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

DATE: May 30, 2012

TO: Chip Harrell, Regional Director
Region 11

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

SUBJECT: Walmart
Case 11-CA-067171

506-0170
512-5012-6722

The Region submitted this case for advice on whether the Employer's social media policy is unlawfully overbroad, and whether the Employer violated Section 8(a)(1) by discharging the Charging Party because of the comments he posted on his Facebook page. We conclude that it is not necessary to decide the lawfulness of the Employer's social media policy that is the subject of this charge because, although the Employer denies that its policy is unlawfully overbroad, the Employer has revised that policy and we conclude that the current social media policy is lawful. We further conclude that the discharge was not unlawful because the Charging Party's comments did not implicate Section 7 concerns.

The Employer's Social Media Policy

In July 2010, the Employer promulgated a social media policy that was in effect at the time this charge was filed. More recently, the Employer revised that policy. The new social media policy is attached to this memorandum.

We conclude that the Employer's current social media policy is not unlawfully overbroad. 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."[1] The Board has developed a two-step inquiry to determine if a work rule would have such an effect.[2]

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[1] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced,* 203 F.3d 52 (D.C. Cir. 1999).

[2] *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 will violate the Act 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.[3]

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.[4] In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.[5] For example, the Board found that a rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity.[6] On the other hand, the Board found that a rule forbidding "statements which are slanderous or detrimental to the company" which appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not be reasonably understood to restrict Section 7 activity.[7] In that context, "employees would not reasonably

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[3] *Id.*

[4] *See, University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), *enforcement denied in pertinent part,* 335 F.3d 1079 (D.C. Cir. 2003) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope.")

[5] *See, Tradesmen Intl.*, 338 NLRB 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity); *Sears Holdings*, Case 18-CA-19081, Advice Memorandum dated December 4, 2009 (lone reference to "disparagement" was made in context of prohibition against serious misconduct, such as use of obscenity, illegal drugs, and discriminatory language).

[6] *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005).

[7] *Tradesmen International*, 338 NLRB at 462.

believe that the ... rule applies to statements protected by the Act,"[8] because it was listed alongside examples of egregious misconduct.

Applying the above principles, we conclude that the Employer's social media policy is not ambiguous because it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably construe the rules to prohibit Section 7 activity. For instance, the Employer's rule against "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct" is not unlawful. Like the rule in *Tradesmen International*,[9] this provision of the Employer's Social Media Policy would not reasonably be construed to apply to Section 7 activity. The rule prohibits plainly egregious conduct, such as discrimination and threats of violence, and there is no evidence that the Employer has used the rule to discipline Section 7 activity.

Also, the portion of the Employer's social media policy entitled "Be Respectful" is also not unlawful. In certain contexts, the rule's exhortation to be respectful and "fair and courteous" in the posting of comments, complaints, photographs or videos, could be overly broad.[10] However, again, the Employer's rule provides sufficient examples of plainly egregious conduct so that employees would not reasonably construe the rule to prohibit Section 7 conduct. For instance, the rule counsels employees to avoid posts that "could be viewed as malicious, obscene, threatening or intimidating." It further explains that prohibited "harassing or bullying" posts would include "offensive posts meant to intentionally harm someone's reputation" or "could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy." The Employer has a legitimate basis to prohibit such workplace communications, and has done so without burdening protected communications about terms and conditions of employment.

In addition, the Employer's rule requiring employees to "maintain the confidentiality of the Employer's trade secrets and private and confidential information" is also not unlawful. Employees have no protected right to disclose trade secrets. Moreover, the Employer's rule provides sufficient examples of prohibited disclosures (i.e., information regarding the

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[8] *Id.*

[9] *Id.*

[10] *See, e.g., University Medical Center*, 335 NLRB at 1320-1321.

development of systems, processes, products, know-how, technology, internal reports, procedures or other internal business-related communications) for employees to understand that it does not reach protected communications about working conditions.

Because the Employer's current social media policy does not infringe on protected employee communications, we conclude it is not necessary to determine whether the prior social media policy, which was the subject of this charge, was lawful or unlawful.

The Charging Party's Discharge

The Charging Party worked for the Employer as a greeter. He maintained a Facebook account at home that was open to the public. He had 1800 Facebook friends, five to ten of whom were co-workers. His profile identified him as an employee of the Employer. On July 12, 2011,[11] he posted the following series of comments on his Facebook wall:

> The government needs to step in and set a limit on how many kids people are allowed to have based on their income. If you can't afford to feed them you shouldn't be allowed to have them. . . . Our population needs to be controlled! In my neck of the woods when the whitetail deer get to be too numerous we thin them out! . . . . Just go to your nearest big box store and start picking them off. . . . We cater too much to the handicapped nowadays! Hell, if you can't walk, why don't you stay the f@*k home!!!!

These comments elicited only one response from a co-worker, who wrote that she could not wait for the day that something happened to the Charging Party and that she could witness his punishment. A customer read his postings and wrote to the Employer to complain, stating that the comments "scared [her] to the point that [she did] not think [she could] come back in [the] store." The customer characterized the Charging Party's comments as "beyond disturbing" and referenced a fatal shooting that had occurred approximately one year before in the same store.

The Employer investigated the incident. According to the Employer, the Charging Party confirmed that he had made the comments, was not angry at anyone at work, and was just letting off steam. He submitted two written statements in connection with the investigation in which he acknowledged that the Facebook postings were in "bad taste" and showed "poor judgment" but were not meant to be taken seriously and he was just

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[11] All dates are in 2011.

"running off at the mouth." He indicated that he used Facebook as a form of "entertainment" and "therapy" and that his comments were meant to see what kind of "reaction [he could] get" and to "get people thinking."

The Employer terminated the Charging Party on August 1 for his Facebook postings.

We conclude that the Employer did not violate the Act by discharging the Charging Party because his comments did not implicate Section 7 concerns. His comments do not address his working conditions, nor do they arise out of any concern or complaint about his working conditions. In fact, the Charging Party admits that he was not angry at anyone at work and that he was "just running off at the mouth." Therefore, even if the Employer discharged the Charging Party pursuant to one of the prior rules alleged to be unlawful, there would be no violation because the conduct for which he was discharged was "wholly distinct from activity that falls within the ambit of Section 7."[12]

In sum, the Region should dismiss this charge, absent withdrawal. Employees would not reasonably construe the Employer's current social media policy to prohibit Section 7 activity, and the discharge of the Charging Party did not violate Section 8(a)(1) of the Act.

/s/
B.J.K.

Attachment

[12] *The Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 5 (2011).

Social Media Policy

Updated: May 4, 2012

At Walmart, we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for Wal-Mart Stores, Inc., or one of its subsidiary companies in the United States (Walmart).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with Walmart, as well as any other form of electronic communication.

The same principles and guidelines found in Walmart policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of Walmart or Walmart's legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the Walmart Statement of Ethics Policy, the Walmart Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of Walmart. Also, keep in mind that you are more likely to resolved work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or

suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about Walmart, fellow associates, members, customers, suppliers, people working on behalf of Walmart or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of Walmart trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a Walmart website without identifying yourself as a Walmart associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for Walmart. If Walmart is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of Walmart, fellow associates, members, customers, suppliers or people working on behalf of Walmart. If you do publish a blog or post online related to the work you do or subjects associated with Walmart, make it clear that you are not speaking on behalf of Walmart. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of Walmart."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use Walmart email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

Walmart prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on Walmart's behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.