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

Advice Memorandum

S.A.M. DATE: May 31, 2016

TO: George P. Velastegui, Regional Director
Region 32

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

SUBJECT: Google, Inc.
Case 32-CA-164766

506-0170
506-2001-5000
506-4033-1200
506-6080-0800
512-5012-0125
512-5012-3322
512-5036-0117

The Region submitted this case for advice as to whether Google, Inc. ("the Employer") violated Section 8(a)(1) of the Act by issuing a final written warning to the Charging Party after [redacted] and like-minded coworkers posted complaints about workplace diversity policies on the Employer's internal social networking platform and requested clarification of what comments they could post on that platform without violating the Employer's rules. The Region also requested advice on whether a nationwide notice posting would be necessary to remedy the alleged unlawful discipline.

We conclude that the Charging Party's comments on the Employer's internal social networking platform constituted concerted activity that did not lose the Act's protection, and therefore the Employer violated Section 8(a)(1) by issuing [redacted] a final written warning and threatening [redacted] for engaging in that conduct. We further find that the Employer violated Section 8(a)(1) by maintaining workplace rules that are unlawfully overbroad. Finally, we conclude that a nationwide notice posting to remedy the violations is appropriate.

FACTS

The Employer is engaged in the business of developing and providing information technology, web development, internet-related services, online advertising technologies, search systems, cloud computing, and related software. It has approximately 60,000 employees worldwide and is headquartered in Mountain View, California. The Charging Party began working for the Employer on January 12, 2015

as a software engineer.[1] [redacted] is responsible for writing code, debugging operating systems, and performing related tasks.

The Employer hosts an intranet employee discussion forum, known as internal Google Plus ("G+"), that is only visible to and accessible by its employees.[2] Any employee assigned to any Employer facility in the world can post messages on G+ "threads" relating to any topic, work and non-work alike. Many employees post items of interest relating to their working assignments, their personal lives, and current events.

Shortly after [redacted] was hired, the Charging Party began observing and participating in conversations on G+. In March, after [redacted] posted a meme, i.e., a photographic image with text, in a G+ discussion thread, the Employer gave [redacted] a verbal counseling for [redacted] post. The thread included a discussion of a [redacted] coworker's reported sexual harassment, and the Charging Party's post stated, "I am [redacted] … has a complete breakdown over some dude's cheesy pickup line … things you should never say in a thread about harassment." Many of the Charging Party's coworkers took offense with the meme and reported it to Human Resources. A Human Resources Business Partner informed the Charging Party that [redacted] should not post comments like that.[3]

The Charging Party believed that certain employees were being harshly and unfairly criticized within the G+ online community for expressing unpopular social, political, and workplace policy viewpoints. Specifically, the Charging Party believed that employees were unfairly denounced when they spoke out against the Employer's various workplace diversity and social justice initiatives and stated that the programs disfavored [redacted]. The posted criticisms of such opinions were often contentious and included calls for those expressing the unpopular viewpoints to be disciplined or even terminated. Because the Employer allows coworkers to submit comments to another employee's supervisor, and those comments can in turn be used in evaluating the employee, the Charging Party also believed that [redacted] could be disciplined if commenters on G+ who disagreed with [redacted] submitted comments to [redacted] supervisor.

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[1] All dates are in 2015.

[2] This internal forum is not to be confused with the public version of G+, which is a social media platform open to the general public. All references to G+ in this memorandum are solely to the Employer's internal discussion forum.

[3] The Charging Party does not include the verbal counseling that [redacted] received in March as part of the current charge.

On April 22, the Charging Party observed a comment thread where employees harshly criticized a coworker for expressing [redacted] views against the Employer's "diversity town hall" webcasts. The coworker had written, "I've yet to see effective 'increasing diversity' efforts which do not bring unfairness against [redacted] (e.g. lowering the hiring bar for minorities, or arranging events where [redacted] are or feel excluded)." The coworker received negative feedback on the same discussion thread from other employees, including supervisors. These included comments such as, "Frankly, I could care less about being 'unfair' to [redacted]. You already have all the advantages in the world." Others called for the coworker to be reported for [redacted] comment. The coworker's manager later joined the discussion thread and apologized for the coworker's comments, saying they were "not acceptable behavior" and that [redacted] would resolve the matter "on the official channels." After reading the thread, the Charging Party sent an email to Human Resources supportive of the coworker and complaining about how employees had treated the coworker for criticizing the Employer's workplace diversity initiatives. Human Resources pledged to look into the matter further.

On April 24, the Charging Party began talking with four like-minded coworkers on a separate G+ discussion thread regarding their own experiences working for the Employer.[4] The group discussed what they perceived to be the mistreatment of employees, such as themselves, who hold unpopular workplace views (including calls for their discipline), the Employer's failure to react to reported concerns regarding such mistreatment, and some suggestions on preserving evidence.

On May 8, one of the Charging Party's colleagues (who was also on the April 24 discussion thread) wrote an open letter to Human Resources and posted it on G+. The letter challenged Human Resources' handling of complaints by employees holding unpopular workplace views. The Charging Party commented on the thread where the letter was posted, echoing the author's complaints that Human Resources failed to respond adequately to harassment complaints.

On May 20, the Charging Party emailed Human Resources and again complained about the mistreatment of coworkers on G+ for expressing views inconsistent with those held by a majority of employees. The Charging Party raised concerns about employees being criticized for their political beliefs and targeted for their race or gender, and concerns about expressing unpopular opinions regarding workplace policies that could result in their discipline. Human Resources replied and, thereafter, held two videoconferences with the Charging Party. During the video conferences, a Human Resources representative said that [redacted] was aware of the issues and had acted on them where it was appropriate.

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[4] It is unclear if this thread was private or viewable by all employees.

On August 6, an Employer Senior Vice President ("the Vice President") posted a G+ thread calling for workplace civility and imploring readers to create a supportive working environment. The Vice President additionally shared an email from a [redacted] software engineer about negative experiences [redacted] had working as a [redacted] in the technology industry. The Charging Party directed the following comment on the thread to the Vice President:

> [m]any Googlers have claimed that it is "harassment" or some other rule violation to critique articles that push the Social Justice political agenda. A few Googlers have openly called for others to be fired over it. Do you support this viewpoint, and if so, can we add a clear statement of banned opinions to the employee handbook so that everybody knows what the ground rules are?

After a few employees negatively responded to [redacted] comment, the Charging Party continued to question the Employer's official stance on this issue. Eventually, the Vice President replied, "I think to ask for a rule book is missing the point. But if you want a succinct summary: don't do what you're doing here. Contact me privately if you want to know more." The thread continued with several comments from other employees, both in support of the Charging Party's original question and in opposition.

Later that same day, after the Vice President's response in the discussion thread, the Charging Party emailed the Vice President and asked several follow-up questions including: "Did I violate any policies by posting in your G+ thread? If so, which ones?"; "Do you think it's reasonable for Googlers to 'dogpile' on fellow employees who express unpopular opinions in good faith, or would you consider that harassment?"; and "Do you think it's reasonable for Googlers to call for coworkers to be fired based on expressing unpopular opinions, or does that cross a line?" The Vice President responded, declining to answer any of the questions directly but noting that [redacted] found the "context" of the Charging Party's comment "inappropriate." The Charging Party replied in a lengthy email, citing a number of circumstances where [redacted] believed like-minded coworkers were mistreated for expressing their views on G+. [redacted] again asked a number of questions about the Vice President's views on the Employer's policies. The Vice President refused to engage, deferring to Human Resources and remarking, "I am not required to reply[;] I choose to spend my time on other matters."

Around this same time, the Charging Party communicated over email with fellow employees to protest the Vice President's and other employees' responses in the August 6 discussion thread. They further discussed how to frame arguments to management and considered the possibility of hiring a lawyer. The Charging Party thereafter created a new internal mailing list ("g+/freespeech") to promote the group's perspectives. Additionally, the Charging Party worked with other employees to draft an email to the Employer protesting the negative treatment they had experienced for

expressing their views. They also sought to relay comments made by managers on G+ about "blacklisting" employees whom they would not select for assignments because of their controversial opinions. The email was eventually sent by one of the employees (not the Charging Party, who also was not copied on the email) to upper management.

On the morning of (b) (6), (b) (7)(C), the Charging Party received an invitation from a Human Resources Manager for a meeting that afternoon. In between this invitation and the meeting, the Charging Party spoke with [redacted] supervisor, who holds the title (b) (6), (b) (7)(C). The Charging Party asked whether [redacted] was being discharged. The (b) (6), (b) (7)(C) replied that [redacted] was not being discharged, but would receive a stern warning. The (b) (6), (b) (7)(C) then told the Charging Party that [redacted] was doing enormous damage to [redacted] career by getting involved in these threads.

The Charging Party attended the meeting later that day, along with the Human Resources Manager and the (b) (6), (b) (7)(C). The (b) (6), (b) (7)(C) began the meeting by referencing the August 6 thread responding to the Vice President. The (b) (6), (b) (7)(C) said the Charging Party's comments in the thread were inappropriate, and that the Charging Party was being given a final written warning. The final written warning states that the Charging Party was being disciplined for violating the Employer's Appropriate Conduct Policy and Code of Conduct.[5] During the meeting, the Charging Party protested the final written warning by saying it was retaliation for filing complaints with Human Resources. The Human Resources Manager denied this and said that the Employer had taken action against other employees for inappropriate postings, but did not mention their names. Also during the meeting, the (b) (6), (b) (7)(C) reiterated what [redacted] had told the Charging Party that morning, namely to stop getting involved in these threads and focus on [redacted] work. According to the Employer's disciplinary policy, the next step after a final written warning is termination.

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[5] The Employer asserted in the final written warning that the Charging Party had violated the Appropriate Conduct Policy's prohibitions on "disorderly or disruptive conduct, including derogatory name-calling, abusive or profane language, intimidation or coercion of co-workers or any 'un-businesslike' behavior toward co-workers, TVCs, clients or visitors" and "insubordination, including refusal of a work assignment or improper language toward a manager or management representative." It also asserted that the Charging Party had violated the following provision from its Code of Conduct: "Each Googler is expected to do his or her utmost to create a respectful workplace culture that is free of harassment, intimidation, bias and unlawful discrimination of any kind."

ACTION

We conclude that the Charging Party's comments on G+ constituted concerted activity that did not lose the Act's protection, and therefore the Employer violated Section 8(a)(1) by issuing [redacted] a final written warning and threatening [redacted] for engaging in that conduct. We further conclude that the provisions of the Employer's Appropriate Conduct Policy and Code of Conduct listed in the final written warning are unlawfully overbroad in violation of Section 8(a)(1). Finally, we conclude that a nationwide notice posting and electronic distribution of the posting are appropriate remedies given the circumstances.

A. The Charging Party's G+ Comments Constituted Concerted Activity that Did Not Lose the Act's Protection.

Section 7 of the Act provides that employees have the right to engage in "concerted activities" for "mutual aid or protection."[6] 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.[7] An individual acts on the authority of other employees even if not directly told to take a specific action if the concerns expressed by the individual employee to management are a "logical outgrowth of the concerns expressed by the group."[8] Mutual aid or protection "focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'"[9]

Applying these principles, the Charging Party's August 6 comments on G+ and emails to the Vice President were concerted activity because they were the logical

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[6] 29 U.S.C. § 157. *See, e.g., Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

[7] *Id.*, slip op at 3 (quoting *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 885, 887 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)).

[8] *Mike Yurosek & Son,* 306 NLRB 1037, 1038-39 (1992) (finding four employees' individual decisions to refuse overtime work were logical outgrowth of concerns they expressed as a group over new scheduling policy), supplemented by 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995).

[9] *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, slip op. at 3 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

outgrowth of [redacted] prior conversations with coworkers about their terms and conditions of employment. Namely, the Charging Party's comments sought clarification from management about workplace rules, and protested the treatment of employees who hold unpopular viewpoints regarding the Employer's workplace diversity initiatives. These were the exact topics that the Charging Party and [redacted] fellow employees previously had discussed among themselves and had expressed to Human Resources in multiple emails and postings on G+.[10] While the Charging Party made the August 6 posting individually, [redacted] comments were clearly connected to [redacted] ongoing efforts to clarify and protest workplace policies in concert with like-minded coworkers. Moreover the comments, disseminated openly on G+, induced discussion and a group response when some coworkers replied favorably to the Charging Party's post. Likewise, the Charging Party's later emails to the Vice President sought information on workplace policies in furtherance of [redacted] and [redacted] coworker's ongoing efforts to clarify disciplinary rules.[11] Thus, the Charging Party's actions sought workplace changes on behalf of [redacted] coworkers.[12]

At the same time, the Charging Party's actions were for "mutual aid or protection" because they were aimed at improving employment conditions and clarifying permissible workplace behavior, which had potential employment consequences for the Charging Party and like-minded coworkers.[13] Namely, the

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[10] *See Five Star Transportation*, 349 NLRB 42, 43-44, 47 (2007) (finding drivers were engaged in protected concerted activity where, after meeting as a group to discuss a change in bus contractors, they sent individual letters to school committee expressing a common desire to retain their negotiated terms and conditions of employment under prior contractor), enfd. 522 F.3d 46 (1st Cir. 2008); *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1423, 1424 (2004) (employees engaged in concerted activity when they raised separate complaints to management after discussing complaints together).

[11] *Hitachi Capital Am. Corp.*, 361 NLRB No. 19, slip op. at 1-2 (Aug. 8, 2014) (employee acted concertedly when she sent several emails to management questioning a workplace policy that the employer knew was of general concern to the workforce).

[12] *See Every Woman's Place*, 282 NLRB 413, 413 (1986) (concerted activity where employee sought clarification of workplace policies on behalf of group), enfd. 833 F.2d 1012 (6th Cir. 1987); *cf. Long Ridge of Stamford*, 362 NLRB No. 33, slip op. at 1-2 (March 24, 2015) (finding employee "clearly engaged in protected concerted activity when he informed [employer's administrator] of employees' concerns regarding recent disciplinary actions and other terms of employment").

[13] *See Five Star Transportation*, 349 NLRB at 47 (letters written by individual employees to employer were protected concerted activity for mutual aid or protection because the letters expressed concerns "within the context of the [employees'] common desire to retain their negotiated terms and conditions of employment").

Charging Party sought information on how the Employer would enforce its workplace harassment rules, and if [redacted] and [redacted] coworkers would be disciplined for expressing disagreement with the Employer's workplace diversity policies, which they perceived as having negative consequences for [redacted] like themselves.[14] "'[P]roof that an employee action inures to the benefit of all' is 'proof that the action comes within the 'mutual aid or protection' clause of Section 7."[15]

Finally, the Charging Party's postings and emails did not lose the protection of the Act. Whether an employee's otherwise lawful Section 7 conduct is sufficiently egregious to lose the Act's protection is based on a balancing of the familiar *Atlantic Steel* factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.[16] The Board has repeatedly recognized that an employer may not discipline an employee merely because the employee's comments make coworkers "feel uncomfortable."[17] Rather, protected activity often includes opinions and actions on contentious subjects that may cause some discomfort.

Applying the *Atlantic Steel* factors, none of the Charging Party's comments lost the protection of the Act. First, the discussion took place in an internal online forum (not in public or in front of customers), and without any in-person confrontation with supervisors or coworkers. Second, the subject matter of the comments was directly

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[14] We note that the Board in *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 1, 4 n.9, 6-7, overruled the mutual aid or protection analysis in *Holling Press, Inc.*, 343 NLRB 301, 302 (2004), relied on by the Employer here.

[15] *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 5 (citations omitted).

[16] *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). We note that because the Charging Party did not in any way embarrass or impugn the Employer in public, the test used by the Board in *Triple Play Sports Bar & Grille* appears inapplicable. *See* 361 NLRB No. 31, slip op. at 3-4 (Aug. 22, 2014) (applying tests from *Jefferson Standard* and *Linn* to determine whether employees' off-duty, offsite use of social media to communicate workplace complaints with coworkers or with third parties lost the Act's protection), enfd. sub nom. *Three D, LLC v. NLRB,* 629 Fed. Appx. 33 (2nd Cir. 2015). While *Triple Play* is the applicable precedent for evaluating if an employee's public social media activity, which may be observed by third parties, including customers, lost the Act's protection, an employee's communications on an internal forum seem more properly evaluated under the traditional *Atlantic Steel* test.

[17] *Chartwells, Compass Group, USA*, 342 NLRB 1155, 1157 (2004).

tied to terms and conditions of employment, namely the Employer's workplace diversity and disciplinary policies. Third, the nature of the Charging Party's comments does not favor a loss of protection. [redacted] did not curse, make threats, or use abusive language toward co-workers. Indeed, the Charging Party's comments were similar in tone and tenor to those of other employees on the August 6 thread, and also similar to those made in other G+ threads.[18] Only the fourth factor would weigh in favor of a loss of protection, since the Employer's unfair labor practices occurred after, rather than before, the Charging Party commented on the Vice President's thread. Thus, taken together, the *Atlantic Steel* factors favor finding that the Charging Party did not lose the Act's protection.

B. The Employer Violated Section 8(a)(1) By Issuing the Charging Party a Final Written Warning and Threatening [redacted] for Engaging in Protected Concerted Activity.

An employer violates Section 8(a)(1) of the Act by interfering with an employee exercising his or her Section 7 rights.[19] The Employer does not dispute that it issued the Charging Party a final written warning for [redacted] comments on the August 6 thread. Because we have found that the Charging Party's August 6 postings constituted protected concerted activity, we conclude that the Employer violated Section 8(a)(1) when it issued the discipline in response to that activity.[20]

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[18] *See, e.g., Kiewit Power Constructors Co.,* 355 NLRB 708, 710-11 (2010) (finding statements by two employees that things would "get ugly" and that one of them would bring in his boxing gloves if employer continued to enforce its break-in-place policy remained protected), enfd. 652 F.3d 22 (D.C. Cir. 2011).

[19] 29 U.S.C. § 158(a)(1). *See, e.g., EF Int'l Language School,* 363 NLRB No. 20, slip op. at 11 (Oct. 1, 2015); *Parexel Int'l, LLC*, 356 NLRB 516, 518 (2011) (finding employer's attempt to prevent future protected concerted activity by discharging an employee for discussing wages violated Section 8(a)(1)); *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000) (finding employer violated Section 8(a)(1) by discharging employee for speaking out against new break policy and how managers scheduled work during a group meeting), enfd. 262 F.3d 184 (2d Cir. 2001); *CKS Tool & Engineering of Bad Axe*, 332 NLRB 1578, 1578 n.1, 1584-86 (2000) (finding employer violated Section 8(a)(1) by discharging employee for raising group concerns about productivity in a group meeting called by the employer to discuss productivity and efficiency).

[20] In finding that the Employer violated Section 8(a)(1) by issuing the Charging Party a final written warning, we do not rely on a theory of violation based on *Continental Group*, 357 NLRB 409, 412 (2011), which modified the rule for when discipline pursuant to an unlawful overbroad work rule may, in and of itself, violate Section 8(a)(1). While we conclude below that the work rules referenced in the final

We agree with the Region that no motive analysis is necessary in this case because the Employer has not offered a separate and independent basis for the Charging Party's discipline.[21] The Employer concedes that it disciplined the Charging Party for [redacted] comments on G+ regarding workplace policies—but contends that the comments were inappropriate and caused [redacted] to lose the Act's protection. Because we have already concluded that the comments did not lose the protections of the Act under *Atlantic Steel*, the discipline violated Section 8(a)(1)—regardless of the Employer's motivations.[22] We also note that because the Charging Party was disciplined for [redacted] protected concerted activity on August 6, which involved direct contact with the Employer's Vice President, it is unnecessary to determine whether the Employer had knowledge of the Charging Party's previous protected concerted activities.[23]

We also conclude that the Employer independently violated Section 8(a)(1) by threatening the Charging Party on two separate occasions. The first threat occurred on the August 6 thread when the Vice President stated "don't do what you're doing here" in response to the Charging Party's questions about the Employer's policies. The Vice President's comment instructed the Charging Party to cease [redacted] questioning, and suggested [redacted] comments were in violation of the Employer's work rules. As already discussed above, the Charging Party's comments were protected concerted activity, and therefore the Vice President's attempt to inhibit that activity violated

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written warning are unlawfully overbroad, in light of the strong evidence showing that the Employer unlawfully disciplined the Charging Party for engaging in protected concerted activity, we do not find it necessary to argue a *Continental Group* theory of violation in the alternative. Moreover, if the Board were to decide here that the Charging Party's statements lost the Act's protection we could not prevail under that alternate theory in any event. *Id.* at 412.

[21] *See, e.g., Chromalloy Gas Turbine Corp.*, 331 NLRB at 864 ("where protected concerted activity is the basis for an employee's discipline, the normal *Wright Line* analysis is not required").

[22] *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002), enfd. mem. 63 Fed. Appx. 524 (D.C. Cir. 2003).

[23] *See Timekeeping Sys., Inc.*, 323 NLRB 244, 244 (1997) (finding unnecessary to pass on whether the employer was aware of employee's additional concerted activity, because the employer was aware of the protected email that led to the employee's discipline).

Section 8(a)(1).[24] Similarly, the (b) (6), (b) (7)(C) repeated statements on (b) (6), (b) (7)(C) that the Charging Party was doing enormous damage to [redacted] career by getting involved in the G+ threads were unlawful threats because they discouraged the Charging Party from engaging in protected activity and implied that the Employer would issue [redacted] further discipline if [redacted] continued to exercise [redacted] Section 7 rights.[25]

We note that both the final written warning and management's threats indicated the Charging Party was reprimanded for discussing employment conditions on G+. Our determination that this violated the Act should not be construed to mean that an employer is prohibited from demanding that employees advance company policies and viewpoints. Companies are permitted to base hiring and advancement decisions on employees' adherence to their legitimate policy objectives, so long as they do not inhibit protected concerted activity. Here, however, the Employer disciplined and threatened the Charging Party for discussing terms and conditions of employment, and inquiring about how workplace policies would be applied. This is clearly protected activity, and accordingly the Employer's actions violate the Act.

C. The Employer Violated Section 8(a)(1) By Maintaining Unlawfully Overbroad Rules.

The mere maintenance of a rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights" constitutes a violation of Section 8(a)(1).[26] The unlawful effect of such a rule is "to inhibit employees who are considering engaging in legally protected activities by convincing them to refrain from doing so rather than risk discipline."[27] The Board has developed a two-step inquiry to determine whether an employer rule or policy would have such an effect.[28] First, a rule is unlawful if it

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[24] *See EF Int'l Language School,* 363 NLRB No. 20, slip op. at 11 (finding employer unlawfully threatened employee by, among other things, stating she should not discuss work-related matters via group emails, and instead instructed the employee to take the matter up with management in person).

[25] *Id. See also Desert Springs Hospital Medical Center*, 363 NLRB No. 185, slip op. at 2-3 (May 10, 2016) (finding human resources director threatened employee with unspecified reprisal by stating during investigatory meeting that "it will be trouble for you" if she informed coworkers of the meeting or her discipline for pro-union activity).

[26] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

[27] *Continental Group*, 357 NLRB at 411.

[28] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

explicitly restricts activity protected by Section 7. Second, even if it does not explicitly restrict Section 7 activities, a workplace rule violates Section 8(a)(1) if: (1) employees would reasonably construe the rule's language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 activity.[29] We find that the rules the Employer referred to in the Charging Party's final written warning violate Section 8(a)(1) under these principles.

First, employees would reasonably construe the specific provisions quoted from the Appropriate Conduct Policy as prohibiting Section 7 activity. Those provisions bar "disorderly or disruptive conduct, including derogatory name-calling, abusive or profane language, intimidation or coercion of co-workers or any 'un-businesslike' behavior toward co-workers, TVCs, clients or visitors" and "insubordination, including refusal of a work assignment or improper language toward a manager or management representative." A reasonable employee would read those rules to prohibit concerted discussions and complaints regarding the Employer's workplace policies or treatment of employees because such discussions could be considered "disruptive," "un-businesslike," or "improper language toward a manager."[30] Similarly, employees would reasonably construe the Code of Conduct's instruction that "[e]ach Googler is

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[29] *Id.* at 647. *See also William Beaumont Hosp.*, 363 NLRB No. 162, slip op. at 2 (April 13, 2016).

[30] *See, e.g., Valley Health Sys. LLC,* 363 NLRB No. 178, slip op. at 1-2 (May 5, 2016) (finding unlawful rule prohibiting behavior that "brings discredit" to the employer, "or is offensive to patients or fellow employees"); *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014) (finding rule prohibiting "insubordination or other disrespectful conduct" unlawful); *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2 n.5, 12 (April 2, 2014) (finding unlawful rule prohibiting employees from "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company"); *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1 n.4 (June 18, 2015) (finding that employees would reasonably fear that employer prohibitions on "conflict[s] of interest" and "behavior that violates common decency or morality or publicly embarrasses the" employer apply to "any conduct the Respondent may consider to be detrimental to its image or reputation or to present a 'conflict' with its interests, such as informational picketing, strikes, or other economic pressure"), incorporating by reference 359 NLRB No. 95, slip op. at 56 (April 23, 2014); *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (rule prohibiting "derogatory attacks on . . . hospital representative[s]" found unlawful), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 & nn.5, 6, 357 (2000) (rule that prohibited "[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates" found unlawful), enfd. 297 F.3d 468 (6th Cir. 2002).

expected to do [redacted] or her utmost to create a respectful workplace culture that is free of harassment, intimidation, bias and unlawful discrimination of any kind" to prohibit protected concerted activity. Section 7 activity can often involve contentious issues, which may be considered disrespectful toward or harassment of a coworker. As the Board held in finding a similar rule prohibiting "[i]nsubordination … or other disrespectful conduct" unlawful, "concerted employee protest of supervisory activity and employee solicitation of union support from other employees are protected activities under the Act, and employees [] could reasonably believe that both forms of activity might be prohibited by" such a broadly worded rule.[31]

D. The Region Should Seek a Nationwide Remedy.

Where an employer violates Section 8(a)(1) by disciplining an employee, the traditional remedy includes a physical notice posting at the location where the violation occurred, as well as electronic distribution of the notice (such as by email, posting on an intranet or internet site, and/or other electronic means) if the employer "customarily communicates" with its employees by such means.[32] Where an employer violates Section 8(a)(1) by maintaining an unlawfully overbroad workplace rule, the traditional remedy of posting a notice is generally ordered at each location where the rule is in place, as well as electronic distribution in the manner described above, along with rescission of the unlawful rule and notice to the employees that the unlawful rule has been rescinded and will no longer be enforced.[33]

Here, the Region should seek a nationwide notice posting to remedy the Section 8(a)(1) violations discussed above. The Charging Party's protected concerted activity took place on the Employer's internal networking site, which is visible to all of its employees companywide. The Vice President unlawfully threatened the Charging Party on August 6 over this same internal, companywide site in response to questions about the Employer's workplace policies and work rules. Further, the unlawful rules the Employer then relied on to discipline the Charging Party apply to

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[31] *University Medical Center*, 335 NLRB 1318, 1321 (2001), enf. denied in relevant part sub nom. *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003). *See also Cincinnati Suburban Press*, 289 NLRB 966, 966 n.2, 975 (1988) (finding unlawful rules prohibiting "false, vicious, or malicious statements concerning any employee, supervisor, the [c]ompany, or its products" and "improper or unseeming conduct").

[32] *J. Picini Flooring,* 356 NLRB 11, 11, 13 (2010).

[33] *See, e.g., MasTec Advanced Technologies*, 357 NLRB 103, 109, 110 (2011); *Guardsmark, LLC*, 344 NLRB 809, 811-12 (2005), enfd. 475 F.3d 369, 380-81 (D.C. Cir. 2007).

all Employer locations. Accordingly, a nationwide posting is proper to remedy each of those violations. In addition, because the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) unlawful threats and the final written warning are inextricably intertwined with the prior threat the Vice President directed at the Charging Party, those violations also should be included in the same nationwide posting. As noted above, during the disciplinary meeting on (b) (6), (b) (7)(C), the (b) (6), (b) (7)(C) discussed the August 6 thread where the Vice President made (b) (6) unlawful threat in response to the Charging Party's protected concerted activity, and the final written warning was based on the Charging Party's comments on that thread. The Region should additionally seek electronic distribution of that notice over the forums by which the Employer customarily communicates with its employees, including G+, if that is appropriate. Finally, the Region should seek a rescission of the unlawful rules, as well as an affirmative order requiring the Employer to notify all employees that the overbroad rules have been rescinded and will no longer be enforced.

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

/s/
B.J.K.

h://ADV.32-CA-164766.Response.Google.(b) (6), (b) (7