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

Advice Memorandum

DATE: July 7, 2011

TO: Gail R. Moran, Acting Regional Director
Region 13

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

SUBJECT: JT's Porch Saloon & Eatery, Ltd. 506-0170
Case 13-CA-46689 506-2001-5000

The Region submitted this Section 8(a)(1) case for advice as to whether the Employer unlawfully discharged the Charging Party for posting a message on his Facebook page that referenced the Employer's tipping policy, in response to a question from a nonemployee. We conclude that the Employer did not unlawfully discharge the Charging Party because he was not engaged in concerted activity.

FACTS

The Charging Party was employed as a bartender at JT's Porch Saloon & Eatery, Ltd (the Employer), a restaurant and bar in Lombard, Illinois. The Employer maintains an unwritten policy, communicated to bartenders when they are hired, that waitresses do not share their tips with the bartenders even though the bartenders help the waitresses serve food.

Sometime in the fall of 2010, the Charging Party had a conversation with a fellow bartender about this tipping policy. He complained about the policy, and she agreed that it "sucked." However, neither of them, or any other bartender, ever raised the issue with management.

On February 27, 2011,[1] the Charging Party had a conversation on Facebook with his step-sister. She sent him a message asking how his night at work went. He responded with complaints that he hadn't had a raise in five years and that he was doing the waitresses' work without tips. He also called the Employer's customers "rednecks" and stated that he hoped they choked on glass as

[1] All dates are in 2011 unless otherwise noted.

they drove home drunk. The Charging Party did not discuss his Facebook posting with any employees either before or after he wrote it. In addition, none of his fellow employees responded to it.

About a week after this Facebook posting appeared, the Employer's night manager advised the Charging Party that he was probably going to be fired over it. On May 7, the Charging Party received a Facebook message from the Employer's owner informing him that his services were no longer required. The next day, the Employer's day manager left him a voice message stating that he was fired for his Facebook posting about the Employer's customers.[2]

ACTION

We conclude that the Employer did not violate Section 8(a)(1) because the Charging Party did not engage in any concerted activity.

The Board's test for concerted activity is whether activity is "'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.'"[3] The question is a factual one and the Board will find concert "[w]hen the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise[.]"[4] Thus, individual activities that are the "logical outgrowth of concerns expressed by the employees collectively" are considered

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[2] Although the Employer now claims that the Charging Party was fired [*FOIA Exemptions 6 and 7(C)*], in contesting his unemployment insurance claim the Employer cited the Facebook posting. We assume for purposes of this Memorandum that the evidence will demonstrate that the Charging Party was discharged because of his Facebook posting.

[3] *Meyers Industries*, 281 NLRB 882, 885 (1986) (*Meyers II*), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied,* 487 U.S. 1205 (1988).

[4] *Id.* at 886.

concerted.[5] Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention.[6]

Here, there is no evidence of concerted activity. Although the Charging Party's posting addressed his terms and conditions of employment, he did not discuss his Facebook posting with any of his fellow employees either before or after he wrote it, and none of his coworkers responded to the posting. There had been no employee meetings or any attempt to initiate group action with regard to the tipping policy or the awarding of raises. There also was no effort to take the bartenders' complaints about these matters to management. In this instance, the Charging Party was merely responding to a question from his step-sister about how his evening at work went. And this internet "conversation" did not grow out his prior conversation with a fellow bartender months earlier about the tipping policy.

We conclude that because the Charging Party's Facebook posting did not involve any concerted activity, he was not discharged in violation of Section 8(a)(1).[7] Accordingly, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

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[5] *See, e.g., Five Star Transportation, Inc.*, 349 NLRB 42, 43-44, 59 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008) (drivers' letters to school committee raising individual concerns over a change in bus contractors were logical outgrowth of concerns expressed at a group meeting).

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

[7] In the absence of any evidence of concerted activity, it is unnecessary to reach the question of whether the Charging Party's comments about the Employer's customers rendered his posting unprotected.