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

Advice Memorandum

DATE: June 11, 2018

TO: John D. Doyle, Regional Director
Region 10

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

SUBJECT: Kumho Tires
Cases 10-CA-208153 and 10-CA-208414

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The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by discharging an employee ("Employee #1") for violating its social media policy by posting a photograph of a team leader's bonus request form in a closed social media group shared with other employees in the context of a union organizing campaign. We conclude that, although Employee #1 was otherwise engaged in protected concerted activity when [redacted] posted the form, [redacted] conduct was not protected because [redacted] photographed and disseminated the form after having received it from a co-worker ("Employee #2") who Employee #1 knew had improperly taken it from the team leader's desk to another floor to photocopy. The Employer therefore did not violate Section 8(a)(1) by discharging Employee #1.

FACTS

Kumho Tires (the "Employer") manufactures original vehicle tires in Macon, Georgia. In early August,[1] Employee #1 contacted the local president of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, AFL-CIO (the "Union") and began an organizing drive of the Employer's employees. The Employer concedes that it knew that Employee #1 was an open Union supporter.

During the campaign, the Employer maintained a website directed at its employees called "kumhounionfacts.org." On October 2, the Employer posted the following on the site addressing a rumor among workers:

[1] All dates are in 2017.

> Rumor: *The Company paid supervisors and team leads a bonus of $2,000 to fight the union.* [Emphasis in original.]
>
> FACT: Absolutely false!
>
> When supervisors and team leaders ("salary exempt employees") work overtime, they historically received extra compensation. Mistakenly, we called this overtime compensation a "bonus" instead of "overtime premium" . . . . We are in the process of correcting this designation. . . .

Employees and team leaders regularly work in the MCC Control room. There, employees are responsible for accessing forms, including scrap reports and forklift checklists, that are located one to two feet from a team leader's (the "Team Leader") desk.

On (b) (6), (b) (7)(C) Employee #2 was working in the MCC Control room, securing forms needed to complete a report. While doing so, (b) (6), (b noticed a bonus request form face-up in a basket on the adjacent Team Leader desk. It had been completed and signed by the Team Leader, seeking $350 for "non-union support." It was not labeled "confidential." Employee #2 took the form out of the basket on the Team Leader's desk and walked down one floor to a copy machine. (b) (6), (b photocopied the form and then returned the original. (b) (6), (b) then showed Employee #1 the copy of the form, explaining where and how (b) (6), found it, and opined that the Employer must have instructed the Team Leader to tell employees on (b) (6), (b team to vote no because they had been excited about the Union. Employee #2 also said that the form showed that, contrary to the Employer's assertions, it had enough money to increase employee pay. Employee #1 said that everyone needs to see this, and Employee #2 agreed. Employee #1 took a photograph of the photocopied bonus request form. (b) (6), (b then posted it on the Union's closed, private Facebook group titled "CYOA," which was a forum for Union supporters—primarily employees of the Employer—to discuss the organizing campaign and work issues. (b) (6), (b captioned the photo "I'm just going to sit this right here!" The post garnered over 10 comments and likes.

On (b) (6), (b) (7)(C) a supervisor called Employee #1 into a meeting and told (b) (6), (b) (7 that (b) (6), was being discharged because (b) (6), (b Facebook post of the bonus request form violated the Employer's social media policy. The Employer concedes that it would not have terminated Employee #1 but for the Facebook post.

ACTION

We conclude that the social media policy provision that the Employer relied on when discharging Employee #1 was facially lawful under *The Boeing Company* ("*Boeing*"),[2] and that Employee #1 was engaged in concerted activity for mutual aid or protection at the time [redacted] posted the photograph to the closed Facebook group. However, [redacted] conduct was not protected because [redacted] photographed and disseminated the form after having received it from Employee #2, who [redacted] knew had improperly taken it from the Team Leader's desk to another floor to photocopy. The Employer therefore did not violate Section 8(a)(1) by discharging Employee #1.

A. Social Media Rule is Facially Lawful

We conclude initially that the Employer's social media rule is lawful. *Boeing*[3] set out the Board's new test for determining the lawfulness of work rules. Under *Boeing*, if a rule would be reasonably interpreted to interfere with the exercise of NLRA rights, the Board must consider not only the rule's potential impact on NLRA rights but must also balance those interests against the employer's legitimate justifications for maintaining the rule.[4] If the rule would not reasonably be interpreted as restricting NLRA rights, however, the rule is lawful and no balancing is necessary.[5]

The Employer's Social Media policy states, in relevant part:

> Maintain the confidentiality of the Company's trade secrets and private or confidential information. Trade secrets include information regarding the development of systems, processes, products, know-how, and technology. Do not post internal reports,

[2] 365 NLRB No. 154 (Dec. 14, 2017).

[3] 365 NLRB No. 154 (overturning the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

[4] *Id.*, slip op. at 5 ("Since *Lutheran Heritage*, the Board has far too often failed to give adequate consideration and weight to employer interests in its analysis of work rules. Accordingly, we find that the Board must replace the *Lutheran Heritage* test with an analysis that will ensure a meaningful balancing of employee rights and employer interests.").

[5] *Id.*, slip op. at 3.

> policies, procedures, or other internal business-related confidential communications.

The instant rule would not reasonably be interpreted as restricting NLRA rights under *Boeing*. Indeed, this rule would have been facially lawful under the Board's prior *Lutheran Heritage* standard because it does not explicitly reference information concerning employees or terms and conditions of employment, and it does not otherwise contain language that would reasonably be construed to prohibit Section 7 communications.[6] Instead, it provides examples of "trade secrets" that give context to the limited scope of what would be considered confidential under the rule.[7]

Although the Employer's rule is facially lawful, the *Boeing* Board made clear that discipline under a lawful rule may still be unlawful. The Board explained that "even when a rule's *maintenance* is deemed lawful, the Board will examine the circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act."[8]

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[6] *See, e.g., Super K-Mart*, 330 NLRB 263, 263 (1999) (finding lawful a rule prohibiting employees from discussing "company business or documents," as employees would reasonably understand it to protect the employer's legitimate private business information because it "does not by its terms prohibit employees from discussing wages or working conditions.").

[7] *Compare Lafayette Park Hotel*, 326 NLRB 824, 826 (1998) (finding short rule requiring that employees keep "hotel-private" information to authorized employees lawful, as "[c]learly, businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including . . . trade secrets . . . . "), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999), *with Citizens Co-op, Inc.,* 12-CA-125333, Advice Memorandum dated Nov. 12, 2014, at p. 5 (finding confidentiality rule unlawful under *Lutheran Heritage* standard, even though rule did not mention employees or terms and conditions of employment, because it prohibited employees from discussing "all nonpublic information concerning the Company" and "work matters" with nonemployees and in "public places," which employees would reasonably interpret to prohibit discussing wages, benefits, and other working conditions with the public).

[8] *Boeing*, 365 NLRB No. 154, slip op. at 4-5 (emphasis in original); *see also id.*, slip op. at 16.

B. Employee #1 Engaged in Protected Concerted Activity Concerning Wages

We conclude that Employee #1 was engaged in protected concerted activity concerning wages at the time [redacted] posted the bonus request form. The Employer addressed the issue of team leader bonus/overtime compensation during the organizing campaign by posting about it on its anti-union website. Moreover, Employee #1 discussed the issue with Employee #2, and addressed it online with a closed Facebook group of Union supporters, including employees, who "liked" and commented on [redacted] post. Employees believed that, contrary to the Employer's claims, it could afford to pay them higher wages. Employee #2 said to Employee #1 when [redacted] showed [redacted] a copy of the bonus request form that management talks as if they don't have money for a raise but they have money for these extra bonuses. Another employee recalls that an employee commented on the Facebook post to the effect that it was a shame the Employer could pay the Team Leader $350 but couldn't give employees a raise.[9]

C. Employee #1's Conduct in Posting the Bonus Request Form Was Not Protected, Because the Form Was Improperly Taken From a Private Desk

The Board has held that the disclosure of certain types of information, which may otherwise constitute protected concerted activity, may involve such disloyalty to an employer that the disclosure falls outside the Act's protection. Examples of such disloyalty include an employee taking and disseminating employer information they knew that they had no right to access. For instance, in *First Data Resources, Inc.*, the Board found lawful the discharge of an employee who was caught "leafing through folders" she was told not to access and "reading through the pages" of a manager's file.[10] Similarly, in *Roadway Express*, the Board found lawful the Employer's discharge of an employee who took bills of lading from the employer's private files, copied them, and gave the copies to the union.[11] Additionally, the Board has

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[9] *See, e.g., Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 220 (1995) (wage discussions among employees are considered to be at the core of Section 7 rights, because wages, "probably the most critical element in employment," are "the grist on which concerted activity feeds") (citations omitted), *enforced in part*, 81 F.3d 209 (D.C. Cir. 1996).

[10] 241 NLRB 713, 716-17 (1979).

[11] 271 NLRB 1238, 1239 (1984). *See also Flex Frac Logistics, LLC*, 360 NLRB 1004, 1004-06 (2014) (finding lawful discharge of accounting department employee who disclosed client rates and profit margins where she did not need to know those rates to perform her duties). *Cf. A.L.S.A.C.*, 277 NLRB 1532, 1535-36, 1544-45 (1986)

concluded that an employee who disseminated company information was engaged in unprotected conduct even where he obtained it anonymously from another employee rather than procuring it himself, where he knew that the information was wrongly obtained.[12]

In this case, Employee #1's conduct was unprotected because [redacted] disseminated a copy of the bonus request form even though [redacted] knew that Employee #2 had misappropriated the form. This case is similar to *Roadway Express* and *First Data Resources, Inc.*, in that Employee #2 removed the bonus request form from a basket on the Team Leader's personal desk, an area that [redacted] should have known gave the Team Leader some expectation of privacy. Further, the substance of the form also communicated its private nature to employees, i.e., it was a request from the Team Leader to the Employer about [redacted] personal compensation, and not wage data or other general information that the Employer had on hand.[13] Significantly, Employee #1 did not merely pass along the readily viewable information found in the Team Leader's compensation request form. Instead, [redacted] took the form, made [redacted] own copy, and then publicized that copy of the form.[14]

Finally, although the Employer, in discharging Employee #1, stated that [redacted] had violated a social media rule that arguably did not apply to [redacted] conduct, the discharge

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(finding unlawful the employer's discharge of an employee who went to the office copy machine in the course of performing her regular job duties, found a copy of a "salary increases" list lying face-up with the word "Confidential" on top, copied it, and shared it with co-workers).

[12] *See International Business Machines Corp.*, 265 NLRB 638, 638 & n.4, 641 (1982) (finding lawful discharge of employee who disseminated company documents to co-workers even though he received the documents through an anonymous mailing because he knew the company classified the documents as confidential, as he had been given a version of the documents years earlier in litigation marked "IBM Confidential" and was admonished at trial not to show them to anyone).

[13] *Cf. A.L.S.A.C.*, 277 NLRB at 1535 & n.2 (finding a list of pay raises for individual employees not to be private).

[14] *Cf. Id.* at 1535-36 (finding discharge unlawful where the document was taken from shared photocopier and not from a private area).

was lawful regardless of whether the conduct was properly covered by an employer rule because the conduct was not protected by the Act.[15]

Accordingly, the Region should dismiss the instant 8(a)(1) charge, absent withdrawal.

/s/
J.L.S.

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[15] *See Roadway Express*, 271 NLRB at 1239 (finding "the absence of a written rule" to be "of little significance here, where the documents taken were clearly the [employer's] private business records and were taken from files to which [the employee] had no proper access. In such circumstances, an employer, regardless of whether it has a written rule, has a right to expect its employees not to go into its files and to take its business records for whatever purposes they wish . . . .").