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

Advice Memorandum

DATE: December 4, 2009

TO : Marlin O. Osthus, Regional Director
Region 18

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

SUBJECT: Sears Holdings (Roebucks) 512-5012-0100
Case 18-CA-19081 512-5012-0125

This case was submitted for advice as to (1) whether the Employer's Social Media Policy could reasonably be construed to chill Section 7 protected activity in violation of Section 8(a)(1) of the Act; and (2) if so, whether the Employer's attempt to clarify the rule effectively repudiated the violation; and (3) [***FOIA Exemption 5***

.] We conclude that the Social Media Policy does not violate Section 8(a)(1) because it cannot reasonably be interpreted in a way that would chill Section 7 activity. We therefore need not reach the remaining issues.

FACTS

The Employer, Sears Holdings, is the parent company of Sears and Kmart Holding Corporation and employs more than 300,000 associates nationwide. These include the employees of all Sears and Kmart retail stores as well as employees of all other Sears- and Kmart-affiliated businesses.

The Union, International Brotherhood of Electrical Workers, filed a petition with Region 18 on October 29, 2008, to represent the Employer's in-home service technicians working in Iowa. The Union withdrew the petition one week later after concluding that the likely appropriate unit would include technicians from a greater geographic area. The Union has since begun organizing this broader group of service technicians. The campaign has utilized various forms of online media, including the creation of a website (Union4Sears.webs.com) and public pages on Facebook and MySpace.

These service technicians communicate with their Sears colleagues around the country using an email listserv known as "s-tech," and have done so since at least the summer of 2008.[1] The listserv is a free service offered by Yahoo which allows interested parties to subscribe to the group using an email address. List members are able to communicate with one another by means of mass email discussions on any given topic. The list is not sponsored by, administered, or affiliated with the Employer. Although members may register anonymously, many can be identified by their use of an email address or username containing their real names. S-tech participants routinely use the list to discuss the Union campaign and other work-related concerns.

On June 2, 2009,[2] the Employer issued a Social Media Policy to all of its employees regarding their use of blogs, message boards, social networks, and other types of online media. In its email announcing the Policy, the Employer explained that it was a response to "some highly-publicized examples of companies whose reputations have suffered as a result of inappropriate conduct (whether intentional or unintentional) by their employees in the social media." The policy reads, in relevant part:

Sears Holdings Social Media Policy

. . .

[I]n order to ensure that the Company and its associates adhere to their ethical and legal obligations, associates are required to comply with the Company's Social Media Policy. The intent of this Policy is not to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates.

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[1] Although the record evidence only documents activity back to September 2008, the listserv already contained more than 57,000 messages by that date.

[2] All dates are in 2009, unless otherwise noted.

Prohibited Subjects

In order to maintain the Company's reputation and legal standing, the following subjects may not be discussed by associates in any form of social media:

- Company confidential or proprietary information
- Confidential or proprietary information of clients, partners, vendors, and suppliers
- Embargoed information such as launch dates, release dates, and pending reorganizations
- Company intellectual property such as drawings, designs, software, ideas and innovation
- **Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects**[3]
- Explicit sexual references
- Reference to illegal drugs
- Obscenity or profanity
- Disparagement of any race, religion, gender, sexual orientation, disability or national origin

. . .

The Employer's Social Media Policy became a frequent topic of discussion amongst the s-tech participants once it was promulgated; specifically, the member technicians debated whether or not the Policy applied to their online discussions. Several participants expressed concern that the Policy infringed upon their freedom of expression. Despite the new policy, list members openly continued to use the listserv to discuss the Union campaign and the relative merits of unionization.

The Union filed the instant charge on June 16. Although the Union challenged the entire policy, the Region has submitted only the rule emphasized above. There is no evidence that the Employer has used the Policy to discipline any employee for engaging in protected activity, nor that the Policy was promulgated in response to the

[3] Emphasis added.

Union campaign, the s-tech listserv discussions, or any other Section 7 activity.

ACTION

We conclude that the Region should dismiss the complaint, absent withdrawal, because the Employer's Social Media Policy cannot reasonably be interpreted to prohibit Section 7 protected activity.

In Lafayette Park Hotel,[4] the Board explained that an Employer may violate Section 8(a)(1) through the mere maintenance of certain work rules even in the absence of enforcement. The appropriate inquiry for such a case is whether the rule in question "would reasonably tend to chill employees in the exercise of their Section 7 rights."[5]

The Board refined this standard in Lutheran Heritage Village – Livonia[6] by articulating a two-step inquiry for determining whether the maintenance of a rule violates Section 8(a)(1). First, the rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that:

> (1) *employees would reasonably construe the language to prohibit Section 7 activity*; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[7]

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[4] 326 NLRB 824 (1998).

[5] Id. at 825.

[6] 343 NLRB 646 (2004).

[7] Id. at 647 (emphasis added). Since there is no evidence to suggest that the Employer implemented the Policy in response to Section 7 activity or that the Employer has applied the rule to discipline an employee for engaging in protected activity, as noted above, the only question here is whether employees would reasonably construe the Policy to prohibit Section 7 activity.

In Lutheran Heritage, the Board held that this inquiry must begin with a reasonable reading of the rule. The Board cautioned against "reading particular phrases in isolation,"[8] and counseled that it will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.[9]

The Board has indicated that a rule's context provides the key to the "reasonableness" of a particular construction. For example, a rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity.[10] The Board held that, in the absence of further guidance from the employer, an employee could reasonably construe the rule to limit his or her Section 7 right to engage in protected protest. On the other hand, the Board found that a rule forbidding "statements which are slanderous or detrimental to the company" which appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" could not be reasonably understood to restrict Section 7 activity.[11] In that context, the Board found that "employees would not reasonably believe that

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[8] Id. at 646.

[9] Id. at 647 ("[W]e will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way"); see also Palms Hotel and Casino, 344 NLRB 351, 355–56 (2005)("We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it").

[10] Claremont Resort and Spa, 344 NLRB 832, 836 (2005); see also id. at 832 n. 5 (Member Schaumber relying on the context of the other policies promulgated with this challenged rule to find the chilling effect reasonable).

[11] Tradesmen International, 338 NLRB 460, 462 (2002).

the ... rule applies to statements protected by the Act,"[12] because it was listed alongside examples of egregious misconduct.

Like the rule in Tradesmen International,[13] the challenged provision of the Employer's Social Media Policy can not reasonably be construed to apply to Section 7 activity. The Board's exhortation against reading phrases in isolation[14] prevents us from surgically excising one piece of the policy for close examination. While the ban on "[d]isparagement of company's . . . executive leadership, employees, [or] strategy . . . ." could chill the exercise of Section 7 rights if read in isolation, the Policy as a whole provides sufficient context to preclude a reasonable employee from construing the rule as a limit on Section 7 conduct. The Policy covers a list of proscribed activities, the vast majority of which are clearly not protected by Section 7. As in Tradesmen International, the rule appears in a list of plainly egregious conduct, such as employee conversations involving the Employer's proprietary information, explicit sexual references, disparagement of race or religion, obscenity or profanity, and references to illegal drugs. The Policy preamble further explains that it was designed to protect the Employer and its employees rather than to "restrict the flow of useful and appropriate information." Taken as a whole, as in Tradesmen International, the Policy contains sufficient examples and explanation of purpose for a reasonable employee to understand that it prohibits the online sharing of confidential intellectual property or egregiously inappropriate language and not Section 7 protected complaints about the Employer or working conditions. This conclusion is bolstered by evidence showing that employees continued to discuss the Union campaign on the s-tech listserv after the Employer implemented the Policy.

We conclude that no employee could reasonably construe the Employer's Social Media Policy to prohibit Section 7

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[12] Id.

[13] Id.

[14] See Lutheran Heritage, 343 NLRB at 646.

activities. As noted above, there is no evidence that the Employer implemented this Policy in response to protected activities. In the absence of any evidence that the Policy has been utilized to discipline Section 7 activity, there is no Section 8(a)(1) violation and the case should be dismissed, absent withdrawal.

/s/
B.J.K.