, but that he was just trying to do his job of getting information out to the public. He apologized if the manner in which he was doing his job was not what the Employer wanted. The Charging Party then left the meeting.

On September 30, the Charging Party returned to work. The Human Resources Director escorted him into a conference room. When the Charging Party entered the conference room, the Daily Star's publisher handed him a letter and told him that "we are terminating your employment with the Arizona

Daily Star effective today, for cause." The Charging Party's termination letter reads, in relevant part, as follows:

Your employment with the Arizona Daily Star is terminated effective today, September 30, 2010. We have provided repeated training on our Respectful Workplace Guidelines, a high level of supervision and regular feedback, yet you continue to disregard professional courtesy and conduct expectations.

Despite the multiple warnings, suspension and final verbal notice issued as recently as February 2010, when you were told to refrain from using derogatory comments in any social media forums that may damage the goodwill of the company, you have again disregarded that guidance.

After careful review of last week's inappropriate Twitter posting along with other concerning postings, we have no confidence that you can sustain our expectation of professional courtesy and mutual respect therefore, you give us no alternative but to terminate your employment immediately.

ACTION

We conclude that the Charging Party's discharge did not violate Section 8(a)(1) because he was terminated for writing inappropriate and offensive Twitter postings that did not involve protected concerted activity.

The Charging Party alleges that he was disciplined pursuant to an unlawful rule that prohibited certain Section 7 activities. The Board has consistently held that "an employer's imposition of discipline pursuant to an unlawfully overbroad policy or rule constitutes a violation of the Act."² However, the Board has found discipline pursuant to an overbroad rule to be unlawful only where the underlying conduct involved Section 7 activity.³ The Board

² NLS Group, 352 NLRB 744, 745 (2008), affirmed by 335 NLRB No. 169 (2010) (citations omitted).

³ See e.g. A.T. & S.F. Memorial Hospitals, 234 NLRB 436 (1978) (employer unlawfully reprimanded employee pursuant to overly broad rule limiting union solicitation and distribution activities); Opryland Hotel, 323 NLRB 723 (1997) (warning regarding soliciting and distribution of union literature under an overly broad solicitation rule); Saia Motor Freight, 333 NLRB 784 (2001) (warning in response to soliciting and distribution of union literature pursuant to an overly broad solicitation rule); Double

has also made clear, in the context of soliciting activity, that a discharge for conduct that violates an unlawful rule is not unlawful if the employer can establish that the conduct interfered with the employee's own work or that of other employees, and that this rather than the violation of the rule was the real reason for the discharge.⁴ We have found no case in which the Board held discipline pursuant to an unlawful rule to be unlawful where the underlying conduct was itself unrelated to protected, concerted activity.⁵

In this case, even if the Employer implemented an unlawful rule, the Charging Party was terminated for posting inappropriate and unprofessional tweets, after having been warned not to do so, i.e. for engaging in misconduct. The Charging Party's conduct was not protected and concerted: it did not relate to the terms and conditions of his employment or seek to involve other

Eagle Hotel & Casino, 341 NLRB 112 (2004) (discharge based on unlawful rule broadly prohibiting discussion of tips amongst casino employees).

⁴ Daylin, Inc., 198 NLRB 281, 282 (1972) (had employer shown that employee was engaged in conduct that interfered with his or others' work, discharge would have been lawful notwithstanding overly broad no solicitation rule). See also The Continental Group, Inc., 353 NLRB No.31 (2008) (two member Board decision that has not been reissued following New Process Steel, L.P. v. NLRB, 130 S.Ct. 2635 (2010)) (no violation where employer discharged an employee for loitering in its facility while off-duty, despite the fact that the employer cited an overly broad no-access rule in its disciplinary notice, because the employee's conduct was not protected by Section 7; Board distinguished the cases cited in fn 3, supra, on the basis that they all involved protected activity).

⁵ Advice has dismissed several charges involving enforcement of overbroad rules against unprotected conduct. See e.g. Hotel Employees Restaurant Employees, Local 5, Case 27-CA-18612, Advice Memorandum dated September 22, 2003 ("the discharge was not unlawful because the Employer can establish a lawful basis for the discharge apart from the unlawful rule, i.e., the employee's conduct was unprotected"); National TechTeam, Inc., Case 16-CA-20176, Advice Memorandum dated April 11, 2000 ("the discipline was imposed for 'creating and printing' the document on company owned equipment . . . this reason does not implicate a Section 7 right and can form a basis for Smith's discipline, separate and apart from the unlawfully overbroad aspect of the [] rule").

employees in issues related to employment. Specifically, after opening a Twitter account and linking it to the Employer's website, the Charging Party began tweeting inappropriate comments. The Employer warned the Charging Party that his comments were inappropriate, but he ignored the warning and continued to post additional inappropriate tweets while covering his beat as a public safety reporter. Those tweets included: "What?!?!?! No overnight homicide? WTF? You're slacking Tucson" and "[Exemptions 6 and 7(C)]". The Charging Party's discharge did not violate the Act because he was discharged for this misconduct, which did not involve protected activity.

We further conclude that the Employer did not implement an unlawful rule. In this regard, we acknowledge that, in warning the Charging Party to cease his inappropriate tweets, and then discharging him for continuing to post inappropriate tweets, the Employer made statements that could be interpreted to prohibit activities protected by Section 7. For example, after the Human Resources Director had met with the Charging Party and warned him to stop making inappropriate comments, and the Charging Party persisted, the Managing Editor called him in and warned him to stop airing his grievances or commenting about the Employer in any public forum. And after the Charging Party persisted in writing his offensive messages, the Managing Editor told him that he was not allowed to tweet about anything work related. Finally, the Charging Party's termination letter refers to the fact that he was told "to refrain from using derogatory comments in any social media forums that may damage the goodwill of the company."

However, those statements did not constitute orally-promulgated, overbroad "rules." Thus, the statements were made solely to the Charging Party in the context of discipline, and in response to specific inappropriate conduct, and were not communicated to any other employees or proclaimed as new "rules." In fact, the Employer indicated that it was in the process of developing a written social media rule, but that it did not yet have one. Finally, although the statements arguably constituted unlawful restrictions on the Charging Party's own Section 7 activities, it would not effectuate the purposes and policies of the Act to issue a complaint where the statements were directed to a single employee who was lawfully discharged.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.