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

Advice Memorandum

DATE: May 3, 2018

TO: Nancy Wilson, Regional Director
Region 6

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Comprehensive Healthcare Management Services, LLC d/b/a Brighton Rehabilitation and Wellness Services
Case 06-CA-209251

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The Region submitted this case for advice as to whether: (1) the Employee was engaged in protected concerted activity via (b)(6), (b)(7) post on Facebook, (2) the Employer's Social Media Policy is facially unlawful, and (3) the Employer unlawfully terminated the Employee pursuant to that policy in violation of Section 8(a)(1) of the Act. We conclude that the Employer lawfully terminated the Employee for violating the Resident Abuse Policy regardless of whether the Facebook post was protected concerted activity, and therefore the Region should dismiss the unlawful termination allegation, absent withdrawal. The legality of the Employer's Social Media Policy will be addressed in a separate memorandum.

FACTS

Comprehensive Healthcare Management Services, LLC d/b/a Brighton Rehabilitation and Wellness Services ("the Employer") operates a rehabilitation center and nursing home in a town northwest of Pittsburgh, Pennsylvania. SEIU Healthcare PA ("the Union") represents three separate bargaining units of employees at the Employer's facility, including a service and maintenance unit that includes the certified nursing assistants ("CNAs"). The employee at issue in this charge ("the Employee") works as a CNA for the Employer. The parties had a collective-bargaining agreement that expired on March 31, 2017. The parties operated under the terms and conditions of that expired collective-bargaining agreement while they negotiated for a successor agreement.[1]

[1] The parties have since negotiated a successor agreement, which appears to be effective retroactive to April 1, 2017 and will expire on March 31, 2020.

The Employer also has an Employee Handbook with various rules, including a Social Media Policy. It also includes a Resident Abuse Policy, which in conjunction with the Employer's Abuse/Neglect Prevention Program,[2] requires that "[a]ny employee who suspects that [the Employer's] Resident Abuse Policy has been violated must immediately report their suspicions to the Administrator. Any employee who fails to report a suspicion that [the Employer's] Resident Abuse Policy has been violated is subject to disciplinary action up to, and including, discharge." The Employer provides periodic training for its employees about the Abuse/Neglect Prevention Program and their duty to recognize and report potential abuse or neglect of residents.

The Handbook also contains a progressive disciplinary policy. Under that policy, violations of various rules are categorized into four groups, with scaled discipline resulting from violations of each group. Offenses falling in the most severe group, Group IV, which include violations of the Social Media and Resident Abuse Policies, warrant immediate termination under this policy. The Employer provided the Region records of all discipline issued to its employees in 2016 and 2017. There is no evidence that the Employer was aware of any other violations of its Social Media Policy or the Resident Abuse Policy. Additionally, there is no evidence that the Employer disparately enforced Group IV violations.

On the evening of (b)(6), (b)(7)(C) 2017,[3] the Employee, who was on the (b)(6), (b)(7)(C) shift, was working with (b)(6), (b)(7)(C) other employees, (b)(6), (b)(7)(C) CNAs and (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) While (b)(6), (b)(was at the nurses' station, and the (b)(6), (b)(7) was completing paperwork, the Employee saw one of the (b)(6), (b)(7)(C) CNAs ("CNA 1") using (b)(6), (b)(7) cellphone. The Employee told CNA 1 to go find something to do. CNA 1 left the area. CNA 1's shift ended around (b)(6), (b)(7)(C) on (b)(6), (b)(7)(C) When CNA 1 was about to leave, the Employee asked (b)(6), (b)(7) whether (b)(6), (b)(7) had completed (b)(6), (b)(7) rounds (i.e., checking in on and taking care of each of the residents on the floor) and changed everyone. CNA 1 said (b)(6), (b)(had. The (b)(6), (b)(7) overheard this conversation.

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[2] The Employer's Abuse/Neglect Prevention Program is a separate document that describes staff education regarding abuse and neglect, a definition of abuse that includes neglect, prevention strategies, investigation procedures for suspected abuse and neglect, and employee responsibilities regarding abuse and neglect. The Employer ostensibly refers to this broader policy in the Resident Abuse Policy in its Handbook.

[3] All dates hereinafter are 2017 unless otherwise specified.

The Employee then took over the care of the residents that had been assigned to CNA 1 for the rest of [redacted] shift. When the Employee did the next rounds for the floor at about [redacted] got to one resident who was very wet and had not been changed. This resident was supposed to be dressed to leave the facility for an appointment at 8 am that morning. The Employee said [redacted] had never seen this particular resident as wet as [redacted] was and assumed that CNA 1 had not changed [redacted] at all. The Employee and another CNA on duty ("CNA 2") cleaned up the resident and prepared [redacted] to leave the facility for [redacted] appointment. The Employee and CNA 2 say they had previously cleaned up after CNA 1 when [redacted] had not completed [redacted] work properly, as well as cleaning up after other employees who were not as thorough. After cleaning up the resident, [redacted] recalls the Employee commenting to [redacted] along the lines of "well [redacted] left a mess" referring to CNA 1, but not by name. [redacted] knew who the Employee was referring to based on the earlier interaction, but did not respond. The Employee did not report the incident to management.

On the morning of [redacted] when the Employee returned home after [redacted] shift had ended, [redacted] posted the following comment on [redacted] personal Facebook page: "[I] was feeling frustrated . . . When co-workers leave early and you ask them if their job is complete and they tell you 'yes' only to find out it wasn't done at all!! Can anyone say NEGLECT?!? It's all good tho cause karma's a bitch!!! Rant over!" The Employee does not identify [redacted] employer anywhere on [redacted] Facebook page. The page was public at the time [redacted] posted the comment. [redacted] received ten likes/reactions, two of which were from coworkers including CNA 2 who had helped [redacted] clean up the resident. Two individuals also commented on the post, including CNA 1 who wrote, "who are you talking about." The Employee was Facebook friends with about 10 coworkers at that point.

After the Employee posted [redacted] comment on Facebook, the Employer said that [redacted] different individuals reported the post to management, including CNA 1. During the Employee's next shift, the [redacted] approached [redacted] and asked whether [redacted] had posted the Facebook comment. The Employee confirmed that [redacted] had. The [redacted] asked the Employee why [redacted] had not reported the allegation of neglect to management. The Employee asked what was the point of reporting an allegation of neglect when nothing was ever done about it.[4] The

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[4] The Employee had previously reported several employees to management for not completing their work, and states that [redacted] has never seen management take action in response to complaints in the past. Both the Employee and [redacted] also recall a written petition signed by numerous employees and given to management accusing another employee of neglect, with no action taken in response to that complaint.

(b)(6), (b)(7)(C) asked the Employee to write a statement about what had happened, which (b)(6), (b)(7) did.

Several days later, on (b)(6), (b)(7)(C) the (b)(6), (b)(7)(C) called the Employee into a meeting. The Union (b)(6), (b)(7)(C) was also present. The (b)(6), (b)(7)(C) asked the Employee about (b)(6), (b)(7) Facebook post and whether (b)(6), (b) was aware it violated the Employer's Social Media Policy. The Employee said (b)(6), (b)(7) had no idea the post violated the policy. The (b)(6), (b)(7)(C) asked the Employee why (b)(6), (b)(7) did not turn in the allegation of neglect to management. The Employee said (b)(6), (b) had reported alleged neglect many times before but nothing ever had been done. The Employee did not say that CNA 2 had helped (b)(6), (b) and was also aware of this perceived instance of neglect. The (b)(6), (b)(7)(C) discussed the importance of reporting neglect and asked the Employee about the circumstances of this allegation of neglect. The Employee explained what had occurred with CNA 1 and the resident who (b)(6), (b)(7) found very wet. The (b)(6), (b)(7)(C) said that (b)(6), (b)(7) was forced to terminate the Employee because (b)(6), (b)(had failed to report the incident. The (b)(6), (b)(7)(C) handed the Employee a written disciplinary notice stating that (b)(6), (b)(had violated the Employer's Social Media Policy with (b)(6), (b)(7) Facebook post and that (b)(6), (b)(7) had violated the Employer's Resident Abuse Policy, each of which is a Group IV violation.

On the same day that the Employer terminated the Employee, the Union filed a grievance over the termination on (b)(6), (b)(7) behalf. The parties agreed to arbitrate the grievance, and they had a hearing before an Arbitrator on (b)(6), (b)(7)(C) 2018. In (b)(6), (b) (b)(6), (b)(7)(C) 2018 award, the Arbitrator found that the Employee violated the Social Media Policy but not the Resident Abuse Policy.[5] Concluding that the Employer had failed to train its employees about the proper use of social media, the Arbitrator's award ordered the Employer to reinstate the Employee on (b)(6), (b)(7)(C) 2018, but without backpay.

ACTION

We conclude that the Employer lawfully terminated the Employee because (b)(6), (b)(7) violated the Resident Abuse Policy, and the Employer would have terminated (b)(6), (b)(7) for that violation regardless of whether (b)(6), (b)(7) Facebook post constituted protected

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[5] The Arbitrator determined that the Employee did not violate the Resident Abuse Policy because there was no actual abuse or neglect to report, even though the Employee clearly suggested neglect in (b)(6), (b)(7) Facebook post. The Arbitrator based his determination on the Employee's statement during the arbitration that the condition in which (b)(6), (b) found the resident could have occurred after CNA 1 had left.

concerted activity or violated the allegedly unlawful Social Media Policy.[6] Accordingly, the Region should dismiss the allegation that the Employer violated Section 8(a)(1) by terminating the Employee, absent withdrawal.

Where an employer asserts that it discharged an employee because of activity unrelated to the employee's protected concerted activity, the Board applies a *Wright Line*[7] analysis to determine whether the employer lawfully discharged the employee for a non-discriminatory reason, or unlawfully discharged the employee for engaging in protected concerted activity. To establish that an employee's discharge or other discipline violates the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected concerted activity, the employer had knowledge of such activity, and the employer exhibited animus or hostility toward that activity, such that the employee's protected activity was a "motivating factor" in the employer's decision to take adverse action against the employee.[8] Once the General Counsel makes that showing, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected concerted activity.[9]

Here, the Employer clearly stated that the Facebook post was one of the reasons it terminated the Employee. Assuming, without deciding, that the Employee's Facebook post was protected concerted activity and that the General Counsel could establish Employer animus toward that protected concerted activity, the burden of persuasion under *Wright Line* then shifts to the Employer to establish that it would have terminated the Employee even absent any protected concerted activity.[10]

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[6] The legality of the Employer's Social Media Policy will be analyzed in a separate memorandum. The Employer lawfully terminated the Employee regardless of the outcome of that analysis.

[7] 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981) *cert. denied* 455 U.S. 989 (1982), *approved* in *Transportation Management, Inc. v. NLRB*, 462 U.S. 393 (1983); *see also Approved Electric Corp.*, 356 NLRB 238, 238 (2010) (applying *Wright Line* analysis to find discharge violated Section 8(a)(1)).

[8] 251 NLRB at 1089.

[9] *Id.; Approved Electric Corp.*, 356 NLRB at 238, 240.

[10] *See e.g.*, *T-Mobile USA, Inc.*, 365 NLRB No. 15, slip op. at 1 n.1 (Jan. 23, 2017) (finding the employer met its rebuttal burden of establishing that the adverse actions

We conclude that the Employer has met its rebuttal burden under *Wright Line* of showing that it would have terminated the Employee even absent any protected concerted activity. In that regard, the Employer stated two reasons on (b)(6), (b)(7)(C) both orally and in writing, for terminating the Employee, specifically, that (b)(6), (b)(had violated the Social Media Policy with (b)(6), (b)(7) Facebook post and the Resident Abuse Policy by failing to report (b)(6), (b)(belief that CNA 1 had neglected a resident. The Employee's violation of the latter policy did not implicate any Section 7 activity. Although the Arbitrator determined that CNA 1 had not neglected the resident, the Employer had a legitimate, non-pretextual reason to conclude that the Employee believed such neglect had occurred based on the Employee's public comment on Facebook.[11] The Employer's handbook states that an infraction of the Resident Abuse Policy is a Group IV violation pursuant to the Employer's progressive discipline policy and, therefore, could independently result in termination. The Employer asserts that it would have terminated the Employee solely for failing to report neglect, and there is no evidence that the Employer has inconsistently issued discipline for Group IV violations or failed to discipline another employee for violating the Resident Abuse Policy such that it would call into question the Employer's defense.[12]

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would have been taken absent the employees' protected activity); *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180, slip op. at 3 (Aug. 26, 2015) (same), *enforced*, 689 Fed. Appx. 639 (D.C. Cir. 2016).

[11] *Cf. Cordúa Restaurants, Inc.*, 366 NLRB No. 72, slip op. at 4-6 (April 26, 2018) (explaining that an employer can meet its *Wright Line* defense "if it can establish, under all of the circumstances that it had a reasonable, good-faith belief that the employee engaged in the misconduct, and that it acted on that belief in taking the adverse employment action against the employee" and deciding that the employer lawfully terminated an employee for creating a hostile work environment because the employer had a good-faith belief about the hostile work environment based on widespread complaints and signed witness statements).

[12] *See, e.g.*, *Stabilus, Inc.*, 355 NLRB 836, 839-40 (2010) (holding no disparate enforcement of a lawful food and drink policy where there was no evidence that the supervisor was aware of other employees violating the policy); *Septix Waste, Inc.*, 346 NLRB 494, 496 & n.15 (2006) (in analyzing an employer's *Wright Line* defense, the Board considers whether the employer has consistently and nondiscriminatorily applied its disciplinary rules.).

Moreover, there is no allegation that the Employer's Resident Abuse Policy is overbroad under Section 8(a)(1).[13] The Employer has strong interests, including legal requirements, to ensure that the residents in its facility are properly cared for and not abused or neglected in any way. Thus, regardless of whether (b)(6), (b)(7) Facebook post was protected concerted activity, the Employer lawfully discharged the Employee for the non-discriminatory reason of violating the Resident Abuse Policy.

Based on the preceding analysis, the Region should dismiss the unlawful termination allegation in the charge, absent withdrawal.[14]

/s/
J.L.S.

ADV.06-CA-209251.Response.ComprehensiveHealthcare BrightonRehab (b)(6), (b)(7)(C)

[13] Thus, there is no need to analyze the Employee's termination under the test set forth in *Continental Group*, 357 NLRB 409, 412 (2011), for discipline issued pursuant to an unlawfully overbroad rule. Had such an analysis been required, we note that the (b)(5)

[14] The Employer had previously requested pre-arbitral deferral of the charge, but the Region determined that deferral was not appropriate because there was no contract in effect at the time of the Employee's termination. Though the Arbitrator appears to have decided the case based on the successor agreement, which the parties entered into after the discharge and is retroactive to April 1, 2017, deferral to the Award is not appropriate because there is no evidence of either the parties authorizing the Arbitrator to decide the statutory issue or the Arbitrator considering the alleged unfair labor practice. *See Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1131 (2014). (b)(5)
(b)(5)