OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 11-74 August 18, 2011

To: All Regional Directors, Officers-in-Charge, and Resident Officers

From: Anne Purcell, Associate General Counsel

Subject: Report of the Acting General Counsel Concerning Social Media Cases

Attached is a report of the Acting General Counsel concerning social media cases within the last year.

/s/
A.P.

Attachment

cc: NLRBU
Release to the Public

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

REPORT OF THE GENERAL COUNSEL

During my term as Acting General Counsel, I have endeavored to keep the labor-management community fully aware of the activities of my office. It is my hope that this openness will encourage compliance with the Act and cooperation with Agency personnel. As part of this goal, I continue the practice of issuing periodic reports of cases raising significant legal or policy issues.

This report presents recent case developments arising in the context of today's social media. Social media include various online technology tools that enable people to communicate easily via the internet to share information and resources. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications. Recent developments in the Office of the General Counsel have presented emerging issues concerning the protected and/or concerted nature of employees' Facebook and Twitter postings, the coercive impact of a union's Facebook and YouTube postings, and the lawfulness of employers' social media policies and rules. This report discusses these cases, as well as a recent case involving an employer's policy restricting employee contacts with the media. All of these cases were decided upon a request for advice from a Regional Director.

I hope that this report will be of assistance to practitioners and human resource professionals.

/s/
Lafe E. Solomon
Acting General Counsel

Employees' Facebook Postings About Job Performance and Staffing Were Protected Concerted Activity

In one case, we found that an Employer--a nonprofit social services provider--unlawfully discharged five employees who had posted comments on Facebook relating to allegations of poor job performance previously expressed by one of their coworkers--a domestic violence advocate. We concluded that the discharged employees were engaged in protected concerted activity.

In or around July 2010, the advocate began complaining to one particular coworker that clients did not want to seek services from the Employer. Similarly, in August she had conversations with other coworkers in which she criticized the work done by the Employer's employees. She also sent regular text messages to the one particular coworker, criticizing other employees' work performance and complaining about workload issues.

In early October, the advocate discussed several client and workload issues with this one coworker, with the advocate asserting, among other things, that the coworker had not properly assisted a client. They exchanged multiple text messages related to these issues. During the final exchange of messages, the advocate said that the Employer's Executive Director would settle their differences.

The one coworker then talked to another employee about what she considered to be a constant barrage of text messages from the advocate criticizing the job performance of the Employer's employees. This employee suggested that she meet with the Employer's Executive Director.

To prepare for this meeting, the one coworker posted on Facebook that the advocate felt that her coworkers did not help the Employer's clients enough. She then asked her coworkers how they felt about it. The four coworkers who were later discharged and the advocate responded to the Facebook posting.

That evening, the advocate reported the Facebook conversation to the Employer's Executive Director, indicating that she considered her coworkers' Facebook comments to be "cyber-bullying" and harassing behavior.

On the next workday, the coworker tried to meet with the Executive Director. The Executive Director said that she was busy, but that she would call when she was available. A few hours later, the coworker was called to the Executive Director's office and was terminated. That same day, the Employer terminated the four other employees who had posted Facebook responses to their coworker's initial solicitation.

We first concluded that the discharged employees' postings on Facebook were concerted activity under the Meyers cases. Meyers Industries (Meyers I), 268 NLRB 493 (1984), revd. sub nom Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand Meyers Industries (Meyers II), 281 NLRB 882 (1986), affd. sub nom Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In these cases, the Board explained that an activity is concerted when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself."

We decided that the Facebook discussion here was a textbook example of concerted activity, even though it transpired on a social network platform. The discussion was initiated by the one coworker in an appeal to her coworkers for assistance. Through Facebook, she surveyed her coworkers on the issue of job performance to prepare for an anticipated meeting with the Executive Director, planned at the suggestion of another employee. The resulting conversation among coworkers about job performance and staffing level issues was therefore concerted activity.

We next found that the discharged employees were engaged in protected activity. The Board has found employee statements relating to employee staffing levels protected where it was clear from the context of the statements that they implicated working conditions. This finding of protected activity does not change if employee statements were communicated via the internet. See, e.g., Valley Hospital Medical Center, 351 NLRB 1250, 1252-54 (2007), enfd. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 358 F. App'x 783 (9th Cir. 2009).

Here, the coworker sought input from a fellow employee about her dispute with the advocate after the advocate indicated that they should have the Executive Director settle their differences. The coworker had reason to believe that the advocate's action would result in a discussion with management about employees' responsibilities and performance and could result in discipline. The comments of the other employees in response to the coworker's initial Facebook posting were directly related to criticisms of job performance and staffing/workload issues. Thus, because the Facebook postings directly implicated terms and conditions of employment and were initiated in preparation for a meeting with the Employer to discuss matters related to these issues, we concluded that the Facebook conversation was concerted activity for "mutual aid or protection" under Section 7.

Finally, we held that the discharged employees did not lose the Act's protection. Although there was swearing and/or sarcasm in a few of the Facebook posts, the conversation was objectively quite innocuous. We also found that the postings were not "opprobrious" under the Atlantic Steel Co. test, 245

NLRB 814, 816-817 (1979), typically applied to employees disciplined for public outbursts against supervisors.

Internet and Blogging Standards and Discharge of Employee for Facebook Posting Were Unlawful

In this case, we considered whether the Employer--an ambulance service--maintained an unlawful internet and blogging policy and whether it unlawfully terminated an employee who posted negative remarks about her supervisor on her personal Facebook page.

When asked by her supervisor to prepare an incident report concerning a customer complaint about her work, the employee asked for a union representative while she prepared the report. She did not receive any union representation. Later that day from her home computer, the employee posted a negative remark about the supervisor on her personal Facebook page, which drew supportive responses from her coworkers, and led to further negative comments about the supervisor from the employee. The employee was suspended and later terminated for her Facebook postings and because such postings violated the Employer's internet policies.

The Employer's employee handbook contained a blogging and internet posting policy. It prohibited employees from making disparaging remarks when discussing the company or supervisors, and from depicting the company in any media, including but not limited to the internet, without company permission.

We initially concluded that the incident report the employee was asked to prepare constituted an investigatory interview to which the employee had a Weingarten right to union representation, and that the Employer unlawfully denied her that right and threatened her with discipline for invoking that right. We then turned to whether the Employer unlawfully terminated her for engaging in protected activity and whether it maintained unlawful internet and blogging policies.

We found that the General Counsel established a prima facie case under Wright Line, and that the Employer did not meet its rebuttal burden. The employee engaged in protected activity by exercising her Weingarten right and by discussing supervisory actions with coworkers in her Facebook post. It is well established that the protest of supervisory actions is protected conduct under Section 7. See Datwyler Rubber and Plastics, Inc., 350 NLRB 669 (2007).

Applying Atlantic Steel, we concluded that the employee did not lose the Act's protections when she referred to her supervisor by such terms as "scumbag." As to the place of the discussion, the Facebook postings did not interrupt the work of any employee because they occurred outside the workplace and

during nonworking time. As to the subject matter of the discussion, the comments were made during an online employee discussion of supervisory action, which is protected activity. Regarding the nature of the outburst, the name-calling was not accompanied by verbal or physical threats, and the Board has found more egregious name-calling protected. We found that the last Atlantic Steel factor strongly favored a finding that the conduct was protected; the employee's Facebook postings were provoked by the supervisor's unlawful refusal to provide her with a union representative and by his unlawful threat of discipline.

We also considered the lawfulness of the Employer's blogging and internet posting policy. The first challenged portion of the policy prohibited employees from posting pictures of themselves in any media, including the internet, which depict the company in any way, including a company uniform, corporate logo, or an ambulance. We concluded that this language violated Section 8(a)(1) because it would prohibit an employee from engaging in protected activity; for example, an employee could not post a picture of employees carrying a picket sign depicting the company's name, or wear a t-shirt portraying the company's logo in connection with a protest involving terms and conditions of employment.

We also concluded that the portion of the policy prohibiting employees from making disparaging comments when discussing the company or the employee's superiors, coworkers, and/or competitors was unlawful. In University Medical Center, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003), the Board found that a similar rule prohibiting "disrespectful conduct" towards others violated Section 8(a)(1). Like the rule in University Medical Center, the rule here contained no limiting language to inform employees that it did not apply to Section 7 activity.

Also under challenge was the Employer's standards-of-conduct policy. This policy prohibited the use of language or action that was inappropriate or of a general offensive nature, and rude or discourteous behavior to a client or coworker. We concluded that the prohibition here of "offensive conduct" and "rude or discourteous behavior" proscribed a broad spectrum of conduct and contained no limiting language to remove the rule's ambiguity in prohibiting Section 7 activity.

Employee's Facebook Postings Were Part of Protected Concerted Conduct Related to Concerns Over Commissions

In this case, we concluded that the Employer--a luxury automobile dealership--violated Section 8(a)(1) when it discharged an employee--a salesperson--for posting on his Facebook page photographs and commentary that criticized a sales event held by the Employer. We concluded that the employee's

postings were part of a course of protected, concerted conduct related to employees' concerns over commissions and were not disparaging of the Employer's product or so "egregious" as to lose the Act's protection.

In early June 2010, the employee was at work when someone in a vehicle at a dealership across the street, which was also owned by the Employer, accidently drove into a pond in front of the dealership. The employee joined his coworkers in watching the commotion, and he took some photographs.

That same week, the Employer was hosting an all-day event to introduce a new car model. Clients registered for this event, and the corporate office provided professional drivers to drive the cars with clients. Shortly before the event, around June 6, the Employer's General Sales Manager met with the salespeople to discuss the event. He explained that the Employer would serve hot dogs, cookies and snacks from a warehouse club, and water. The salespeople remarked about the choice in food, and at least one asked why the Employer was not serving more substantial refreshments.

After the meeting, the salespeople discussed their disappointment with the way the Employer was handling the event. They were concerned that the inexpensive food and beverages would send the wrong message to their clients and negatively affect their sales and commissions.

During the sales event, the employee took photographs of the food and beverages served, of his coworkers posing with the food, and of a large promotional banner advertising the new car model.

The following week, while at home, the employee posted on his Facebook page the photographs of the vehicle in the pond and of the sales event. In an introduction to the sales event photographs, he remarked that he was happy to see that the Employer had gone all out for the important car launch by providing small bags of chips, inexpensive cookies from the warehouse club, semi-fresh fruit, and a hot dog cart where clients could get overcooked hot dogs and stale buns. The photographs included one of a coworker holding a water bottle, kneeling next to a cooler with ice and water bottles; several of the cookie and snack table; one of a coworker near the hot dog cart, and one of the promotional banner. The employee included comments along with the photographs, reflecting his critical opinion of the inexpensive food and beverages provided.

The following week, the Employer received a call from another dealer who commented about the photographs of the car in the pond. A part-time coworker, who was Facebook "friend" with the employee, had also seen the posting and had mentioned it to her supervisor. This prompted the Employer to look at the employee's Facebook page and to print out the photographs and

comments related to the pond incident and the sales event. The Employer's General Sales Manager called the employee at home and told him to remove the photographs and comments from his Facebook page; he immediately complied.

When the employee went to work on June 16, he was called into a meeting with managers. The Employer tossed the printout of the sales event photographs at him, asked him what he was thinking, and said they were embarrassing to the dealership and its founder and CEO. The Employer sent him home while it considered a final decision regarding his employment. Shortly after, the employee was terminated.

Several months later, the Employer claimed that the real reason for the employee's discharge was his posting of the photographs of the car in the pond because he had made light of a serious accident.

We concluded that the employee was engaged in concerted activity, under the Meyers cases discussed above, when he posted the comments and photographs regarding the sales event on his Facebook page. As noted, before the event, several employees were displeased with the planned food choices, and after the meeting, the employees discussed this frustration among themselves. At the event, the employee took photographs to document the event and capture his coworker's frustration. He told his coworkers that he would put the photographs on Facebook, and in doing so, expressed the sentiment of the group. The Facebook activity was a direct outgrowth of the earlier discussion among the salespeople that followed the meeting with management.

Although the employee posted the photographs on Facebook and wrote the comments himself, we concluded that this type of activity was clearly concerted. We found that he was vocalizing the sentiments of his coworkers and continuing the course of concerted activity that began when the salespeople raised their concerns at the staff meeting. Further, we concluded that this concerted activity clearly was related to the employees' terms and conditions of employment. Since the employees worked entirely on commission, they were concerned about the impact the Employer's choice of refreshments would have on sales, and therefore, their commissions.

We found that the Employer knew of the concerted nature of the employee's conduct and that it could not meet its burden under Wright Line of demonstrating that it would have discharged the employee, even in the absence of the protected activity, because of his postings regarding the incident with the car in the pond.

We also concluded that the employee's activity did not lose the protection of the Act under either Atlantic Steel or under NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346

U.S. 464 (1953). As noted above, Atlantic Steel is generally applied to an employee who has made public outbursts against a supervisor, while Jefferson Standard is usually applied where an employee has made allegedly disparaging comments about an employer or its product in the context of appeals to outside or third parties.

Applying Atlantic Steel, we found that the employee's Facebook postings regarding the sales event were not so opprobrious as to lose the Act's protection. The activity concerned a subject matter protected under Section 7. Further, although the activity was not provoked by any unfair labor practice committed by the Employer, the nature of the outburst was much less offensive than other behavior found protected by the Board. We found it unnecessary to rule on the place of the discussion factor because, on balance, the conduct clearly retained the Act's protection.

Under Jefferson Standard, the inquiry is whether the communication is related to an ongoing labor dispute and whether it is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection. Here, the employee's postings were neither disparaging of the Employer's product nor disloyal. The postings merely expressed frustration with the Employer's choice of food at the sales event. They did not refer to the quality of the cars or the performance of the dealership and did not criticize the Employer's management. We found it irrelevant that the postings did not clearly indicate that they were related to a labor dispute given that they were neither disparaging nor disloyal.

Employees' Facebook Postings About Tax Withholding Practices Were Protected Concerted Activity

We also considered a case in which the Employer--a sports bar and restaurant--discharged and threatened to sue two employees who participated in a Facebook conversation initiated by a former coworker about the Employer's tax withholding practices. This case also raised issues concerning the Employer's internet/blogging policy that prohibited "inappropriate discussions." We found that the discharges, threats of legal action, and the internet policy were unlawful.

In early 2011, several of the Employer's former and current employees discovered that they owed state income taxes for 2010, related to earnings at the Employer. After this discovery, at least one employee brought the issue to the Employer's attention and requested that the matter be placed on the agenda for discussion at an upcoming management meeting with employees.

Thereafter, on February 1, a former employee posted on her Facebook page a statement, including a short-hand expletive, that expressed dissatisfaction with the fact that she now owed

money. She also asserted that the Employer's owners could not even do paperwork correctly. One employee--Charging Party A--responded to this posting by clicking "Like." That same day, a series of statements related to the initial posting followed. Two other employees commented that they had never owed money before, and one of them referred to telling the Employer that we will discuss this at the meeting. Two of the Employer's customers joined in the conversation, as did Charging Party B, who asserted that she also owed money and referred to one of the Employer's owners as "[s]uch an asshole."

The Charging Parties were not working on the day of the Facebook conversation. When Charging Party B reported back to work on February 2, she was told that her employment was terminated due to her Facebook posting and because she was not "loyal enough" to work for the Employer anymore. The following day, Charging Party A reported to work and was confronted by the Employer about the Facebook conversation. He was terminated and told that he would be hearing from the Employer's attorney.

Thereafter, Charging Party B received a letter dated February 5 from the Employer's attorney stating that legal action would be initiated against her unless she retracted her "defamatory" statements regarding the Employer and its principals published to the general public on Facebook.

As noted, under the Meyers cases, 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." 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. Meyers II, 281 NLRB at 887.

Here, the February 1 conversation on Facebook related to employees' shared concerns about a term and condition of employment--the Employer's administration of income tax withholdings. Moreover, prior to the Facebook conversation, this shared concern had been brought to the Employer's attention by at least one employee who specifically noted on Facebook that she had requested it be discussed at an upcoming management meeting with employees. Thus, the conversation that transpired on Facebook not only embodied "truly group complaints" but also contemplated future group activity.

We found that the Charging Parties' statements did not lose protection either under Atlantic Steel or, as the Employer asserted, because they were defamatory.

Applying Atlantic Steel, we found that three of the four factors weighed in favor of the Charging Parties' retaining the protection of the Act. As noted, the Charging Parties'statements related to a core concern protected under

Section 7. Moreover, the comments were initiated outside of the workplace during the Charging Parties' nonworking time, and neither disrupted operations nor undermined supervisory authority. Furthermore, although the activity was not provoked by any unfair labor practice committed by the Employer, the nature of the Charging Parties' postings was much less offensive than other behavior found protected by the Board.

With regard to the Employer's allegation of defamation, an alleged defamatory statement will not lose its protected status unless it is not only false but maliciously false. Here, Charging Party A merely indicated that he "liked" the initial Facebook posting by his former coworker, which accused the Employer's owners of not being able to do paperwork correctly. Charging Party B's posting was limited to a factually correct statement that she had an outstanding tax obligation, and her opinion that one of the Employer's owners was "[s]uch an asshole." The Charging Parties' Facebook postings, to the extent that they constituted statements of fact that could be alleged as defamatory, were not even false, much less maliciously false under the Board's standard.

We also concluded that the Employer's threats to sue the Charging Parties for engaging in protected concerted activity violated Section 8(a)(1). It is well established that an employer's threat to sue employees for engaging in Section 7 activity violates the Act because it would reasonably tend to interfere with the exercise of Section 7 rights. The Board has historically distinguished the threat of a lawsuit from the actual filing of a lawsuit and has rejected employers' attempts to extend the First Amendment protection accorded to lawsuits to threats to sue where those threats, as here, were not incidental to the actual filing of a suit. Thus, we found that the Employer's threats to sue the Charging Parties were unlawful, even if there was a reasonable basis for potential legal action.

We also considered the lawfulness of the Employer's internet/blogging policy. This policy, included in the Employer's employee handbook, provided that the employer supported the free exchange of information and camaraderie among employees. The policy went on to state that when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the employer, or engaging in inappropriate discussions about the company, management, and/or coworkers, the employee may be violating the law and is subject to disciplinary action, up to and including termination.

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." Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The Board uses a two-step inquiry to

determine if a work rule would have such an effect. Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004). First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, it is unlawful only 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.

Applying these standards here, we concluded that the provision of the Employer's policy stating that employees are subject to discipline for engaging in "inappropriate discussions" about the company, management, and/or coworkers could reasonably be interpreted to restrain Section 7 activity. This policy utilized broad terms that would commonly apply to protected criticism of the Employer's labor policies, treatment of employees, and terms and conditions of employment. Moreover, the policy did not define what was encompassed by the broad term "inappropriate discussions" by specific examples or limit it in any way that would exclude Section 7 activity. Absent such limitations or examples of what was covered, we concluded that employees would reasonably interpret the rule to prohibit their discussion of terms and conditions of employment among themselves or with third parties.

Employee Who Posted Offensive Tweets Was Not Engaged in Protected Concerted Activity

In another case, we considered whether the Employer--a newspaper--violated Section 8(a)(1) when it discharged an employee--a reporter--for posting unprofessional and inappropriate tweets to a work-related Twitter account. We concluded that the employee's Twitter postings did not involve protected concerted activity.

In the spring of 2009, after the Employer encouraged employees to open Twitter accounts and to use social media to get news stories out, the employee opened a Twitter account, picked his screen name, and controlled the content of his tweets. In the biography section of his account, he stated that he was a reporter for the Employer's newspaper, and he included a link to the newspaper's website.

In early 2010, the employee posted a tweet critical of the paper's copy editors. The tweet was in response to his concerns about sports department headlines, but there is no evidence that he had discussed his concerns with any of his coworkers.

About a week after that tweet, the Employer's Human Resources Director asked the employee 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 post these types of tweets. The employee asked if the newspaper had a social media policy. The Human Resources Director replied that the policy was being worked on.

About a week later, the employee was told that he was prohibited from airing his grievances or commenting about the newspaper in any public forum. He replied that he understood.

He continued to tweet and to use other social media to post about various matters, including matters relating to his public safety beat. He did not make public comments about the newspaper. Between August 27 and September 19, he posted various tweets about homicides in the city, as well as several with sexual content.

On September 21, the employee posted a tweet that criticized an area television station. The next day, a web producer for the television station took issue with the tweet and emailed the paper about it. Thereafter, the employee emailed the web producer and apologized.

During the afternoon of September 22, the employee was called into a meeting with the Managing Editor, the City Editor, and his team leader. The Managing Editor referred to the tweet about the television station and then asked the employee why he was tweeting about homicides. She told him that it was not okay to make these types of tweets and that they would meet again when the Executive Editor and Human Resources Director were there. Until then, she said that he was not allowed to tweet about anything work-related. The employee asked whether the paper had a social media policy. She replied that it had not yet been established and that it was almost complete.

Two days later, the employee was suspended for three days without pay. When he returned to work, he was terminated. The termination letter asserted that he had disregarded guidance to refrain from using derogatory comments in any social media forums that could damage the goodwill of the company and that the Employer had no confidence that he could sustain its expectation of professional courtesy and mutual respect.

We found that the employee'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. His conduct was not protected and concerted: it did not relate to the terms and conditions of his employment or seek to involve other employees in issues related to employment. Ignoring his Employer's warning, he continued to post inappropriate tweets while covering his beat. He was discharged for this misconduct, which did not involve protected activity.

The employee alleged that he was disciplined pursuant to an unlawful rule that prohibited certain Section 7 activities. We

concluded, however, that the Employer did not implement an unlawful rule. Although some of the Employer's statements could be interpreted to prohibit activities protected by Section 7, these statements did not constitute orally promulgated, overbroad "rules". They were made solely to the employee in the context of discipline, and in response to specific inappropriate conduct, and were not communicated to other employees or proclaimed as new "rules." In fact, the Employer indicated that it had not yet developed a written social media rule.

Bartender Who Posted Facebook Message About Employer's Tipping Policy Was Not Engaged in Concerted Activity

This case concerned an employee--a bartender--who was discharged for posting a message on his Facebook page that referenced the Employer's tipping policy, in response to a question from a nonemployee. We found that the employee was not engaged in concerted activity.

The Employer operates a restaurant and bar. It maintains an unwritten policy 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 employee had a conversation with a fellow bartender about this tipping policy. He complained about the policy, and she agreed that it "sucked." However, neither they nor any other bartender ever raised the issue with management.

In February 2011, the employee had a conversation on Facebook with a relative. Responding to her query as to how his night at work had gone, he complained 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 they drove home drunk. He did not discuss his posting with any of his coworkers, and none of them responded to it.

About a week later, the Employer's night manager told the employee that he was probably going to be fired over it. In May, the employee received a Facebook message from the Employer's owner informing him that his services were no longer required, and 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.

As noted above, under the Meyers cases, 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." We found no evidence of concerted activity here. Although the employee's Facebook posting addressed his terms and conditions of employment, he did

not discuss the posting with his coworkers, and none of them responded to the posting. There had been no employee meetings or any attempt to initiate group action concerning the tipping policy or raises. We also found that this internet "conversation" did not grow out of the employee's conversation with a fellow bartender months earlier about the tipping policy.

Employee Who Posted on Her Senator's 'Wall' Was Not Engaged in Concerted Activity

In another case, we considered whether the Employer unlawfully discharged an employee who had posted messages on the Facebook page of one of the U.S. Senators who represented her state. We concluded that the discharge was not unlawful because the employee was not engaged in concerted activity.

The Employer provides emergency and nonemergency medical transportation and fire protection services to municipal, residential, commercial, and industrial customers. The employee worked as a dispatcher for the Employer, and her husband was an EMT.

The Senator had announced on Facebook that four fire departments in his state had received federal grants. Responding to this announcement, the employee wrote comments on the Senator's Facebook "wall". She stated, among other things, that her Employer had contracts with several fire departments for emergency medical services because it was the cheapest service in town and paid employees $2 less than the national average. She complained that the state was looking for more cheap companies to farm jobs out to. She also referred to the fact that the Employer had only two trucks for an entire county, and she mentioned an incident in which a crew that responded to a cardiac arrest call did not know how to perform CPR.

The employee did not discuss her Facebook comments with other employees before or after posting them. She claimed that she wanted to let the Senator know that she disagreed with how emergency medical services were handled in her state and that her kind of company was not helping the current situation. She did not think that the Senator could help with her employment situation. Although she had discussed wages with other employees after the Employer had announced a wage cap, there is no evidence that employees had met or organized any group action to raise wage issues with the Employer.

Ten days after her Facebook comments, the Employer terminated her for publicly posting disparaging remarks about the Employer and confidential information about its response to a service call. Her termination form also stated that her comments violated the Employer's code of ethics and business conduct policy.

We concluded that the employee here did not engage in any concerted activity under the Meyers test discussed above. As noted, she did not discuss her posting with any other employee, including her spouse. There had been no employee meetings or any attempt to initiate group action. She was not trying to take employee complaints to management and admittedly did not expect the Senator to help her situation. Instead, she was merely trying to make a public official aware of the condition of emergency medical services in her state.

Employee Who Made Facebook Comments About Mentally Disabled Clients Was Not Engaged in Concerted Activity

In this case, we considered whether the Employer--a nonprofit facility for homeless people--violated the Act when it discharged an employee for inappropriate Facebook posts that referred to the Employer's mentally disabled clients. We concluded that the employee was not engaged in protected concerted activity and therefore the discharge was not unlawful.

In May 2010, the Employer received a grant to develop a new residential program for residents with significant mental health issues. The employee, who had been a part-time residential assistant, became a full-time recovery specialist in the new program.

On January 27, 2011, the employee, while working on the overnight shift, engaged in a "conversation" on her Facebook wall with two Facebook "friends". Among other things, she stated that it was spooky being alone overnight in a mental institution, that one client was cracking her up, and that the employee did not know whether the client was laughing at her, with her, or at the client's own voices.

The two "friends" who commented on the employee's posts were not coworkers. The employee was Facebook "friends", however, with one of the Employer's former clients, who saw the postings and called the Employer to report her concern. As a result, when the employee reported for work on January 31, she was terminated. The termination letter referenced the phone call from the former client and quoted the employee's January 27 Facebook posts. The letter stated that "[w]e are invested in protecting people we serve from stigma" and it was not "recovery oriented" to use the clients' illnesses for the employee's personal amusement. The letter also cited confidentiality concerns and noted that the employee's posts were entered when she should have been working.

We found that the employee did not engage in any protected concerted activity under the Meyers cases discussed above. The employee did not discuss her Facebook posts with any of her fellow employees, and none of her coworkers responded to the

posts. Moreover, she was not seeking to induce or prepare for group action, and her activity was not an outgrowth of the employees' collective concerns. In fact, her Facebook posts did not even mention any terms or conditions of employment. The employee was merely communicating with her personal friends about what was happening on her shift.

Employee's Facebook Postings About Manager Were Individual Gripes, Not Concerted Activity

In another case, the Employer--a retail store operator--disciplined a customer service employee for profane Facebook comments that were critical of local store management. We found insufficient evidence that the employee engaged in concerted activity.

On October 28, after an interaction with a new Assistant Manager, the employee posted a comment complaining about the "tyranny" at the store and suggesting that the Employer would get a wake up call because lots of employees are about to quit. Several coworkers responded to his comment, expressing emotional support, and asking why he was so wound up.

The employee responded to his coworkers' postings by asserting that the Assistant Manager was being a "super mega puta" and complaining about being chewed out for mispriced or misplaced merchandise. The employee asserted that two other coworkers also made supportive comments. One of those coworkers confirmed that she made a "hang in there" type of remark.

At least one coworker who viewed the employee's Facebook postings provided a printout to the Employer's Store Manager. On about November 4, the Store Manager told the employee that his Facebook comments were slander and that he could be fired. She imposed a one-day paid suspension that precluded promotion opportunities for 12 months. She also prepared a discipline report stating that the employee had put bad things on Facebook about the Employer and Assistant Manager, that the employee's behavior was not within company guidelines, and that the employee would be terminated if such behavior continued.

The employee subsequently deleted the Facebook postings.

We concluded that the employee's Facebook postings were an expression of an individual gripe, and were not concerted within the Meyers cases discussed above. They contained no language suggesting that the employee sought to initiate or induce coworkers to engage in group action; rather they expressed only his frustration regarding his individual dispute with the Assistant Manager over mispriced or misplaced items. Moreover, none of the coworkers' Facebook responses indicated that they had otherwise interpreted the employee's postings. They merely

indicated that they had found the employee's first posting humorous, asked why the employee was so "wound up," or offered emotional support. We also found no evidence that established that the employee's postings were the logical outgrowth of prior group activity.

Union Violated Section 8(b)(1)(A) by Posting 'Interrogation' Videotape on YouTube and Facebook

In this case, we found that a Union violated Section 8(b)(1)(A) when it interrogated employees at a nonunion jobsite about their immigration status, videotaped that interrogation, and posted an edited version of the videotape on YouTube and the Local Union's Facebook page.

A Union business agent and three Union organizers visited the worksite of a nonunion subcontractor. The Union representatives did not identify themselves or reveal their Union affiliation. One carried a video recorder. After climbing to the roof where employees were working, the chief Union spokesman told the employees that they had to ask some questions, that they were inspecting the job, and that they had reports of illegal workers. He then asked three employees about their country of origin, their immigration status, whether they had "ID's," when and how they were hired, how they were paid, how they paid their taxes, and whether they supplied social security numbers or the Employer assigned them numbers.

At various times, the employees tried to resist answering the questions and return to work, but the Union agents instructed them not to. They asked the employees for identification to verify their legal status. When the employees said that they did not have identification, the Union agents said that they would return in a half hour and that the employees better have identification then. The Union agents then climbed down to the ground level and asked similar questions of some of the employees there.

The videotape of this incident runs approximately eighteen minutes. The Union gave copies of the DVD to various federal and state government officials. A Local Union member edited the video down to approximately four minutes and interspersed written editorial comments. He posted the edited version on YouTube and on the Facebook page for his Local Union.

We initially concluded that the Union's videotaped "investigation" violated Section 8(b)(1)(A). The Board will find a violation of Section 8(b)(1)(A) if a union's conduct had a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights. It implicitly has found that there is a protected right to work for a nonunion employer. In the Electrical Workers Local 98 cases, the Board ruled that a union violated Section 8(b)(1)(A) by interfering with an

employee's performance of his work duties for a nonunion employer. See Electrical Workers Local 98 (Tri-M Group, LLC), 350 NLRB 1104, 1105-08 (2007), enfd. 317 F. App'x 269 (3d Cir. 2009); Electrical Workers Local 98 (MCF Services), 342 NLRB 740, 740, 752 (2004), enfd. 251 F. App'x 101 (3d Cir. 2007).

In addition, union threats to call immigration authorities or to have employees deported constitute unlawful coercion. Further, videotaping or photographing employees is unlawful under Section 8(b)(1)(A) where accompanied by other conduct indicating that the union would react adversely to employees' exercising their Section 7 right to refrain from union activity.

In this case, we found that the Union's own videotape demonstrates that its agents engaged in coercive conduct within the scope of Section 8(b)(1)(A). As described above, Union agents entered the Employer's jobsite in a threatening manner, interfered with its employees' performance of their work, and coercively interrogated the employees in circumstances that reasonably would have led them to believe that they were in danger of being deported for immigration violations.

We also concluded that the Union's posting of an edited version of the videotape on YouTube and the Local's Facebook page was unlawful as well. Any employees who viewed these postings, either through the YouTube link that expressly named the Union or through the Local's Facebook page, were subject to the same coercive message conveyed to the workers at the jobsite.

Provisions of Employer's Social Media Policy Were Overly Broad

In another case, we found that several provisions of an Employer's social media policy were overly broad as employees could reasonably construe them to prohibit protected conduct.

The Employer--a hospital--issued a social media, blogging and social networking policy, which was later incorporated into the Employer's employee handbook. Rule 4 of the policy prohibited employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity. Rule 5 prohibited any communication or post that constitutes embarrassment, harassment or defamation of the hospital or of any hospital employee, officer, board member, representative, or staff member. Rule 6 contained a similar prohibition against statements that lack truthfulness or that might damage the reputation or goodwill of the hospital, its staff, or employees.

In this case, several nurses were unhappy with one of their colleagues who was frequently absent, creating extra demands on their time and workload. The Charging Party and others had

complained to their manager about this, but he had not done anything to rectify the situation.

One weekend, the nurse who was frequently absent called in sick. Several days later, the Charging Party posted a comment on her own Facebook page complaining about her colleague's recent absence. The Charging Party referred to the colleague's pattern of calling in sick or absent and that she had disrupted the work that weekend. The posting ended with asking anyone with other details to contact her. One of the Charging Party's Facebook "friends" gave a copy of this posting to the Employer.

About a week later, the Charging Party was reprimanded for her posting on Facebook, told that she had "talked badly about the hospital" in violation of the Employer's social media policy, and was terminated.

We concluded that the provisions of the Employer's social media policy, as set out above, were overly broad as employees could reasonably construe them to prohibit protected conduct.

We concluded that portions of the Employer's social media policy were unlawful under the second step of the Lutheran Heritage test discussed above. We found that Rule 4 provided no definition or guidance as to what the Employer considered to be private or confidential. Yet, the Employer relied on the rule to terminate the Charging Party for her Facebook complaints that were clearly concerted and related to her working conditions and, if she was a statutory employee, would be protected under the Act. Thus, absent any limitations on what was covered, and in light of the Employer's application of the rule to protected conduct, Rule 4 could reasonably be interpreted as prohibiting protected employee discussion of wages and other terms and conditions of employment, and was therefore overbroad.

We also found that Rules 5 and 6 were overbroad. These included broad terms that would commonly apply to protected criticism of the Employer's labor policies or treatment of employees. The policy did not define these broad terms or limit them in any way that would exclude Section 7 activity. We concluded that the Employer's application and interpretation of the broad language in Rule 5 to cover the Charging Party's expression of frustration over a colleague's conduct that frequently resulted in heavier demands on the staff would reasonably lead employees to conclude that protected complaints about their working conditions were prohibited.

Employee Handbook Rules on Social Media Policies Were Overly Broad

Similarly, we found that another Employer's handbook rules pertaining to social media policies were overly broad.

The Employer's online social networking policy, included in the Employer's employee handbook, prohibited employees on their own time from using micro-blogging features to talk about company business on their personal accounts; from posting anything that they would not want their manager or supervisor to see or that would put their job in jeopardy; from disclosing inappropriate or sensitive information about the Employer; and from posting any pictures or comments involving the company or its employees that could be construed as inappropriate. It also cautioned that one inappropriate picture or comment taken out of context could fall into the wrong hands and cost an employee his or her job.

We found that the prohibited conduct section of the policy was unlawful under the second part of the Lutheran Heritage test, described above, because its prohibitions would reasonably be construed to prohibit Section 7 activity.

These prohibitions were broad terms that would commonly apply to protected discussion about, or criticism of, the Employer's labor policies or treatment of employees. Neither the handbook nor its online social networking policy section provided any definition or guidance as to what communications the Employer was referring to that would put employees' jobs in jeopardy, or that the Employer would consider inappropriate or sensitive. Absent such limitations or examples of what was covered, the rules would reasonably be interpreted as prohibiting the employees' right to discuss wages and other terms and conditions of employment, as well as to communicate through the posting of pictures.

The Employer's policy prohibited employees from using the company name, address, or other information on their personal profiles. We found that this prohibition was unlawful. The Employer offered no explanation as to why employees could not identify the Employer on their personal profiles, but even assuming that it had a legitimate interest in preventing disclosure of certain protected company information to outside parties, the ban was not narrowly drawn to address those concerns. Here, moreover, the function that the "personal profile page" serves in letting employees use the social network to find and communicate with their coworkers made this prohibition particularly harmful to their Section 7 rights.

Policy's Bar on Pressuring Coworkers to Use Social Media Was Lawful, But Other Prohibitions Were Too Broad

In another case, we looked at three policy guidelines in an Employer's social media policy. We found one guideline lawful, where it was narrowly drawn to restrict harassing conduct and could not reasonably be construed to interfere with protected activity. However, we found that two other provisions of the policy were unlawfully broad.

The Employer operates a supermarket chain. It implemented a new social media and electronic communication policy, which stated that it was designed to protect the Employer's reputation and that it governed employee communications during both work and personal time. Guideline 3 of the policy precluded employees from pressuring their coworkers to connect or communicate with them via social media. Guideline 5 precluded employees from revealing, including through the use of photographs, personal information regarding coworkers, company clients, partners, or customers without their consent. Guideline 6 precluded the use of the Employer's logos and photographs of the Employer's store, brand, or product, without written authorization.

Applying Lafayette Park Hotel and Lutheran Heritage, as discussed above, we concluded that the Employer's admonition in guideline 3 that no employee should ever be pressured to "friend" or otherwise connect with a coworker via social media could not be reasonably read to restrict Section 7 activity. The rule was sufficiently specific in its prohibition against pressuring coworkers and clearly applied only to harassing conduct. It could not reasonably be interpreted to apply more broadly to restrict employees from attempting to "friend" or otherwise contact colleagues for the purposes of engaging in protected concerted or union activity.

We found, however, that guideline 5's restriction upon revealing personal information was unduly broad and could reasonably be interpreted as restraining Section 7 activity. Employees have a Section 7 right to discuss their wages and other terms and conditions of employment. A rule precluding employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with each other or with nonemployees violates Section 8(a)(1). Absent any limitations or examples of what is covered, we concluded that the guideline would reasonably be interpreted as prohibiting employees' right to discuss wages and other terms and conditions of employment.

Similarly, we decided that the prohibition in guideline 6 on using the Employer's logos or photographs of the Employer's stores would restrain an employee from engaging in protected activity. For example, an employee could not post pictures of employees carrying a picket sign depicting the Employer's name, peacefully handbill in front of a store, or wear a t-shirt portraying the Employer's logo in connection with a protest involving terms and conditions of employment.

Employer's Rule Restricting Employee Contacts with Media Was Lawful

Another case presented a challenge to an Employer's policy restricting employees' contacts with the media. Applying the Lutheran Heritage standard, discussed above, we concluded that the policy could not reasonably be interpreted to prohibit employees from speaking on their own behalf with reporters and therefore did not violate the Act.

The Employer--a grocery store chain--included a media relations and press interviews policy in its employee handbook. Under this policy, the public affairs office was responsible for all official external communications; employees were expected to maintain confidentiality about sensitive information; and it was imperative that one person should speak for the Employer to deliver an appropriate message and avoid giving misinformation.

The policy also prohibited employees from using cameras in the store or parking lot without prior approval from the corporate office. In addition, employees were directed to respond to all media questions by replying that they were not authorized to comment for the Employer or did not have the information being sought, to take the name and number of the media organization, and to call the public affairs office.

It is well established that employees have a Section 7 right to speak to reporters about wages and other terms and conditions of employment. See Kinder-Care Learning Centers, 299 NLRB 1171, 1172 (1990). Therefore, while an employer has a legitimate business interest in limiting who can make official statements for the company, its rules cannot be so broadly worded that employees would reasonably think that they were prohibited from exercising their Section 7 right to speak with reporters about working conditions.

However, a media policy that simply seeks to ensure a consistent, controlled company message and limits employee contact with the media only to the extent necessary to effect that result cannot be reasonably interpreted to restrict Section 7 communications. In AT&T Broadband & Internet Services, Case 12-CA-21220 at 10, Advice Memorandum dated November 6, 2001, we determined that a policy that stated that "the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons" could not be read as "a blanket prohibition" against all employee contact with the media. Additional language in the rule referring to "crisis situations" and ensuring "timely and professional" response to media inquiries further clarified that the rule was not meant to apply to Section 7 activities.

Similarly, we concluded here that the Employer's media policy repeatedly stated that the purpose of the policy was to ensure that only one person spoke for the company. Although

employees were instructed to answer all media/reporter questions in a particular way, the required responses did not convey the impression that employees could not speak out on their terms and conditions of employment.

We also concluded that the Employer's rule against allowing cameras in the store was not unlawfully overbroad. The prohibition of cameras followed and preceded instructions about how to deal with news media and events drawing outside attention. The only reasonable interpretation of this rule was that the cameras referred to are *news* cameras, not employees' own personal cameras, and therefore this part of the media policy would not chill employees' Section 7 conduct.