

From: (b) (6), (b) (7)(C)
To: [Overstreet, Cornele](#); [Baynes, Barbara](#); [Garza, David T.](#); [Harvey, Rachel](#); [Leung, Katherine](#); [SM-Region 28, Phoenix](#)
Cc: [Bock, Richard](#); [Szapiro, Miriam](#); [Dodds, Amy L.](#); [Shorter, LaDonna](#); [Mohr, Kyle](#)
Subject: Cudd Energy, 28-CA-240949 (case closing email)
Date: Wednesday, July 8, 2020 11:48:04 AM

The Region submitted this case for advice as to whether the Charging Party was unlawfully terminated due to a protected concerted Facebook post, or in the alternative, pursuant to unlawfully overbroad social media rules under the rationale set forth in *Continental Group, Inc.*, 357 NLRB 409 (2011) and *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005). We conclude the Charging Party's post was neither concerted nor for mutual aid or protection, that (b) (6), (b) (7)(C) discharge was lawful, and *Continental Group* and *Double Eagle* not implicated. Because the charge only alleged that the Charging Party was unlawfully discharged, and we conclude that discharge was lawful, we do not reach the legality of the social media policy. To the extent Charging Party believes any aspect of the social media policy is unlawful and files an appropriate charge, the Region should make a recommendation and submit the case to Advice.

Cudd Pumping Services (the "Employer") is an oilfield service company. The Charging Party was a mechanic at the Employer's facility in Hobbs, New Mexico. On April 30, 2019, a supervisor posted a picture of a new fracking engine from a supplier, S&S, on Facebook. In response, the Charging Party commented "I'm fucked we are fucked lord help us should just work for S&S so called supervisors in the field are going to fuck this up and can't wait for them to ask me questions I'm not going to till I get paid," followed by a middle finger emoji and a smiley face with sunglasses. The Employer shortly thereafter terminated the Charging Party for multiple violations of its social media policies.

The Charging Party's Facebook post was not concerted

In *Alstate Maintenance, LLC*, 367 NLRB No. 68 (January 11, 2019), the Board clarified its standard for establishing concert by specifically overruling *WorldMark by Wyndham*, 356 NLRB 765 (2011), and holding that an employee who merely complains in a group setting is not per se engaged in initiating group action. See *Alstate*, slip op. at 6-7.

Here, there is no evidence that anticipated problems with the new S&S fracking engine was a subject of discussion or concern among any of the Charging Party's co-workers. Moreover, the mere fact that the comment was made on Facebook and therefore in a virtual "group setting" is insufficient, after the Board's overruling of *WorldMark by Wyndham* in *Alstate*, to establish that the Charging Party was attempting to initiate group action. In any event, we also note that there is no evidence regarding how many, if any, of the Charging Party's co-workers are "friends" with (b) (6), (b) (7)(C) or the supervisor on Facebook and thus would have been able to view the comment.

The Charging Party's Facebook post was not for mutual aid or protection

In *Quicken Loans*, 367 NLRB No. 112 (April 10, 2019), the Board held, *inter alia*, that a conversation between two mortgage bankers was not for mutual aid or protection where the second mortgage banker was unable to identify, in testimony, any goal of their conversation, "much less that it involved a goal of improving the working conditions shared by them or with coworkers."

Here, the Charging Party's profane comment on Facebook, even generously construed, expressed only (b) (6), (b) (7)(C) belief that there would be problems with the new engines, that (b) (6) (rather than the supervisors) would be one of the only people capable of handling the problems, and (b) (6), (b) (7)(C) didn't intend to help anyone until (b) (6), (b) (7)(C) got a raise. This opinion did not include a goal of improving employees' shared working conditions; rather, it only included a goal of the Charging Party securing (b) (6), (b) (7)(C) a raise. The comment was, therefore, not for the goal of mutual aid or protection.

The Charging Party was not unlawfully discharged pursuant to an overly broad rule

Because the Charging Party's comment was neither concerted nor for mutual aid or protection, even assuming (b) (6), (b) (7)(C) was discharged pursuant to an overly-broad or unlawful rule, the discharge would be lawful, as the Board explains in *Continental Group*, 357 NLRB 409, 412 (2011), which clarified *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enforced, 414 F.3d 1249 (10th Cir. 2005). The Region should therefore dismiss the charge, absent withdrawal.

This email closes this case in Advice as of today. Feel free to contact us if you have any questions.

Thanks

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