OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 12-31 January 24, 2012

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 an updated report from 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

On August 18, 2011, I issued a report presenting case developments arising in the context of today's social media. As I noted in that report, 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. Cases concerning the protected and/or concerted nature of employees' social media postings and the lawfulness of employers' social media policies and rules continue to be presented to the Regional Offices and are then submitted to the Division of Advice in Washington for my consideration. In addition, these issues and their treatment by the NLRB continue to be a "hot topic" among practitioners, human resource professionals, the media, and the public. Accordingly, I am issuing this second report on fourteen recent cases that present emerging issues in the context of social media.

I hope that this report will continue to provide guidance as this area of the law develops.

/s/
Lafe E. Solomon
Acting General Counsel

Discharge for Facebook Comments and For Violation of Non-Disparagement Rule Was Unlawful

In this case, we addressed the lawfulness of the Employer's rule prohibiting employees from "disparaging" the Employer in any media. We also looked at the Employer's termination of the Charging Party for posting comments critical of the Employer on Facebook. We found that the rule was unlawful and that the Employer violated the Act when it terminated the Charging Party for her protected concerted Facebook postings and pursuant to the rule.

The Employer is a collections agency. The Charging Party worked in the inbound calls group at one of the Employer's call centers. This group operates differently from the other client groups, which use a calling system that automatically dials the number of a debtor from a pre-programmed list. The employees then leave a voicemail, or if they reach the correct person, they attempt to convince the person to make the payments owed. The inbound calls group is responsible for answering all returning phone calls from debtors. According to the Charging Party, employees in the inbound group are able to collect more money than employees who make outbound calls because those in the inbound group connect with a live person and because, for the most part, individuals who return calls are interested in repaying their debts.

Employees are paid an hourly rate and bonuses based on the total amount of payments they secure from debtors. Employees in the inbound calls group earn more, on the whole, than employees in the outbound sections. The Charging Party worked in the inbound calls group for approximately seven years. She asserted that she was the second best performing employee in the group based on the volume of payments received, and thus that she earned a significant portion of compensation in bonuses.

On October 7, 2010, the Charging Party's supervisors informed her that due to low call volume in the inbound calls group, she was being moved to one of the outbound calls groups. The following day, the Charging Party approached her supervisor and expressed her frustration with the transfer decision, arguing that given her high performance level, it did not make sense to transfer her.

After arriving home, the Charging Party posted a status update on her Facebook page. Using expletives, she stated the Employer had messed up and that she was done with being a good employee.

The Charging Party was Facebook "friends" with approximately 10 coworkers, including her direct supervisor. One coworker indicated she was "right behind" the Charging Party and was also angry. Another coworker made a similar comment. Several former employees also posted, with one of them commenting that only bad behavior gets rewarded, and that honesty, integrity, and commitment are a foreign language to them. This coworker also wrote that the Employer would rather pay the $9 an hour people and get rid of higher paid, smarter people. The Charging Party responded and indicated that the Employer could keep the $9 an hour people who would get the Employer sued. Another former employee called for a class action, stating that there were enough smart people to get them sued.

The Charging Party returned to work on October 12. At the end of the day, she was told that she was being terminated due to her comments on Facebook, and the Employer showed her a copy of her Facebook wall from October 8.

An employer violates Section 8(a)(1) 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 clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) 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.

The Employer's rule prohibited "[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media." We concluded that this rule was unlawful because it would reasonably be construed to restrict Section 7 activity, such as statements that the Employer is, for example, not treating employees fairly or paying them sufficiently. Further, the rule contained no limiting language that would clarify to employees that the rule does not restrict Section 7 rights.

We next considered the employer's discharge of the Charging Party. In the Meyers 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." Meyers Industries

(Meyers I), 268 NLRB 493, 497 (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). The definition of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." Meyers II, 281 NLRB at 887.

The Charging Party here initiated the Facebook discussion because the Employer transferred her to a less lucrative position. In response, coworkers and former coworkers responded. Some of the comments echoed the Charging Party's frustrations with the Employer's treatment of employees, and one former coworker suggested taking concerted activity through the filing of a class action lawsuit. Thus, the Charging Party's initial Facebook statement, and the discussion it generated, clearly involved complaints about working conditions and the Employer's treatment of its employees and clearly fell within the Board's definition of concerted activity, which encompasses employee initiation of group action through the discussion of complaints with fellow employees.

We also concluded that the Employer unlawfully terminated the Charging Party in response to her protected activity. Here, as an initial matter, there is no dispute that the Employer knew about the Charging Party's Facebook statements and that it terminated the Charging Party in response to those statements because the Employer specifically cited them to the Charging Party as the reason for her discharge. Further, the evidence supports the conclusion that the Employer discharged the Charging Party specifically as a result of the protected nature of her posts, i.e., because they were fomenting additional discussion among employees about workplace problems. We found that the Employer unlawfully terminated the Charging Party in retaliation for her protected future concerted activity.

Finally, we concluded that the Employer's discharge of the Charging Party also violated Section 8(a)(1) because it was made pursuant to its unlawfully overbroad non-disparagement rule. The Board recently held that "discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." The Continental Group, Inc., 357 NLRB No. 39, slip op. at 4 (2011). An employer will not be liable for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the

employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference was the reason for the discipline. Here, the evidence demonstrates that the Employer discharged the Charging Party pursuant to its unlawfully overbroad rule. Finally, we found no evidence that the Charging Party's conduct interfered with her work or that of other employees.

Discharge for Facebook Comments Was Lawful, But Social Media Policy and No-Solicitation Rule Were Overly Broad

In another case, we addressed the Employer's discharge of the Charging Party for her Facebook comments, and the Employer's social media policy and its no-solicitation rule. We concluded that the discharge did not violate the Act because the Charging Party was not engaged in concerted activity. We found, however, that the Employer's social media policy and no-solicitation rule were unlawful.

The employer operates a chain of home improvement stores. On September 1, 2010, in response to an incident where her supervisor reprimanded her in front of the Regional Manager for failing to perform a task that she had never been instructed to perform, the Charging Party used her cell phone during her lunch break to update her Facebook status with a comment that consisted of an expletive and the name of the Employer's store. Four individuals, including one of her coworkers, "liked" that status, and two other individuals commented on that status.

About 30 minutes later, the Charging Party posted again, this time commenting that the employer did not appreciate its employees. Although several of the Charging Party's friends and relatives commented on this second post, the four coworkers who were her Facebook "friends" did not respond.

In the following days, the Charging Party informed one or two coworkers and a supervisor about the incident that had prompted her Facebook posts. These individuals offered their sympathy, but none of them indicated that they viewed the incident as a group concern or desired to take further group action. During a social dinner, the Charging Party also mentioned the incident to the same coworker who "liked" her original Facebook status. That coworker expressed sympathy and may have generally referenced her displeasure with her own job, but work-related issues were not the primary subject of their conversation.

On October 5, the Store Manager and a Human Resources Manager interviewed the Charging Party and asked her to explain her Facebook comments. She stated that she had

felt frustrated and attacked after her supervisor and the Regional Manager came to her about not performing tasks that she had neither been trained nor instructed to perform. The Charging Party was discharged on October 15 for her Facebook postings.

Five days later, the Employer issued a new social media policy, which applied to all social networking communications. The section concerning restrictions on the use of the Employer's confidential and/or proprietary information provided that, in external social networking situations, employees should generally avoid identifying themselves as the Employer's employees, unless there was a legitimate business need to do so or when discussing terms and conditions of employment in an appropriate manner.

The Employer's employee handbook contained a no solicitation/no distribution rule. This rule stated that employees may not solicit team members while on company property and that employees may not solicit others while on company time or in work areas.

Addressing the Charging Party's discharge, we concluded, under the Meyers cases, that the Charging Party's Facebook postings were merely an expression of an individual gripe. The Charging Party's first status update was because she was frustrated about an interaction she had had with her supervisor. The Charging Party had no particular audience in mind when she made that post, the post contained no language suggesting that she sought to initiate or induce coworkers to engage in group action, and the post did not grow out of a prior discussion about terms and conditions of employment with her coworkers. Moreover, there is no evidence that she was seeking to induce or prepare for group action or to solicit group support for her individual complaint. Although one of her coworkers offered her sympathy and indicated some general dissatisfaction with her job, she did not engage in any extended discussion with the Charging Party over working conditions or indicate any interest in taking action with the Charging Party.

Analyzing the employer's rules under Lutheran Heritage Village-Livonia, discussed above, we found unlawful the provision of the Employer's social media policy that provided that employees should generally avoid identifying themselves as the Employer's employees unless discussing terms and conditions of employment in an appropriate manner. Employees have a Section 7 right to discuss their wages and other terms and conditions of employment. Here, the Employer's rule limits employee discussion of terms and conditions of employment to discussions conducted in an "appropriate" manner, thereby implicitly prohibiting "inappropriate" discussions of terms and conditions of

employment. The policy does not define what an "appropriate" or "inappropriate" discussion of terms and conditions of employment would be, either through specific examples of what is covered or through limiting language that would exclude Section 7 activity. We concluded that employees would therefore reasonably interpret the rule to prohibit protected activity, including criticism of the Employer's labor policies, treatment of employees, and terms and conditions of employment.

We also found that the "savings clause" in the Employer's social media policy was insufficient to cure the ambiguities in the rule and remove the chill upon Section 7. The savings clause provided that the policy would not be interpreted or applied so as to interfere with employee rights to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities. We explained that an employee could not reasonably be expected to know that this language encompasses discussions the Employer deems "inappropriate."

We also determined that the no-solicitation rule was unlawfully overbroad. Rules that ban solicitation in non-work areas during non-work time are "an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945). As such, solicitation rules that prohibit employee solicitation on company property during non-work time are presumptively unlawful, although a retail establishment like the Employer may lawfully ban solicitation during non-work time in the selling areas of its establishment.

Employees would reasonably interpret the portion of the Employer's rule prohibiting employees from soliciting team members while on company property to prohibit them from engaging in Section 7 solicitation during non-work time in a non-selling area of the Employer's property. Employees would also reasonably interpret the portion of the rule stating that employees may not solicit "on company time or in work areas" as also precluding solicitation during non-work time, such as a paid break, in a non-selling work area.

Work Rules Were Overbroad, But Discharge Under Rules Was Lawful Because Employee's Facebook Posts Were Not Protected

Similarly, in this case we addressed the Charging Party's discharge under the Employer's work rules because of her Facebook posts and the legality of the rules. We found that the rules were overbroad, but we concluded that the Facebook activity did not implicate terms and conditions of employment and was not protected.

The Employer operates a restaurant chain. Its handbook contains a section entitled Team Member Conduct & Work Rules. These rules provide that "insubordination or other disrespectful conduct" and "inappropriate conversation" are subject to disciplinary action.

The Charging Party was a bartender at one of the Employer's restaurants. In late summer or early fall 2010, the Employer hired a new General Manager, who in turn hired a close friend as a bartender. The Charging Party and the other bartenders immediately began having problems with the new bartender. Although the Charging Party was the most senior bartender and until then had been able to secure the more profitable weekend shifts based on her seniority, the new bartender was assigned several weekend shifts. In addition, the Charging Party and one of her coworkers complained to the General Manager that the new bartender failed to clean up the bar, resulting in more work for the bartender who opened the bar the following day.

On December 11, the Charging Party learned that the new bartender was serving customers drinks made from a pre-made mix while charging them for drinks made from scratch with more expensive premium liquor. The Assistant Manager discovered this, spoke to the new bartender about it, and made a note in his personnel file.

Meanwhile, on the morning of December 12, the Charging Party posted a status update on her Facebook page indicating that she had learned that a coworker/bartender was a cheater who was "screwing over" the customers. The Charging Party is Facebook "friends" with coworkers, former coworkers, and customers. In response to the Charging Party's status update, a former coworker asked if the bartender was stealing. The Charging Party replied that he was using the mix instead of the premium alcohol and that it had been mentioned at a staff meeting that the liquor cost was up.

Later that day, the Charging Party posted a new update to the effect that dishonest employees along with management that looks the other way will be the death of a business. A coworker posted agreement but warned the

Charging Party to be careful with what she posted. Another coworker agreed. The following morning, the Charging Party posted that she had every right to say how she felt.

The Charging Party stated that she was concerned about the new bartender's behavior because she feared that if customers found out, they might stop buying drinks at the bar or would tip lower, and as a result, her income would be decreased. She was also concerned simply because the new bartender's behavior was dishonest.

In the days that followed, the Charging Party spoke to another bartender and a server about her Facebook posts. The server thought that her posts were brave. Her fellow bartender shared complaints with the Charging Party about other ways the new bartender was making their jobs more difficult but did not share the Charging Party's concern about his substitution of cheap alcohol for premium liquor. At the same time, this bartender and two servers complained to the General Manager about the Charging Party's Facebook posts. They were worried that customers would see them.

On December 15, the Employer discharged the Charging Party for violation of the work rules, specifically using unprofessional communication on Facebook to fellow employees.

We initially concluded, under Lutheran Heritage Village-Livonia, discussed above, that the Employer's Team Member Conduct & Work Rules were unlawfully overbroad because the prohibitions on "disrespectful conduct" and "inappropriate conversations" would reasonably be construed by employees to preclude Section 7 activity.

As noted above, in The Continental Group, Inc., the Board outlined limits to the application of the rule that discipline imposed pursuant to an unlawfully overbroad rule violates the Act. Thus, while the work rules that the Employer applied to discharge the Charging Party are unlawfully overbroad, her discharge would be unlawful only if her Facebook activity was protected conduct or conduct that otherwise implicates Section 7 concerns.

The Board has held that employee protests over the quality of service provided by an employer are not protected where such concerns have only a tangential relationship to employee terms and conditions of employment. See, e.g., Five Star Transportation, Inc., 349 NLRB 42, 44 (2007), enfd. 522 F.3d 46 (1st Cir. 2008). On the other hand, when employees engage in conduct to address the job performance of their coworkers or supervisor that adversely impacts their working conditions, their activity is protected. See, e.g., Georgia Farm Bureau Mutual Insurance Cos., 333 NLRB 850, 850-51 (2001).

Here, we found that the Charging Party's Facebook posts regarding her fellow bartender's job performance had only a very attenuated connection with terms and conditions of employment. She made the posts because she was upset that he was passing off low-grade drinks as premium liquor and management was condoning the action. She did not reasonably fear that her failure to publicize her coworker's dishonesty could lead to her own termination. Although she later stated that she was concerned that the bartender's conduct would cause customers to stop buying drinks or lower their tips, she did not state this concern in her posts. And this assertion is belied by the fact that she was communicating with customers about the bartender's conduct, which if anything would cause the impact on business that she later asserted she was trying to prevent.

Thus, we concluded, at most, that the Charging Party's Facebook posts were motivated by a concern that the service her Employer was providing was deficient. In these circumstances, we found that the link between the subject of the posts and any terms or conditions of employment was too attenuated to implicate the concerns underlying Section 7. Accordingly, her discharge did not violate Section 8(a)(1) even if her conduct was concerted and even though she was discharged under the Employer's overbroad rule.

Employer's Social Media Policy Was Overbroad, But Employee's Facebook Posts Were Not Protected

This case presented a similar situation. We found that the Employer's social media policy violated Section 8(a)(1), but we found that the Charging Party's discharge, pursuant to the policy, for her Facebook posts was not unlawful because the conduct did not constitute protected concerted activity or fall within the ambit of Section 7.

The Charging Party, a phlebotomist, had a history of conflict with several coworkers. In the spring of 2010, the Charging Party was blamed for the discharge of another employee and became the target of coworkers' insults and threats. She attempted to resolve these problems by informing her supervisor and using the Employer's Employee Assistance Program, but was unsuccessful.

In frustration, in February 2011, the Charging Party posted angry profane comments on her Facebook wall, ranting against coworkers and the Employer, and indicating that she hated people at work, that they blamed everything on her, that she had anger problems, and that she wanted to be left alone.

One coworker commented that she had gone through the same thing. Two other employees read these posts and provided them to the Employer. On March 30, the Laboratory Director met with the Charging Party and informed her that the Human Resources Department had received a complaint regarding her Facebook postings. The Charging Party was issued a written warning for violating the Employer's social media policy, and terminated for multiple violations under the Employer's progressive discipline policy.

The Employer's social media policy prohibits employees from using social media to engage in unprofessional communication that could negatively impact the Employer's reputation or interfere with the Employer's mission or unprofessional/inappropriate communication regarding members of the Employer's community. Applying Lutheran Heritage Village-Livonia, discussed above, we found that the policy here violates Section 8(a)(1) because it would reasonably be construed to chill employees in the exercise of their Section 7 rights.

These prohibitions would reasonably be read to include protected statements that criticize the Employer's employment practices, such as employee pay or treatment. Further, the rule contained no limiting language excluding Section 7 activity from its restriction. We noted that although the rule did contain examples of clearly unprotected conduct, such as displaying sexually oriented material or revealing trade secrets, it also contained examples that would reasonably be read to include protected conduct, such as inappropriately sharing confidential information related to the Employer's business, including personnel actions.

As noted above, in The Continental Group, Inc., the Board outlined limits to the application of the rule that discipline imposed pursuant to an unlawfully overbroad rule violates the Act. In this case, when the Employer terminated the Charging Party, it specifically cited its social media policy as grounds for her discharge. We found, however, that the Employer's termination of the Charging Party did not violate Section 8(a)(1) because the Charging Party was not terminated for activity that either falls within Section 7 or that touches the concerns underlying Section 7.

First, the Charging Party was not engaged in protected concerted conduct under the Meyers cases discussed above. Her Facebook postings expressed her personal anger with coworkers and the Employer, were made solely on her own behalf, and did not involve the sharing of common concerns. The postings also contained no language suggesting that the Charging Party sought to initiate or induce coworkers to engage in group action. Second, the Charging Party did not

engage in conduct that, though not concerted, nonetheless implicated common concerns underlying Section 7 of the Act. Rather, the Charging Party's Facebook comments consisted of personal and highly charged rants against coworkers and general profanities about the Employer.

Portions of Employer's Communications Systems Policy Were Overbroad

In this case, we applied Lafayette Park Hotel and Lutheran Heritage Village-Livonia, discussed above, to find that various provisions in the Employer's Communications Systems policy, including those dealing with use of the Employer's name and those governing social media communications, could reasonably be construed to chill Section 7 protected activity in violation of Section 8(a)(1).

The Employer operates clinical testing laboratories throughout the United States. In July 2010, it issued a revised Communications Systems policy on its intranet to its approximately 30,000 employees.

The first provision we looked at prohibited employees from disclosing or communicating information of a confidential, sensitive, or non-public information concerning the company on or through company property to anyone outside the company without prior approval of senior management or the law department.

Employees have a Section 7 right to discuss their wages and other terms and conditions of employment, both among themselves and with non-employees. A rule that precludes employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with outside parties, therefore violates Section 8(a)(1). Employees would reasonably understand this provision to prohibit them from communicating with third parties about Section 7 issues such as wages and working conditions. We found it irrelevant that the policy only prohibited communications or disclosures made on or through company property, as employees have the right to engage in Section 7 activities on the Employer's premises during non-work time and in non-work areas. Moreover, the Employer failed to provide any context or examples of the types of information it deems confidential, sensitive, or non-public in order to clarify that the policy does not prohibit Section 7 activity. We also found that this provision further violates Section 8(a)(1) to the extent that it requires employees to obtain prior Employer approval before engaging in protected activities.

Another provision of the policy prohibited use of the company's name or service marks outside the course of business without prior approval of the law department. Employees have a Section 7 right to use their employer's name or logo in conjunction with protected concerted activity, such as to communicate with fellow employees or the public about a labor dispute. See, e.g., Pepsi-Cola Bottling Co., 301 NLRB 1008, 1019-20 (1991), enfd. 953 F.2d 638 (4th Cir. 1992). We concluded that this provision of the policy could reasonably be construed to restrict employees' Section 7 rights to use the Employer's name and logo while engaging in protected concerted activity, such as in electronic or paper leaflets, cartoons, or picket signs in connection with a protest involving the terms and conditions of employment.

Although an employer has a proprietary interest in its service marks and in a trademarked or copyrighted name, we found that employee use in connection with Section 7 activity would not infringe on that interest. Interests protected by trademark laws--such as the trademark holder's interests in protecting the good reputation associated with the mark from the possibility of being tarnished by inferior merchandise sold by another entity using the trademark and in being able to enter a related commercial field and use its well-established trademark, and the public's interest in not being misled as to the source of products using confusingly similar marks--are not remotely implicated by employees' non-commercial use of a name, logo, or other trademark to identify the Employer in the course of engaging in Section 7 activity.

The policy also prohibited employees from publishing any representation about the company without prior approval by senior management and the law department. The prohibition included statements to the media, media advertisements, electronic bulletin boards, weblogs, and voice mail. The Board has long recognized that "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute." Valley Hospital Medical Center, 351 NLRB 1250, 1252 (2007), enfd. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 358 F. App'x 783 (9th Cir. 2009). An employer's rule that prohibits employee communications to the media or requires prior authorization for such communications is therefore unlawfully overbroad. The Employer's policy goes further, restricting *all* public statements regarding the company, which would include protected Section 7 communications among employees and between employees and a union.

In another provision of the policy, the Employer required that social networking site communications be made in an honest, professional, and appropriate manner, without

defamatory or inflammatory comments regarding the employer and its subsidiaries, and their shareholders, officers, employees, customers, suppliers, contractors, and patients. We found that employees would reasonably construe broad terms, such as "professional" and "appropriate," to prohibit them from communicating on social networking sites with other employees or with third parties about protected concerns.

Another provision in the social networking and weblog portion of the policy provided that employees needed approval to identify themselves as the Employer's employees and that those employees who had identified themselves as such on social media sites must expressly state that their comments are their personal opinions and do not necessarily reflect the Employer's opinions. We noted that personal profile pages serve an important function in enabling employees to use online social networks to find and communicate with their fellow employees at their own or other locations. We found that this policy, therefore, was particularly harmful to the Section 7 right to engage in concerted action for mutual aid or protection and was unlawfully overbroad. Moreover, we also concluded that requiring employees to expressly state that their comments are their personal opinions and not those of the Employer every time that they post on social media would significantly burden the exercise of employees' Section 7 rights to discuss working conditions and criticize the Employer's labor policies, in violation of Section 8(a)(1).

The Employer's policy also provided that it could request employees to temporarily and/or permanently suspend posted communications if the Employer believed it necessary or advisable to ensure compliance with securities regulations, other laws, or in the best interests of the company. It required employees to first discuss with their supervisor or manager any work-related concerns, and it provided that failure to comply could result in corrective action, up to and including termination. Although the first portion of the provision does not expressly restrict employee communication, we found that the rule restricted Section 7 activity by requiring, on threat of discipline, that employees first bring any "work-related concerns" to the Employer.

Employer's Initial Social Media Policy Was Overbroad, But Amended Version Was Lawful

In another case, we found that an Employer's social media policy--as implemented--was unlawfully broad, but that--as amended--it did not violate the Act.

As implemented in 2010, the Employer's social media policy prohibited discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites. In June 2011, the Employer replaced that policy with one that prohibited the use of social media to post or display comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.

We concluded that the Employer's initial social media policy was unlawful under the second part of the Lutheran Heritage test discussed above. The listed prohibitions, which contain broad terms such as "defamatory" entries, apply specifically to discussions about work-related issues, and thus would arguably apply to protected criticism of the Employer's labor policies or treatment of employees. Moreover, in this case, the Employer had actually applied this policy to restrict its employees' protected Facebook discussion regarding their working conditions. The Employer's interpretation and application of these phrases to cover that discussion would reasonably lead employees to conclude that protected complaints about their working conditions were prohibited.

We found, however, that the Employer's amended policy was lawful. The Board has indicated that a rule's context provides the key to the "reasonableness" of a particular construction. In this regard, the Board has found that a rule forbidding "statements which are slanderous or detrimental to the company" that appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not be reasonably understood to restrict Section 7 activity. Tradesmen International, 338 NLRB 460, 460-62 (2002).

Like the rule in Tradesmen International, the Employer's amended social media policy would not reasonably be construed to apply to Section 7 activity. The rule appears in a list of plainly egregious conduct, such as violations of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or

other protected class, status, or characteristic. Further, unlike the initial policy, there was no evidence that the amended policy had been utilized to discipline Section 7 activity.

Provisions in Drugstore Operator's Social Media Policy Withstand Scrutiny

Similarly, we found that certain provisions in the social media policy of an Employer that operates a national drugstore chain were not unlawful. We concluded that, in context, employees would understand that these provisions did not prohibit Section 7 activity.

The Employer's social media policy provided that the Employer could request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws. It prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients, and it also prohibited employees from discussing in any form of social media "embargoed information," such as launch and release dates and pending reorganizations.

We found that these rules were not unlawful. Although the requirement to confine social networking communications to matters unrelated to the company could be construed to restrict employees from communicating regarding their terms and conditions of employment, we found that, in its context, employees reasonably would interpret the rule to address only those communications that could implicate security regulations. Similarly, we found that the prohibition on disclosing confidential and/or proprietary information acquired in the course of employment was not overbroad. Considering that the Employer sells pharmaceuticals and that the rule contains several references to customers, patients, and health information, employees would reasonably understand that this rule was intended to protect the privacy interests of the Employer's customers and not to restrict Section 7 protected communications. Finally, we noted that employees would have no protected right to disclose embargoes on corporate information; nor would they reasonably interpret the rule to prohibit communications about their working conditions.

Another provision in the Employer's rules provided that while engaging in social networking activities for personal purposes, employees must indicate that their views were their own and did not reflect those of their employer. They were also prohibited from referring to the Employer by name and from publishing any promotional content.

We again concluded that employees would not reasonably interpret this rule, which appears in a section entitled "Promotional Content," to restrict Section 7 activity. The section includes a preface explaining that "special requirements apply to publishing promotional content online," defines such content as "designed to endorse, promote, sell, advertise, or otherwise support the Employer and its products and services" and refers to FTC regulations. In this context, employees could not reasonably construe the rule to apply to their communications regarding working conditions, as they would not consider those communications to promote or advertise on behalf of the Employer.

Employee Was Unlawfully Discharged for Her Facebook Complaint About Reprimand

In another case, we considered whether the Employer unlawfully discharged the Charging Party after she posted comments on Facebook complaining about being reprimanded for her involvement in her fellow employees' work-related problems. We concluded that the Charging Party was engaged in protected concerted activity and thus the discharge was unlawful.

The Charging Party was an administrative assistant in an office area at the Employer's plant. The Employer knew that employees frequently sought her advice about work problems.

On February 2, 2010, following a severe snowstorm, the Tank Yard Manager approached the Charging Party and the Quality Control Supervisor and asked them if they had made it into work the prior day. When they said that they had not, he laughed and said that he knew the females would not make it in. The Charging Party e-mailed her supervisor and an HR Assistant to complain about the Manager's sexist remark. They did not respond. The next day, as she was leaving work, the Charging Party used her cell phone to post a message on Facebook. Using some profanity, she indicated that she could handle jokes but she did not want to be told that she was less of a person because she was a female.

Although the Charging Party was Facebook "friends" with several coworkers, only one, the Quality Control Supervisor who was with her when the Manager made the snowstorm remark, responded during the conversation that ensued over the next few hours. In this conversation, the Charging Party, without specifically naming the Manager, made several derogatory remarks about him. Several "friends" expressed support for the Charging Party's

negative assertions about the Manager, and one told her that she needed to take it further.

A week later, while the Charging Party was working in the office with the Quality Control Supervisor, a coworker was called into an adjacent office with the Employer's President, the Tank Yard Manager, and an HR Assistant. When the coworker came out, he said that he had been fired. As the President came out of the meeting, he looked at the Quality Control Supervisor and asked if she disagreed. She said it was not fair, and then both she and the Charging Party started to cry. The President told the Charging Party that he did not know why she was upset and that she was already on thin ice.

The Charging Party then went into the restroom and posted a message on Facebook from her cell phone. She stated that she couldn't believe employees were losing their jobs because they asked for help, and she indicated that she was very upset.

When she returned to her work area, the President called her into a meeting. The President told her that she was getting upset over something that was none of her business. He stated that it was okay that employees came to talk to her, but that management did not like that she gives them her opinion. She responded that she just told employees to keep a log and take notes that they can use to help them later.

During her lunchtime, the Charging Party posted a series of comments on Facebook using her cell phone. These comments elicited sympathetic responses from two non-employee "friends." The Charging Party said that it was a very bad day, that one of her friends had been fired because he had asked for help, and that she had been scolded for caring.

Later that afternoon, the President terminated her. He said that he had told her not to get emotionally involved and then she had made the Facebook postings from the company computer on company time. He had printouts of her Facebook comments. She pointed out that the postings came from her cell phone. He responded that he had had enough and that they did not appreciate the comments she had posted the prior week about the Tank Yard Manager. He then signed an Employee Warning Report, which stated that after a coaching on not getting involved with other employee problems, the Charging Party had continued to voice her opinion on Facebook on company time, that this was unprofessional, and would not be tolerated.

As explained above, Section 7 protects employees' right to engage in "concerted activity" that is for "mutual

aid and protection." Under the Meyers cases, the Board's test for such concerted activity is whether the activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." As discussed, employees' discussion of shared concerns about terms and conditions of employment, even when "*in its inception* [it] *involves only a speaker and a listener*, . . . is an indispensable preliminary step to employee self-organization." Further, the Board has held that an employer's discharge of an employee to prevent future employee discussions of terms and conditions of employment is unlawful. See Parexel International, LLC, 356 NLRB No. 82, slip op. at 4 (2011).

Here, the Employer was concerned about the Charging Party's involvement in her coworkers' work-related problems, including her discussions with fellow employees about terms and conditions of employment. The President knew that employees came to her for advice, and he expressly counseled her not to offer them her opinions. Her subsequent Facebook posting precipitated her discharge because the Employer perceived that she would not comply with his oral warning not to engage in protected conversations with her fellow employees about their working conditions. We therefore concluded that Charging Party was discharged for her protected concerted activity of engaging in discussions with her coworkers about working conditions and as a "pre-emptive strike" because of the Employer's fear of what those discussions might lead to.

Employees' Facebook Postings About Supervisor and Promotion Selection Were Protected Concerted Activity

In this case, we considered whether the Employer--a veterinary hospital--violated Section 8(a)(1) by discharging two employees and disciplining two other employees for their Facebook complaints regarding their supervisor and the Employer's selection of an employee for promotion. We concluded that the employees were engaged in protected concerted activity and thus that the discharges and discipline were unlawful.

On March 31, 2011, the Employer promoted an employee to the position of "co-manager." Later that day and again that evening, the Charging Party discussed the promotion with two separate coworkers. The Charging Party told the coworkers that she was upset with the way the position had been filled and with the selection of the employee.

When she got home, the Charging Party posted a message on her Facebook account reflecting her frustration. She indicated that she had pretty much been told that all of

the work she had been doing wasn't worth anything and that she couldn't do it anymore.

Three coworker Facebook "friends" responded to the Charging Party's post, resulting in a Facebook conversation in which they complained, among other things, about the woman who had gotten the promotion and about mismanagement. The Charging Party noted that she had not received a raise or a review in three years, that the promoted individual did not do any work, and that the Employer didn't know how to tell people when they did a good job. One coworker commented that it would be pretty funny if all of the good employees actually quit. The Charging Party expressed her appreciation for the support her coworkers had given her and stated that this wasn't over by a long shot, and that her days at the employer were limited.

In the days following this Facebook conversation, the Employer terminated the Charging Party and one of the coworkers, and disciplined the other two coworkers, because of their posts on Facebook.

We concluded that the employees were engaged in protected concerted activity when they posted comments on Facebook discussing their shared concerns about terms and conditions of employment. These discussions constituted "concerted activity for mutual aid and protection" within the meaning of Section 7 because multiple employees were involved in the discussion, and the discussion involved a term or condition of employment. Here, prior to her Facebook postings, the Charging Party spoke to two coworkers, on separate occasions, about their shared concerns over how the Employer selected the employee for promotion. The employees' discussions on Facebook also dealt with the Employer's selection of the "co-manager," as well as with shared concerns over the quality of their supervision and the opportunity to be considered for promotion, important terms and conditions of employment.

In the Meyers cases, discussed above, the Board articulated that to be protected, concerted activity "must seek to initiate or to induce or to prepare for group action." This is most clearly met when an employee group discussion expressly includes the topic of collective action. But this requirement may also be met when the discussion does not include a current plan to act to address the employees' concerns. In this regard, the Board has long described concerted activity "in terms of interaction among employees." Meyers I, 268 NLRB at 494. The Board has also explained that in a variety of circumstances, employees' discussion of shared concerns about terms and conditions of employment, even when "*in its inception* [it] *involves only a speaker and a listener*, . . . is an indispensable preliminary step to employee self-

organization." Meyers I, 268 NLRB at 494 (emphasis in original); Meyers II, 281 NLRB at 887, quoting Root-Carlin, Inc., 92 NLRB 1313, 1314 (1951).

Applying these principles, we concluded that the employees were engaged in concerted activity by posting comments on the Charging Party's Facebook page. The Charging Party's Facebook post sparked a collective dialogue that elicited responses from three of her coworkers, and their conversations related to shared concerns among the employees over important terms and conditions of employment.

We noted that the employees' posts on Facebook might suggest group action. The suggestion by one coworker that it would be pretty funny if the good employees quit and the Charging Party's concluding statement that this wasn't over and that her days were limited could be read as early expressions of an intent to initiate group action and could have been the seeds of collective action to change their working conditions. While the concerted actions expressed in the posts were of a preliminary nature, we concluded that the movement toward concerted action was halted by the Employer's pre-emptive discharge and discipline of all the employees involved in the Facebook posts. Thus, we concluded that the Employer unlawfully prevented the fruition of the employees' protected concerted activity.

Employee's Facebook Postings About Manager's Attitude and Style Were Protected Concerted Activity

This case presented the issue of whether the Charging Party was engaged in protected concerted activity when she posted a message on another employee's Facebook page. We concluded that she was and thus that her discharge was unlawful.

The Employer operates a popcorn packaging facility. Prior to the Charging Party's Facebook posting at issue here, numerous of the Employer's employees had discussed among themselves the negative attitude and supervision of the Employer's Operations Manager and its effect on the workplace. Several employees, including the Charging Party, had expressed these concerns to management officials or to a management consultant hired by the Employer.

On February 23, 2011, several employees had a Facebook conversation, beginning with one employee's posting that there had been so much drama at the plant. A second employee asked for details, and the first employee responded that she had heard another employee had gotten written up for being "a smart ass," that there were still no bags, and that they were going to have to work on

Saturday to make up for another day. The second employee replied that the disciplined employee probably wasn't "a happy camper," and the first employee commented that the Employer complains about who goes on break and for how long and that they were not doing what they should be doing.

A third employee, the Charging Party, then posted various comments, including that she hated that place and couldn't wait to get out of there. She also stated that the Operations Manager brought on a lot of the drama and that it was the Operations Manager who made it so bad.

The first employee then posted that she wished she could get another job, and that it was hard to get a full time job. This conversation was not discussed further online or at work by any of the employees involved.

On March 2, the Employer discharged the Charging Party for her Facebook posting regarding the Employer and its Operations Manager.

We initially found that the subject of the Charging Party's Facebook posting was protected by the Act. It is well established that employee complaints and criticism about a supervisor's attitude and performance may be protected by the Act (see, e.g., Arrow Electric Company, Inc., 323 NLRB 968 (1997), enfd. 155 F.3d 762 (6th Cir. 1998), and that the protest of supervisory actions is protected conduct under Section 7 (see, e.g., Datwyler Rubber and Plastics, Inc., 350 NLRB 669 (2007)).

We further concluded that the Charging Party's conduct was part of employees' concerted activity for mutual aid and protection, both because it was a continuation of the earlier group action that included employee complaints to management about the Employer's Operations Manager, and because it was part of a discussion of employees' shared concerns about terms and conditions of employment.

We also decided that the Charging Party's Facebook posting would have been protected in any case, because it arose as part of an employee discussion regarding shared concerns about terms and conditions of employment. The Charging Party's Facebook posting was directed to a group that included at least three coworkers. Although the posting was phrased in terms of the Charging Party's own dissatisfaction with the Operations Manager and the Employer's operation generally, it arose in an ongoing conversation between employees discussing other Section 7 subjects related to terms and conditions of employment, including the discipline of another employee, inadequate supplies, and work scheduling.

Finally, we looked at whether the Charging Party's Facebook posting lost the protection of the Act. In making this determination we considered whether the appropriate standard should be that of NLRB v. IBEW, Local No. 1229 (Jefferson Standard), 346 U.S. 464, 472 (1953) or the Board's Atlantic Steel Co., 245 NLRB 814, 816-817 (1979) standard.

The Jefferson Standard test was established by the Supreme Court to analyze handbills that were part of an intentional appeal to the general public. The Board has applied this test to employee communications that are intended to appeal directly to third parties, with an eye toward whether those communications reference a labor dispute and are so disparaging of the employer or its product as to lose the protection of the Act.

Atlantic Steel is generally used to analyze communications between employees and supervisors, and specifically focuses on whether the communications would disrupt or undermine shop discipline. In determining whether employee conduct is so "opprobrious" as to forfeit protection under the Act, the Board looks at the place of the discussion, the subject matter of the discussion, the nature of the outburst, and whether the outburst was provoked by the employer's unfair labor practices.

Considering the focus and traditional application of Jefferson Standard, we concluded that it did not provide a suitable framework to analyze the Facebook posting here. We determined that this Facebook discussion was more analogous to a conversation among employees that is overheard by third parties than to an intentional dissemination of employer information to the public seeking their support, and thus that an Atlantic Steel analysis would be more appropriate. We recognized, however, that a Facebook posting does not exactly mirror the situation in an Atlantic Steel analysis, which typically focuses on whether the communications would disrupt or undermine shop discipline. We also noted that the Atlantic Steel analysis does not usually consider the impact of disparaging comments made to third parties. Thus, we decided that a modified Atlantic Steel analysis that considers not only disruption to workplace discipline, but that also borrows from Jefferson Standard to analyze the alleged disparagement of the employer's products and services, would more closely follow the spirit of the Board's jurisprudence regarding the protection afforded to employee speech.

Applying this modified Atlantic Steel analysis, we concluded that the Charging Party's Facebook discussion did not lose the protection of the Act. The subject matter of the posting weighed in favor of protection as it involved a

complaint about the Employer's Operations Manager and her effect on the workplace, a protected subject that was made during an employee discussion of the workplace and several other Section 7 subjects that clearly involved or implicated terms and conditions of employment. Weighing against a finding of protection was the fact that the discussion was not provoked by an unfair labor practice.

We decided that the remaining Atlantic Steel factors--the location of the conversation and the nature of the outburst--must be adapted to reflect the inherent differences between a Facebook discussion and a workplace outburst. The discussion occurred at home during non-work hours, and thus was not so disruptive of workplace discipline as to weigh in favor of losing protection under a traditional Atlantic Steel analysis. Further, although the Charging Party complained about the Operations Manager, these complaints were not accompanied by verbal or physical threats, and the Board has found far more egregious personal characterizations and name-calling to be protected.

However, given that the conversation was also viewed by some small number of non-employee members of the public, we also considered the impact of the Charging Party's posting on the Employer's reputation and business. We found that, in the context of this Facebook discussion, the "nature of the outburst" and "location" inquiries of Atlantic Steel merge to require consideration of the impact of the fact that the discussion could be viewed by third parties. Here, the Employer asserted that the Charging Party's Facebook posting was "disparaging" of the Employer and its Operations Manager, and that this justified her discharge. While the Charging Party's comments about the Employer's Operations Manager were certainly critical, it is clear under Board law that they were not defamatory or otherwise so disparaging as to lose protection of the Act. They were of a nature routinely found protected by the Board, and were not in any way critical of the Employer's product or business policies. Thus, we decided that this modified analysis weighed in favor of finding that the Charging Party's Facebook posting retained the protection of the Act.

Finding that the only factor that weighed against retaining the Act's protection was that the discussion was not provoked by an unfair labor practice, we concluded that the Charging Party's Facebook posting did not lose the protection of the Act.

Employee's Critical Online Postings Were Protected Concerted Activity That Did Not Lose Act's Protection

In another case, we considered whether the Employer--a hospital--violated the Act by disciplining and discharging the Charging Party--a nurse--because of messages he posted online during a seven-month period in 2010. We concluded that all of the online postings were protected concerted activity and that they were not so defamatory or disparaging as to lose the protection of the Act.

The background facts in this case go back to November 2008, when a recently discharged hospital employee killed one supervisor and critically wounded another. The Employer's internal investigation contended that the discharge of the employee had been handled appropriately, but the Charging Party repeatedly asserted that the Employer's conduct contributed to the shooting incident.

The Charging Party also often publicly criticized the Employer's "management style," including a February 2009 letter in the local newspaper in which he discussed the Employer's "abuse" of its employees. In October 2009, the Charging Party was quoted in a newspaper ad in which a healthcare coalition stated that an advisory board established by one of the state's boroughs had found sufficient evidence to warrant investigating the Employer's conduct, including whether the Employer's conduct contributed to the shootings. Also in October 2009, the Union that represented the Employer's nurses adopted a resolution pertaining to workplace bullying in healthcare, and the Charging Party was thanked for all of his hard work in its passage.

In March 2010, the Charging Party posted an online comment in the local newspaper in conjunction with a letter to the editor he had written that also was posted. The comment referred to the resolution of an unfair labor practice charge the Charging Party had filed--during his previous service as the Union's Grievance Officer--alleging that the Employer had unlawfully disciplined the Union's local president.

On June 21, the Charging Party posted another local newspaper online letter to the editor critical of the Employer. Although the bulk of the letter did not deal directly with any specific actions taken by the Employer, the letter stated that the hospital's corporate abuse was documented and continuing and that this "national corporate paradigm" had led to destruction of life at the hospital.

The first discipline under challenge in this case occurred on June 30, when the Charging Party received a

written reprimand regarding the March and June statements. The Employer contended that they were false and misleading, and that the June comments were inflammatory and injurious to the hospital's reputation.

On July 20, a letter to the editor written by the Charging Party was posted on the local newspaper's website. The letter discussed the Employer's "management style," but mostly focused on its monopoly status and relations with municipal officials. On July 22, the Charging Party posted an online comment in which he responded to a question by a reader of his July 20 letter asking him to describe the Employer's management style. The Charging Party replied that his answer could get him fired, but he stated that the Employer's management style was "far worse" than bullying, that employees who stood up to management were isolated and attacked, and that personal information was used in attempts to destroy employees. He cited examples of four other employees who stood up to management and were subjected to abuse and manipulation. He also referred to a case that had gone to arbitration in which the employee had not yet received his backpay as ordered.

The Employer suspended the Charging Party on July 28. It noted that while the July 20 blog itself did not rise to the level necessary for corrective action, the July 22 blog contained misleading and defamatory statements that were injurious to the hospital.

On October 12, the Charging Party made a presentation to the borough assembly. The presentation included the Charging Party's statement that, under the leadership of the Employer's CEO, there had been multiple unfair labor practices filed, forced policy changes, a murder/suicide, unfair firings, harassment, and workplace bullying. The text of this presentation was posted on the Charging Party's Facebook page and in an online comment in the newspaper.

On October 18, the Employer terminated the Charging Party for posting the presentation. The Employer claimed that the posting violated the conditions of his previous disciplinary actions and that the statements were untrue and seemed to be designed to bring discredit to the hospital's leadership.

We initially found that the comments and communications relied on by the Employer in disciplining and discharging the Charging Party were related to and in the context of an on-going labor dispute between the employees and their employer. In this regard, the Charging Party's March 16 comment referred specifically to the resolution of an unfair labor practice charge. As to the Charging Party's June 21 online letter, the Employer

expressly reprimanded the Charging Party for his discussion of hospital corporate abuses and the "national corporate paradigm" that led to the destruction of life at the hospital. In these statements, the Charging Party clearly was referring to his assertions that the Employer mistreated employees.

We also noted that although most of the Charging Party's July 20 letter had, at best, an attenuated relation to any labor dispute, the Employer specifically stated that it was suspending the Charging Party for his July 22 online comment about the letter. That comment consisted almost entirely of a discussion of the Charging Party's assertions of the Employer's bullying and destructive behavior toward employees, including a lengthy discussion of the Employer's treatment of himself and four employees with whom he had acted in concert.

Lastly, we found that virtually all the subjects covered in the October 12 postings involved labor disputes with the Employer. The Charging Party discussed the parties' collective-bargaining history, and repeated his criticism of the Employer's management style and its mistreatment of its employees, including unfair labor practices, forced policy changes, unfair firings, harassment, and bullying.

Next, we found, under the Meyers cases discussed above, that all of the comments and statements relied on by the Employer in disciplining and discharging the Charging Party constituted concerted activity for mutual aid and protection under the Act. The Charging Party's statements were the logical outgrowth of other employees' collective concerns or were made with or on the authority of other employees. The Charging Party's discussion of the unfair labor practice case and grievance that he had earlier filed referred to action he took on behalf of other employees as the Union's Grievance Officer, and the Charging Party's statements about these matters were a continuation of the employees' earlier concerted union activity.

The other statements asserting Employer workplace abuse of employees were the logical outgrowth of long-standing concerted activity. These issues had arisen as early as February and October 2009, when the Charging Party joined with other employees and Union officials in publishing advertisements alleging Employer misconduct and "abuse" of its employees. Moreover, by October 2009, long before the discipline at issue here, the Charging Party had been working with the Union on workplace bullying issues.

In any event, we noted that the Charging Party's statements were widely approved by fellow employees. Throughout the entire period between the June 21 posting

and his October discharge, fellow employees posted many messages of support for the Charging Party's statements and general encouragement for his activity on his Facebook page, including statements such as: "Thank you for having faith in me & helping my voice be heard!;" "keep fighting the good fight;" "Great letter;" "Thanks for helping us stay informed;" "Like the comment;" and "Thank you for speaking for us who do not dare."

Finally, we addressed the Employer's assertions that the Charging Party's postings were unprotected disparagement or defamation.

Under Jefferson Standard, discussed above, statements will be found to be unprotected where they constitute "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." 346 U.S. at 471. The Board, however, has cautioned that, "great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues." Allied Aviation Service Co., 248 NLRB 229, 231(1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980).

Here, the Charging Party raised sensitive issues in the aftermath of a tragic shooting at the hospital. Indeed, his assertions that the Employer continued to "attack" and "destroy" employees who stood up to management and that the Employer committed a long list of corporate abuses linked this conduct and the shooting. We found that all of these claims, however, were general criticisms of the Employer's treatment of its employees and their working conditions and were related to and in the context of on-going labor disputes. Moreover, the criticisms did not disparage the Employer's product--its provision of healthcare.

In considering the Employer's assertions of defamation, we applied the Supreme Court's determination that labor speech must be evaluated under the "malice" standard enunciated in New York Times v. Sullivan, 376 U.S. 254, 280 (1964). This test requires a determination of whether the statements were made with knowledge of their falsity or with reckless disregard for their truth or falsity. We also noted that the Board and courts have recognized that statements in hotly contested labor campaigns are often statements of opinion or figurative expression, "rhetorical hyperbole" incapable of being proved true or false in any objective sense.

We found that the statements challenged by the Employer here were not unprotected defamation. The Charging Party's statements regarding unfair labor practice cases and an arbitration award were at least generally

fact-based and accurate. As to the Charging Party's statements alleging that the Employer abused, bullied, threatened, and attacked employees, as well as the allegations of broken promises, unfair firings, improper use of personal information, and harassment, we found that many of these statements, if not most, expressed precisely the kind of opinion or figurative expression that the Board and courts have found to be "rhetorical hyperbole" protected under the Act.

To the extent that these statements did assert provable or disprovable facts, we noted that the Charging Party's comments arose out of his history of dealing with a variety of labor disputes with the Employer. In this regard, the Charging Party's statements included specific examples underlying his conclusory allegations, examples that came from his observations of the Employer's conduct, or from the reports of other employees. To the extent such reports were not, in fact, accurate, it is well established that where an employee relays in good faith what he or she has been told by another employee, reasonably believing it to have been true, the fact that the report may have been inaccurate does not remove the relayed remark from the Act's protection. See, e.g., Valley Hospital Medical Center, 351 NLRB at 1252-53. In any event, there was no evidence that the Charging Party made up any of these assertions, or that they otherwise were maliciously false. Finally, as to the Charging Party's suggestions that the Employer's improper conduct may have contributed to the shootings at the hospital, we found that the Employer did not show that these statements were knowingly false or maliciously untrue.

Employee's Facebook Postings About Irritating Coworker and Workplace Incident Were Not Protected

In another case, we looked at whether the Employer unlawfully disciplined the Charging Party for her Facebook comments. We found no violation because we determined that the Charging Party was not engaged in protected concerted activity.

The Employer operates a children's hospital. The Charging Party was a respiratory therapist, who was also assigned to the transport team, which transports patients to the hospital by ambulance, mostly from other hospitals.

On the evening of January 11, 2011, the Charging Party was traveling with the team to pick up a patient and bring her to the hospital. She was sitting in the back of the ambulance with a coworker, a paramedic, who was sucking his teeth. The Charging Party found this practice irritating.

During the ride, the Charging Party used her cell phone to post a message on Facebook indicating that it was driving her nuts that her coworker was sucking his teeth. Two of her Facebook "friends," who were not employees of the hospital, responded with supporting comments, and the Charging Party responded that she was about to beat him with a ventilator.

Once the transport team picked up the patient and her mother, the Charging Party was seated in the ambulance facing the mother. After she noticed behaviors of the patient that were similar to those of her own stepson, she asked the mother whether anyone had ever told her that her daughter was autistic. The coworker thought it was unprofessional for the Charging Party to suggest this to the mother. The coworker stated that he intended to say something to the Charging Party about it the next day.

Before the coworker could say anything to the Charging Party, one of his colleagues showed him the Facebook post. He thought it was vulgar and personally threatening and, instead of raising it with the Charging Party, he sent an e-mail to management the next day complaining about her comments on Facebook and her conduct during the transport. As a result, later on January 12, management informed the Charging Party that they were removing her from the transport team pending further investigation.

The Employer investigated and, on January 13, suspended the Charging Party for two days because of her negative and threatening Facebook comments about her coworker. The Charging Party returned to work after her suspension, though she could no longer work in transport. On January 25, she was given a corrective action form to explain the suspension. In addition to the January 11 threat to smack a coworker with a ventilator, the form referred to the unprofessional conversation she had had with the patient's mother, and another Facebook comment the Employer had become aware of that she had posted in December, in which she had written that apparently respiratory therapists didn't know what they were talking about. She explained that this was a sarcastic comment that she had written to express frustration over the lack of respect a doctor had shown her. She stated that the doctor had degraded her and made her feel that, as a respiratory technician, she did not know what she was talking about. The Employer claimed that the comment was disparaging of her coworkers because it suggested that her fellow respiratory therapists did not know what they were doing.

We found that the Charging Party's January 11 post was not protected because it did not concern terms and conditions of employment. She was merely complaining about

the sounds her coworker was making, and was not even suggesting that the Employer should do anything about it.

To the extent that the Charging Party was also disciplined for her December Facebook posting, that comment could arguably relate to terms and conditions of employment because it pertained to her view that she was not respected on the job. But, even if her comment concerned a protected subject, there was no evidence to establish concert. The Charging Party did not discuss her Facebook post with any of her fellow employees, and none of her coworkers responded. Moreover, the Charging Party was not seeking to induce or prepare for group action, and her activity was not an outgrowth of the employees' collective concerns, but was merely a personal complaint about something that had happened on her shift.

Truck Driver Was Not Engaged In Concerted Activity and Was Not Constructively Discharged

In this case, we found that the Charging Party's Facebook postings did not constitute concerted activity and that the Employer did not unlawfully engage in surveillance by viewing the postings or unlawfully threaten him with adverse action, remove him from leader operator status, or constructively discharge him.

On December 31, 2010, the Charging Party--a truck driver--traveled from Kansas to Wyoming to make a delivery. When he reached Wyoming, he learned that the roads were closed due to snow. He called the Employer's on-call dispatcher several times to report that the roads were closed, but his calls were automatically forwarded to the office phone and then unanswered because of the holiday. He eventually reached another dispatcher and informed him that the roads were closed and that the on-call dispatcher was unreachable.

While in Wyoming, the Charging Party spoke to other drivers and discussed that the on-call dispatcher was not answering the phone. He then made several posts on his Facebook page indicating that the road was closed, that no one was there when he called, and that if he or anyone was late, it would be their own fault. He stated that his company was running off all the good hard working drivers. No other employees joined in his Facebook conversation.

The Charging Party is Facebook "friends" with the Employer's Operations Manager. On January 3, 2011, the Operations Manager posted a critical response on the Charging Party's Facebook page that led to a Facebook dialogue between them. During that conversation, the Charging Party expressed concern for what he had posted and

feared that he could lose his job. The Operations Manager said that he wouldn't need to worry about what he said anymore, and besides she had heard that another company was hiring. The Operations Manager engaged in a simultaneous Facebook conversation with the Office Manager, in which the Office Manager stated that she hoped the Charging Party would be there the next day so that she could be the "true bitch" that she was.

On January 9, the Charging Party returned to the Employer's facility. The Employer's Customer Service Supervisor informed him that he was being stripped of his status as a leader operator because of his Facebook comments and unprofessionalism. As a leader operator, he gave assistance to new drivers and was paid an additional $100 per month for his cell phone bill.

He returned to the facility again on January 25 and found that no one there would talk to him. He took three days off and then resigned on January 28. He claims that he was forced to resign because of the way the office personnel acted towards him.

We found no evidence of concerted activity under the Meyers cases, discussed above. The Charging Party did not discuss his Facebook posts with any of his fellow employees, and none of his coworkers responded to his complaints about work-related matters. Although he had discussed with other drivers the fact that the on-call dispatcher was not reachable, there is insufficient evidence that his Facebook activity was a continuation of any collective concerns. Moreover, the Charging Party plainly was not seeking to induce or prepare for group action. Instead, he was simply expressing his own frustration and boredom while stranded by the weather, by griping about his inability to reach the on-call dispatcher.

Accordingly, we found that any alleged threats of reprisals contained in the Facebook comments by the Operations Manager and the Office Manager and the removal of the Charging Party's leader operator status were not unlawful because they were not in retaliation for any protected concerted activity.

Similarly, we found no unlawful surveillance of protected concerted activity as there were no union or protected concerted activities subject to surveillance.

We also noted that even where employees are engaging in protected activity, there can be no unlawful surveillance if the employer's agent was invited to observe. Thus, when the Charging Party here "friended" his supervisor on Facebook, he essentially invited her to view

his Facebook page. Further, there was no evidence that the Operations Manager was acting at the Employer's direction or was on Facebook for the sole purpose of monitoring employee postings.

Finally, we found that the Charging Party could not establish the necessary elements of a constructive discharge. Here, the alleged "silent treatment" that the Charging Party experienced at the Employer's facility was neither difficult nor unpleasant enough to force a resignation, particularly since most of his work hours were spent on the road. In any event, the alleged burden imposed was not because of any protected activity.

Employee's Facebook Criticism of Supervisor Was Venting and Was Not Concerted

Similarly, in this case we found that the Employer did not violate the Act when it discharged the Charging Party for posting on his Facebook page a criticism of his supervisor, which the Employer regarded as inappropriate and threatening. We concluded that the Charging Party was not engaged in concerted activity.

The Charging Party worked in the warehouse at the Employer's wholesale distribution facility. On January 9, 2011, the Charging Party began feeling ill and asked his supervisor, the Operations Manager, if he could go home early. The Charging Party was told that he could leave but that it would cost him an attendance point. Since he already had three attendance points, the Charging Party said that he would try to tough it out and hoped that he did not pass out. Ten minutes later, the Charging Party was told by his supervisor that if he was not feeling well, that was what the attendance points were for. The Charging Party did not want to risk another attendance point so he completed his shift.

After work, the Charging Party drove to a parking lot across the street and accessed his Facebook account from his phone. The Charging Party, using expletives, posted comments to his Facebook account indicating that it was too bad when your boss doesn't care about your health. A "friend," who is not a coworker, responded, and asked the Charging Party if he was worried. The Charging Party replied that he was not really worried, that he was just "pissed" because he had been there almost five years but was treated as if he had just started, and that he thought they were just trying to give him a reason to be fired because he was about "a hair away from setting it off."

Six of the Charging Party's coworkers are his Facebook "friends." None of them responded to these posts.

The Charging Party called in sick on January 10 and 11. On January 12, the HR Manager told the Charging Party that the Employer was aware of his inappropriate Facebook comments, and showed him printouts from his Facebook page, including the above posts and his profile page, which showed that the Charging Party was an employee of the Employer. The HR Manager told the Charging Party that she interpreted "setting it off" as bringing a gun to the warehouse and shooting everyone in it. The Charging Party explained that he was "just venting," that "setting it off" meant cussing someone out or walking out on the job, and that he would never hurt anyone. The Charging Party was suspended without pay pending an investigation.

On January 14, the Charging Party was discharged for violating company policy. The termination letter stated that his Facebook comments were inappropriate, threatening, and violent.

We concluded that the Charging Party did not engage in any concerted activity under the Meyers cases discussed above. Although the Charging Party's postings addressed his terms and conditions of employment, he did not seek to initiate or induce coworkers to engage in group action, and none of his coworkers responded to the postings with similar concerns. Nor were his postings an outgrowth of prior employee meetings or attempts to initiate group action with regard to the Employer's sick leave or absenteeism policy. Indeed, the Charging Party himself characterized his conduct as "just venting."