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

DATE: September 21, 2015

TO: Marlin O. Osthus, Regional Director
Region 18

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

SUBJECT: North West Rural Electric Cooperative
Case 18-CA-150605

506-2001-5000-0000
506-4033-5500-0000
506-6090-4500-0000

The Region submitted this case for advice as to whether the Charging Party's Facebook posts discussing workplace safety concerns constituted protected concerted activity even though they were not part of a direct dialogue with coworkers. We conclude that they did constitute protected concerted activity, given that the Charging Party's posts involved mutual aid or protection and the Charging Party was engaged in concerted activity with other statutory employees. We further conclude, in the alternative, that the discussion of health and safety issues is protected under the Board's "inherently concerted" doctrine. As a result, we conclude that the Employer violated Section 8(a)(1) of the Act by terminating the Charging Party in response to his protected Facebook posts.

FACTS

The Employer, North West Rural Electric Cooperative, is a member-owned utility cooperative with its main offices in Orange City, Iowa. Most of the Employer's electrical workers, or "linemen," are represented by the International Brotherhood of Electrical Workers Local 231.[1] In February 2007, the Employer hired the Charging Party as a journeyman lineman. The Charging Party asserts that during his tenure as a full-time lineman he raised safety issues with the Employer, including the number of linemen in the air on a project, the training that apprentice linemen received, and the type of work that apprentices performed. In June 2011, September 2012, and December 2013, the Employer verbally disciplined the Charging Party for rule violations and "attitude and cooperation" issues. Regarding the last incident, the

[1] A lineman installs, repairs, and maintains overhead or underground electrical power lines and auxiliary equipment. In light of the content of the discussions in this case, it appears that work for the Employer primarily involved overhead power lines.

Employer informed the Charging Party that it would not promote him to a lead lineman position because he lacked a "good attitude" and did not cooperate with coworkers. The Employer asserts this meeting constituted a final warning. In October 2014, the Charging Party took a non-unit position as a GPS mapping and staking technician, although he continued to regularly perform line work.

"Linejunk" is an online community for linemen and other electrical workers, with a website and a dedicated Facebook page. The Linejunk page on Facebook currently has more than 45,000 "likes," indicating Facebook users who have elected to receive posts from the Linejunk page on their Facebook news feed. The Linejunk page on Facebook regularly posts industry-related news and content. Most posts on the page involve active engagement by the large community of users who follow the page. The Linejunk website claims that it is "the most followed and talked about [online community] in the industry." The Charging Party states that a number of his coworkers also actively followed the Linejunk Facebook page and that he had discussed the page with them in the past.

At 8:53 PM on December 1, 2014,[2] the Linejunk page on Facebook posted a question submitted by an unnamed user (spelling and punctuation in original):

> i have a question to ask…First, i have been a lineman for 36 years, the last four years i have been a line foreman, so i do know line work, I have been ask to be a part of a safety team, to try and figure out why there are so many accidents. I have been following **Time for a Change** like many of you have, were all reading about the accidents, why are they happening????so here is my question to you. How do we fix this, what do we need to do to prevent accidents? i know a few will say that the company pushs us, well that may be, but if you think its unsafe, then why did you do it, so i dont want to get in any pissing match with anyone, i would just like to know your ideas on how we can stop all the accidents, is it lack of training, is it inexperience ect. your thoughts will be appreciated…(D)

At least 77 Facebook users "liked" the post in question, and numerous users posted comments replying to the original post.[3] The original post's reference to "Time for a

[2] All subsequent dates are in 2014.

[3] The original post and its replies no longer appear on the Linejunk page. However, screenshots of the original post and the Charging Party's replies reveal additional comments by at least two other Facebook users, as well as a "Load previous comments" prompt indicating that numerous other comments had already been

Change" concerned a separate Facebook page affiliated with Linejunk, which is currently labeled "Linemen Take A Stand For Safety," and which includes posts regarding safety awareness, industry-wide safety standards, and news about accidents involving electrical workers.[4]

At 6:30 PM the following evening, December 2, the Charging Party replied to the original Linejunk question with the following two comments (spelling and punctuation in original):

> I agree with most comments been in the trade 11 years started with iou and got my ticket was trained by the "old" guys then moved back home to a coop and what a goat bang it has been I will never forget the guys that brought me up they were the real deal the brotherhood that was compared to me at 31 being the oldest jl of our 6 man crew and I use 6 man crew loosely most it's 3 out doing all work a jl or two and apprentice sometimes lead man one man In the air all the time I have brought everyone through there apprenticeship except my lead lineman who's 3 years younger I was In The Air all the time look down not a one would be looking up not even apprentice then I would get lip back when I would talk about it told management all the time these new guys need time in the air I can count on my damn hand how many times I have seen them do hot work. Again brought it up they agree nothing gets done biggest part now days lack of experience one man in the air it all drove me out I got sick of fighting the guys took a staking job. Just last month Lack of disapline, and having to care about others feelings
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> Is why people get hurt I used probably the least amount of cover and like others have said it teaches you to keep your shit In a row and pay attention. Not to just go slopping around. That's my 2 cents. every accident I have heard of is o e man in the air and maybe one on the ground on maybe they are a few spans down stupid.

According to the Employer, the Charging Party's two comments offended an unspecified number of his coworkers who also follow the Linejunk page, and on December 3 the coworkers brought the posts to the Employer's attention. The Employer's operations director states that the coworkers felt the Charging Party had

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posted. The contextual evidence supports the reasonable inference that a large number of comments were posted in reply to the original question.

[4] This second Facebook page's description reads: "With the overwhelming amount of deaths in the Lineman industry it is time to make a change." The page currently has more than 3,900 likes.

thrown them "under the bus" by complaining about them in his comments. On December 5, the operations director called the Employer's CEO to discuss the Charging Party's Facebook posts, and the two agreed that the Charging Party would be terminated.

On December 8, the Charging Party was called into a meeting with the operations director and operations field supervisor, who informed him that he was being terminated. According to the Charging Party, he was informed that it had come to the Employer's attention that he still had "some harsh feelings" about the Employer and that he had "aired them on Facebook," and that the Employer had "policies in [effect] for this" which authorized his employment to be terminated. The Employer's officials pointed out to the Charging Party that he knew his coworkers followed the Linejunk page. The Charging Party noted that he previously had raised the same concerns expressed in his Facebook posts directly to management, including the number of linemen in the air and the work performed by and the training of apprentices, and that the Employer's operations director conceded at the meeting that there was "[nothing] in the post that we had not talked about previously." The Charging Party requested a written termination letter, but the Employer declined to give him one. However, the Employer's CEO concedes that the Charging Party was terminated pursuant to its policies C-6, C-8, and C-9.[5]

ACTION

We conclude that the Charging Party's posts were protected by Section 7 because they involved both mutual aid or protection insofar as they addressed his and other statutory employees' concerns about workplace safety, and concerted activity insofar as he was engaged in a group discussion with other statutory employees and his comments were addressed at least in part to his coworkers. We further conclude, in the alternative, that the Charging Party's discussion of health and safety issues was "inherently concerted" and thus protected by Section 7. Finally, we conclude that the

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[5] Employer Policy C-6 addresses "Attitude, Spirit and Cooperation," and requires employees to resolve work complaints through the Employer's grievance procedure. The policy also implies that if an employee is not satisfied with how a grievance is resolved, he or she must continue to perform in a cooperative and professional manner. Policy C-8 sets forth progressive corrective actions up to termination for unacceptable performance or behavior. Policy C-9 addresses examples of unacceptable conduct, including "poor attitude" and "disclosure of confidential information." The Region already has decided to issue complaint alleging that policies C-6 and C-9 are unlawfully overbroad in violation of Section 8(a)(1), and it has not submitted that issue for advice.

Employer violated Section 8(a)(1) by terminating the Charging Party for engaging in protected concerted activity.

A. The Charging Party Was Engaged in Protected Concerted Activity.

In order to constitute protected concerted activity under Section 7 of the Act, employee conduct that is not union-related must be engaged in for the purpose of "mutual aid or protection" and must be "concerted"—two elements that are closely related but analytically distinct.[6] Conduct involves mutual aid or protection when the "employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees,'" and the improvements sought would inure to the benefit of employees generally.[7] Conduct is concerted when it is "engaged in with or on the authority of other employees," or when an individual employee seeks "to initiate or to induce or to prepare for group action" or to bring group complaints to management's attention.[8] Moreover, "both the concertedness element and the 'mutual aid or protection' element are analyzed under an objective standard. . . . The motives of the participants are irrelevant . . . what is crucial is that the purpose of the conduct relate[s] to collective bargaining, working conditions, or other matters of 'mutual aid or protection' of employees."[9] The Board also has held that conduct involving certain employment terms is "inherently concerted," and is thus protected even when no group action is contemplated.[10]

1. The Charging Party's Posts Involved Mutual Aid or Protection.

We first conclude that the Charging Party's conduct involved mutual aid or protection. Employee efforts to address workplace health and safety concerns plainly

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[6] *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

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

[8] *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 885, 887 (1986), *enforced sub nom.*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

[9] *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (citation omitted).

[10] *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 1 & n.1 (Apr. 30, 2015) (finding employee conversation about job security to be inherently concerted), *incorporating by reference* 359 NLRB No. 36 (Dec. 14, 2012).

involve attempts to improve terms and conditions of employment.[11] The Employer's operations director agreed at the December 8 termination meeting that the Charging Party's posts reiterated the same safety concerns the Charging Party previously had raised with management. Furthermore, the objective content of the Charging Party's comments concerned the topics of safety and accident prevention, and he was engaged in a larger Facebook discussion explicitly seeking input on "how we can stop all the accidents." Although the Employer suggests that the Charging Party's comments may have been motivated by personal animus for not receiving a promotion in December 2013 rather than a genuine desire to improve workplace safety, the subjective motivations of an individual employee are irrelevant for determining whether he or she engaged in protected concerted activity.[12]

Moreover, several considerations support finding a mutual aid or protection goal despite the fact that the Charging Party was not speaking directly to the Employer. First, as mentioned above, the content of the Charging Party's posts involved criticisms of the Employer's safety-related practices, and thus directly concerned the improvement of the Charging Party's and his co-workers' terms and conditions of employment. Second, as the Supreme Court held in *Eastex, Inc. v NLRB*, employees are protected when they seek to improve their terms and conditions of employment "through channels outside the immediate employer-employee relationship."[13] Here, the Charging Party's contribution to a discussion about how to improve industry-wide safety standards promised an indirect impact on the Employer's safety practices.[14]

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[11] *E.g.*, *Daniel Construction Co.*, 277 NLRB 795, 795 (1985) (finding employees' work stoppage to be "plainly protected" where it concerned "uncomfortable, potentially health-threatening working conditions").

[12] *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 ("'Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one.' *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enforced mem.*, 989 F.2d 498 (6th Cir. 1993). Nor is motive relevant to whether activity is for 'mutual aid or protection.'").

[13] 437 U.S. 556, 565-67 (1978) (holding that union's distribution to unit employees of newsletter criticizing presidential veto of federal minimum wage increase and urging readers to vote for labor-friendly political candidates involved mutual aid or protection).

[14] *Cf. id.* at 569-70 (finding that newsletter advocating raise in the minimum wage involved mutual aid or protection even though employees were already paid far above the proposed minimum, given the "widely recognized impact that a rise in the minimum wage may have on the level of negotiated wages generally").

Third, regardless of whether the Charging Party was seeking to improve his *own* terms and conditions of employment, he was clearly contributing to a discussion concerning *other* statutory employees' attempts to improve their terms and conditions of employment, and thus was well within the broad definition of mutual aid or protection under the Act.[15]

2. The Charging Party's Conduct Was Concerted Because it Involved Group Action.

We next conclude that the Charging Party was engaged in concerted activity by partaking in a group discussion on Facebook. As the Supreme Court noted in *Eastex*, it is the "settled construction" of the Act that the statutory "employees" who may engage in concerted activities "include 'any employee, and shall not be limited to the employees of a particular employer.'"[16] Accordingly, the Board has held that statutory employees employed by different employers may join together to engage in concerted activity.[17] Here, the Charging Party and the other statutory employees responding to the question on the Linejunk page about how to reduce work accidents were engaged in traditional group action no different than if the Charging Party and his coworkers had held a meeting to discuss their concerns about the Employer's safety practices.[18]

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[15] *Id.* at 564 ("[Section 2(3)] was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own. In recognition of this intent, the Board and the courts long have held that the 'mutual aid or protection' clause encompasses such activity."); *see, e.g.*, *Etiwanda, LLC*, 357 NLRB No. 172, slip op. at 3 & n.19 (Dec. 30, 2011) (employee engaged in mutual aid or protection by collecting authorization cards and answering questions "in support of employees of an employer other than his own"); *Yellow Cab, Inc.*, 210 NLRB 568, 569 (1974) (employee engaged in mutual aid or protection by seeking to enlist aid of coworkers to support employees of other employers on strike).

[16] 437 U.S. at 564 (quoting 29 U.S.C. § 152(3)).

[17] *E.g.*, *Etiwanda, LLC*, 357 NLRB No. 172, slip op. at 3; *Yellow Cab, Inc.*, 210 NLRB at 569; *Washington State Service Employees*, 188 NLRB 957, 958-59 (1971) (employee engaged in concerted activity by attending and participating in rally with employees of other employers); *cf. Days Inn & Suites*, Case 15-CA-147655, Advice Memorandum dated August 10, 2015, p. 6 (finding that employee who spoke to *Washington Post* reporter about minimum wage increase was engaged in protected concerted activity, and that this conclusion was bolstered by involvement of a second statutory employee also interviewed by the reporter).

[18] *Cf. Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 1-2, 5-6 (Aug. 22, 2014) ("no dispute" that employees engaged in protected concerted activity by taking

Not only was the Charging Party's conduct thus "engaged in *with* . . . other employees," but the Linejunk discussion was intended to "prepare for group action" both abstractly (improving industry-wide safety standards), and concretely (the original poster's suggestion that he was on a safety team and was looking for "ideas on how we can stop all the accidents").[19]

Similarly, we would find that the Charging Party was engaged in concerted activity even absent the involvement of the statutory employees employed by other employers, since the Charging Party was addressing in part his own coworkers. The Employer's officials at the December 8 terminations meeting acknowledged that the Charging Party knew his coworkers were members of the Linejunk community when he posted the comments in question.[20] Furthermore, the Charging Party confirmed in the Facebook posts at issue that he had previously raised his safety concerns with management and had been rebuffed. Given that the Charging Party was raising his safety concerns to an audience that included his coworkers, it is reasonable to infer that the Charging Party's posts were at least in part intended "to initiate or to induce or to prepare for group action" by bolstering support for his position among his coworkers in preparation for again speaking with management. Such conduct remains concerted under the Act even if the Charging Party had no concrete plans for subsequent group action, and even if the Charging Party's coworkers uniformly rejected his concerns and reported him to management, because concerted activity "has to start with some kind of communication between individuals, [and] it would come very close to nullifying" Section 7 rights if those communications were not protected because of a lack of fruition.[21]

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part in Facebook discussion about employer's tax withholding practices; employees' comments were neither "so disloyal" nor defamatory so as to lose the Act's protection).

[19] Although the identities of the original poster and the other Facebook users who engaged in the discussion—and whether they were statutory employees—remain unclear from the existing record, based on the context and the nature of the Linejunk page it is reasonable to infer that at least some of the dozens of users who "liked" the post or participated in the discussion were also employed as non-supervisory linemen, and were thus fellow "employees" within the meaning of the Act.

[20] Likewise, the Charging Party states that his coworkers were active users of the Linejunk page on Facebook and that he had discussed the page with them.

[21] *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3-4 ("Even without more, under *Meyers II* and its progeny, [the charging party's] conduct in approaching her coworkers to seek their support of her efforts regarding this workplace concern would constitute concerted activity. . . . [U]nder Board precedent, concertedness is not dependent on a shared objective or on the agreement of one's

3. The Discussion of Workplace Health and Safety Issues Is Inherently Concerted.

Although we find that the Charging Party's comments involved group action and thus constituted traditional concerted activity, we conclude in the alternative that the Charging Party's discussion of workplace safety was protected under the Board's doctrine of "inherently concerted" activity. The Board has long held that discussions about wages are inherently concerted even absent a showing that group action was contemplated, since wages are a "vital term and condition of employment" and the "grist on which concerted activity feeds."[22] More recently, the Board held, applying the same reasoning, that discussions regarding job security are inherently concerted.[23] The Board declined to address "other possible topics of conversation" that might be found to be inherently concerted in the future.[24] We conclude that discussions concerning workplace health and safety issues implicate the same considerations identified by the Board with respect to wages and job security, and that such discussions are thus also inherently concerted.

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coworkers with what is proposed" (citing cases)); *Whittaker Corp.*, 289 NLRB 933, 934 (1988) ("An employee does not have to engage in *further* concerted activity to ensure that his initial call for group action retains its concertedness. In addition, employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted."); *cf. Timekeeping Systems, Inc.*, 323 NLRB 244, 244, 248 (1997) (finding that employee's unilateral company-wide email to coworkers in response to employer's email about vacation plan changes constituted concerted activity).

[22] *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 4 n.10 (Dec. 16, 2014); *see also Parexel Int'l, LLC*, 356 NLRB No. 82, slip op. at 3 (Jan. 28, 2011); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (finding that employee discussions regarding both wages and work schedules are inherently concerted), *enforcement denied in part on other grounds*, 81 F.3d 209 (D.C. Cir. 1996); *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), *enforced mem.*, 977 F.2d 582 (6th Cir. 1992).

[23] *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 1 & n.1 (Apr. 30, 2015), *incorporating by reference* 359 NLRB No. 36 (Dec. 14, 2012); *see also Food Services of America, Inc.*, 360 NLRB No. 123, slip op. at 3 (May 30, 2014).

[24] *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 1 n.1.

Workplace safety is undoubtedly one of the most "vital terms and conditions of employment" from the perspective of employees,[25] and concerns about workplace health and safety issues often serve as a precursor to organizing or other actions for mutual aid and protection.[26] As the Board has observed, "health and safety matters regarding unit employees' workplaces are of vital interest to employees,"[27] and indeed, "[f]ew matters can be of greater legitimate concern to individuals in the workplace . . . than exposure to conditions potentially threatening their health, well-being, or their very lives."[28] The Board has recognized that unions often play a "central role in efforts to improve workplace safety," and that unions engaged in organizing campaigns may use their expertise to "address employees' safety concerns and advise them on methods to improve workplace safety."[29] Even in a non-union context, workplace health and safety issues often play a critical role in catalyzing employees' actions for mutual aid or protection.[30]

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[25] *Cf. Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 3 (noting that wages and job security are among the "most vital terms and conditions of employment" from the employees' point of view), *incorporated by reference*, 362 NLRB No. 81, slip op. at 1.

[26] *E.g.*, *Crossing Rehabilitation Services*, 347 NLRB 228, 231 (2006) (employees wanted union in order to negotiate over "concerns about safety at work, employment benefits, and job security"); *Snowshoe Co.*, 217 NLRB 1056, 1058 (1975) (employee unionization efforts began for the purpose of "improving working conditions, particularly safety measures, and wages"), *enforced mem.*, 530 F.2d 969 (4th Cir. 1975).

[27] *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995) (confirming relevancy of union's request for information addressing health and safety issues).

[28] *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982) (finding that employer was required to comply with union request for certain health and safety information), *enforced sub nom.*, *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 248 (D.C. Cir. 1983).

[29] *Novotel New York*, 321 NLRB 624, 629-30 (1996) (discussing the "historical role of unions in vindicating the rights of workers," particularly regarding safety issues), *overruled on other grounds*, *Stericycle, Inc.*, 357 NLRB No. 61 (Aug. 23, 2011).

[30] *E.g.*, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (employees' spontaneous walkout to protest intolerably cold working conditions was protected attempt to "correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours"); *Systems with Reliability, Inc.*, 322 NLRB 757, 757-60 (1996) (employees talked among themselves about safety concerns before confronting employer and threatening to

Here, the Charging Party's comments concerned the safety of linemen working with high voltage, overhead power lines in a particularly dangerous industry. Indeed, the issues of safety and accident prevention that the Charging Party was discussing were so important to the Linejunk community that a second Facebook page had been established with the specific aim of advocating for an industry-wide "change" in safety standards, drawing thousands of supporters on Facebook. Furthermore, the specific post that the Charging Party was responding to drew at least 77 Facebook "likes" and sparked an active discussion involving an unknown number of different users. The facts of the present case thus confirm that, like concerns about job security, workplace safety issues have the propensity to "quickly ripple through, and resonate with, the work force."[31] As such, the informal conversation that the Charging Party was contributing to was the type of preliminary discussion that has the inherent propensity to lead to more concrete group action in the future.[32]

In addition, by posting his comments on Linejunk the Charging Party was in part addressing his own coworkers, who were known to also be members of the Linejunk community. Regardless of whether the Charging Party contemplated any future group action, and regardless of whether his coworkers agreed with his views on accident prevention, the Charging Party's comments carried at least the possibility of bolstering support among his coworkers for further actions directed at improving workplace safety. Thus, the Charging Party's discussion of vital health and safety issues was a quintessential example of the prerequisite "grist on which concerted activity feeds." Just as the Board noted in *Hoodview Vending Co.*, to find the Charging Party's comments unprotected here would "allow employers to chill employees in the exercise of their right to act concertedly," and would render the right to act concertedly "meaningless" by permitting employers to retaliate against

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contact OSHA if employer did not correct safety issues); *Burle Industries, Inc.*, 300 NLRB 498, 498 n.1, 503 (1990) (employee engaged in concerted activity for mutual aid and protection by attempting to evacuate coworkers due to the presence of hazardous chemical fumes), *enforced mem.*, 932 F.2d 958 (3d Cir. 1991).

[31] *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 3, *incorporated by reference*, 362 NLRB No. 81, slip op. at 1.

[32] *See Parexel Int'l, LLC*, 356 NLRB No. 82, slip op. at 4 (employer's preemptive-strike discharge of employee before she could discuss wage concerns with coworkers violated Section 8(a)(1) because it "sought to erect 'a dam at the source of supply' of potential, protected activity").

preliminary discussions regarding health and safety, and thereby "shut down future discussions and any other concerted actions that might follow."[33]

Given the vital importance of health and safety issues from the point of view of employees, we conclude that discussions of such issues are "as likely to spawn collective action as the discussion of wages,"[34] or work schedules or job security, and that the discussion of health and safety issues should thus also be found to be inherently concerted. As a result, the Charging Party's comments were protected.[35]

B. The Employer Violated Section 8(a)(1) by Terminating the Charging Party.

Applying the Board's traditional discriminatory discharge analysis as established in *Wright Line*,[36] we conclude that the Employer violated Section 8(a)(1) by terminating the Charging Party. For the reasons discussed above, the Charging Party was engaged in protected concerted activity by posting workplace safety concerns on Facebook, the Employer was aware of his posts and that he was responding to other users, and the Employer discharged him because of that protected concerted activity. The burden then shifts to the Employer to establish that it would have terminated the Charging Party even absent his protected concerted activity. The Employer clearly

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[33] *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 4, *incorporated by reference*, 362 NLRB No. 81, slip op. at 1; *see also Parexel Int'l, LLC*, 356 NLRB No. 82, slip op. at 4.

[34] *Aroostook County Regional Ophthalmology Center*, 317 NLRB at 220.

[35] The Employer does not allege that the Charging Party's posts subsequently lost the protections of the Act, and in any event we find that the posts were not "maliciously untrue or so disloyal and reckless as to warrant removal of the Act's protection." *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (July 21, 2011) (citing *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953)). The Charging Party did not even name the Employer, his criticisms were relatively tame, and his posts were certainly not "reasonably calculated to harm the company's reputation and reduce its income." *Jefferson Standard*, 346 U.S. at 471; *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 4 (finding the framework established in *Atlantic Steel*, 245 NLRB 814, 816 (1979), concerning employee "outbursts" and the use of profanity, to be inapposite in the context of social media discussions occurring on nonworking time).

[36] 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981); *see also Approved Electric Corp.*, 356 NLRB No. 45, slip op. at 1 (Dec. 3, 2010) (applying *Wright Line* analysis to find discharge violated Section 8(a)(1))

cannot meet that burden where the Charging Party's protected Facebook posts were the sole cause of his discharge.[37]

Furthermore, although the Employer suggests that the Charging Party was terminated because the Facebook post exhibited a poor attitude and because his coworkers no longer wanted to work with him as a result of it, the Board has held that the subjective feelings of coworkers towards an employee's protected concerted activity are "not a relevant consideration" in determining whether an employer's decision to discharge the employee was lawful.[38] And, indeed, the Employer contends that the Charging Party had been "difficult to work with" for months if not years prior to his termination, yet it was not until he openly engaged in protected conduct in December 2014 that the Employer discharged him.[39] Therefore, the Employer has failed to carry its burden under *Wright Line*, and its discharge of the Charging Party thus violated Section 8(a)(1).

We also agree with the Region's conclusion that the Employer's policies C-6 and C-9 are unlawfully overbroad, and thus in the alternative we find that the Employer violated the Act by terminating the Charging Party pursuant to those policies. An employer violates Section 8(a)(1) by discharging or otherwise disciplining an employee pursuant to an unlawfully overbroad rule when the employee was engaged in conduct that clearly falls within the protection of Section 7 or that "touches the concerns animating Section 7," unless the employer can establish that the employee's conduct interfered with production or operations and that this was the actual reason for the discipline.[40] Here, the Charging Party was engaged in conduct clearly falling within

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[37] *See Timekeeping Systems, Inc.*, 323 NLRB at 244 (finding employer could not satisfy its rebuttal burden under *Wright Line* because alleged "discourtesy and disrespect" employee engaged in were part of protected concerted email message that employee sent).

[38] *St. Luke's Episcopal-Presbyterian Hospitals, Inc.*, 331 NLRB 761, 762 (2000) (rejecting as irrelevant employer's justification that coworkers no longer wanted to work with employee because they were angry about protected comments she had made, and holding that an employee's "activity does not lose the Act's protection merely because it angered her fellow employees or her superiors"), *enforcement denied*, 268 F.3d 575 (8th Cir. 2001).

[39] *See, e.g., Citizens Trust Bank*, 206 NLRB 320, 324-25 (1973) (finding employer's reliance on employees' excessive absences to be pretext covering its discriminatory motive for their discharges where employer had condoned employees' absences until they engaged in concerted work stoppage for higher pay).

the protection of Section 7 when he posted on Facebook, as outlined above,[41] and the Employer discharged him for such conduct pursuant to its overbroad policies. Although the Employer did not provide the Charging Party with a written termination notice, the Employer's CEO concedes that the Charging Party was terminated pursuant to policies C-6, C-8, and C-9.

There is no evidence that the Charging Party's posts interfered with the Employer's operations in any way, or that any such interference was the real reason for the Charging Party's discharge. During the Charging Party's meeting with management on December 8, the Employer merely stated that it had come "to their attention that [the Charging Party] still had some harsh feelings about the [Employer] and that [he] had aired them on Facebook," that the Employer had "policies in [effect] for this," and that he was being discharged. There is no evidence that the Employer ever informed him of another reason for his discharge.[42] In any event, even crediting the Employer's subsequent explanation that the Charging Party's coworkers no longer wanted to work with him due to his protected Facebook comments, the Employer has not established that any such interpersonal conflict would have actually affected operations.[43] Thus, the Employer violated Section 8(a)(1)

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[40] *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 4 (Aug. 11, 2011).

[41] Under *Continental Group*, the Employer violated the Act by terminating the Charging Party pursuant to its unlawful policies regardless of whether the Charging Party's discussion of safety issues was actually concerted. *See id.*, slip op. at 4 & nn.10-11 (discussing conduct that "touches the concerns animating Section 7" but is not concerted).

[42] *See id.* ("[A]ssuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule.").

[43] *Cf. PCC Structurals, Inc.*, 330 NLRB 868, 874 & n.23 (2000) (rejecting employer's justification for discharging employee where, among other things, the evidence indicated "mere interpersonal friction" rather than actual harassment of other employees). Although the Employer had previously issued the Charging Party warnings for his uncooperative attitude, the Employer cannot merely allege that the Charging Party's protected posts exhibited a "poor attitude." Rather, the Employer must demonstrate that the Charging Party's conduct actually interfered with its operations in some way. *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 4; *see also St. Luke's Episcopal-Presbyterian Hospitals, Inc.*, 331 NLRB at 762 (finding it irrelevant that coworkers no longer wanted to work with employee because they were angry about protected comments she had made).

by discharging the Charging Party because he engaged in protected concerted activity.

Accordingly, the Region should issue complaint, absent settlement, based on the analysis set forth above.

/s/
B.J.K.

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