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

DATE: May 8, 2013

TO: Dennis Walsh, Regional Director
Region 4

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

SUBJECT: Tasker Healthcare Group, d/b/a Skinsmart Dermatology
Case 04-CA-094222

506-2001-5000
506-6090-4200

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act when it discharged the Charging Party for comments made in a private Facebook group message. We conclude that the Charging Party was not engaged in protected concerted activity when she posted comments to the Facebook group message. Therefore, the Employer did not violate the Act when it discharged her for her Facebook comments and, accordingly, the case should be dismissed, absent withdrawal.

FACTS

The Charging Party was employed by Tasker Healthcare Group d/b/a Skinsmart Dermatology ("Employer"), a medical office with approximately nineteen employees. The Charging Party performed various office duties dealing with patients and office guests.

On November 12, 2012[1] the Charging Party and nine other individuals participated in a private Facebook "group message."[2] The message was initiated by a former employee who wanted to organize a social event. Of the ten people invited to participate in the message, seven were current employees and three were former employees. Only four of the current employees took part in the conversation.

---

[1] All dates hereinafter are in 2012, unless otherwise stated.

[2] Facebook allows users to send messages to a group of people using the site's internal email messaging system. Only invited individuals may view and contribute to the conversation.

The first hour of the conversation focused on planning the social event. Then, in response to a joke by one of the former employees, the Charging Party mentioned that a former employee who had previously left was returning. She also speculated that the Employer may make this individual a supervisor. The Charging Party then mentioned a current supervisor who "tried to tell [the Charging Party] something today and [the Charging Party] said aren't you the supervisor for mind and body . . . in other words back the freak off . . ." After a few minutes of banter with former employees, the Charging Party stated, "They [the Employer] are full of shit . . . They seem to be staying away from me, you know I don't bite my [tongue] anymore, FUCK . . . FIRE ME . . . Make my day . . ." Other than the Charging Party, no current employees took part in this portion of the conversation.

Approximately two hours after the "fire me" exchange, the Charging Party stated that she felt like she had been deserted and there was "[n]o one to make me laugh." In response, a current employee joined the conversation saying that she made the Charging Party laugh, and soon after stated that "it's getting bad there [at the Employer's workplace], it's just annoying as hell. It's always some dumb shit going on." The Charging Party did not respond to this statement other than to say that the employee does make the Charging Party laugh. No other current employee responded to the statement and the conversation soon ended for the night. The next morning the group message conversation continued, although neither the Charging Party nor current employees made any work-related statements.

Later that morning, one of the current employees on the message string, who had been silent during the online conversations, showed the exchange to the Employer.

After reading the exchange, the Employer terminated the Charging Party, stating that it was "obvious" that the Charging Party was no longer interested in working there. The Employer also stated they were concerned about having the Charging Party working directly with patients given her feelings about her work and the Employer.

ACTION

We conclude that the Charging Party's Facebook messages did not constitute protected concerted activity, as they did not involve shared employee concerns over terms and conditions of employment.

The Board's test for concert 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."[3] Concerted activity includes circumstances where individual employees seek to "initiate or to induce or to prepare for group action," and where individual employees bring "truly group complaints" to management's attention.[4] In addition, the Board has found concerted activity where employees discuss shared concerns among themselves prior to any specific plan to engage in group action.[5] On the other hand, comments made "solely by and on behalf of the employee himself are not concerted."[6] Moreover, "mere griping" by employees who fail to look forward to any action at all is not protected.[7] For example, in *Tampa Tribune*, the Board held that when an employee who raised a concern about favoritism was speaking "only for himself" and there was no evidence that his coworkers even shared his belief that favoritism existed, his complaint was "a personal gripe," not protected activity.[8]

In the instant case, the Charging Party's comments merely expressed an individual gripe rather than any shared concerns about working conditions. Specifically, her comments bemoaned the return of a former employee and stated that her current supervisor tried to tell her something and she told her to "back the freak off"; that the Employer was "full of shit"; and that the Employer should "FIRE ME . . . Make my day." These comments merely reflected her personal contempt for her returning coworker and for her supervisor, rather than any shared employee concerns over terms and conditions of employment. Thus, although her comments referenced her situation at work, they amounted to nothing more than individual "griping," and boasting about how she was not afraid to say what she wished at work.

Further, there is no evidence that the Charging Party's coworkers interpreted the postings as an expression of shared concerns over working conditions. Thus, the only subsequent posting pertaining to the workplace by a coworker (that "it's getting bad there[,] it's just annoying as hell") was itself ambiguous and bore no relation to the Charging Party's earlier comments. Moreover, the Charging Party's only response to that coworker's comment was to reassure the coworker that she makes the Charging Party laugh. Thus, there was no thread connecting the Charging Party's comments to

---

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

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

[5] *Id.* at 886.

[6] *Id.* at 885.

[7] *Mushroom Transportation Co., Inc. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

[8] *Tampa Tribune*, 346 NLRB 369, 371-72 (2006).

those of any coworkers pertaining to shared concerns about working conditions. Therefore, the Charging Party's discharge was not unlawful because her comments were not concerted and, instead, were merely boasting and griping.

Finally, the "inherently concerted" analysis in *Hoodview Vending Co.*[9] does not permit a finding of concerted activity here. In *Hoodview*, the Board held that conversations between coworkers regarding terms and conditions such as wages, work schedules, and job security involved subjects of such mutual workplace concern that contemplation of group action was not required to find concert.[10] Here, the Charging Party's postings not only did not discuss possible group action; they also did not even pertain to any mutual workplace concerns. Therefore, since the Charging Party was not engaged in protected concerted activity when she posted her comments to the Facebook group message, her discharge did not violate Section 8(a)(1).

Accordingly the charge should be dismissed, absent withdrawal.

/s/
B.J.K.

---

[9] 359 NLRB No. 36 (2012).

[10] *See Id.* at slip op. 3-4. *See also Automatic Screw Products Co., Inc.*, 306 NLRB 1072 (1992) (discussing salaries is "an inherently concerted activity clearly protected by Section 7 of the Act") *enforced*, 977 F.2d 582 (6th Cir. 1992); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995) (discussion of changes in work schedule directly linked to hours and conditions of work and are as likely to spawn collective action as the discussion of wages) *enforcement den. in rel. part* 81 F.3d 209 (D.C. Cir. 1996).