

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

Advice Memorandum

DATE: December 14, 2011

TO: Rochelle Kentov, Regional Director
Region 12

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

SUBJECT: Miami Jewish Health Systems
Case 12-CA-065993

506-0170
506-2001-5000

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by suspending and discharging the Charging Party because of an email he sent through Facebook that criticized his former employer's management. We conclude that the suspension and discharge were not unlawful because the Charging Party was not engaged in protected concerted activity.

FACTS

The Charging Party worked for University of Miami Hospital from about December 2008 to about October 2010 as an Intensive Care Unit Registered Nurse (ICU RN). On December 13, 2010, the Employer hired Charging Party as a nurse manager, with authority to hire, fire and discipline employees. In about May 2011, Charging Party was moved to a different position, infection control/wound care nurse, which he contends is not a supervisory position.

On September 21, 2011, Charging Party was at home and wrote an email, through Facebook, to a former co-worker from UM Hospital, who still works as an ICU RN at that hospital. Charging Party's email exchange with Former Co-worker was as follows:

Charging Party:

"Hi [Former Co-Worker], how r u holding up? A question-is are [Exs. 6 & 7(C)] in [Exs. 6 & 7(C)] still there making life miserable for u guys? Is [Exs. 6 & 7(C)] still the wimp he is? How long u gonna put up with that?"

Former Co-worker:

"[Charging Party], I really respected you during the time we worked together. I always appreciated you making me feel so welcome to a new

hospital. I don't, however, appreciate you saying things like this to me. Whatever happened between you and management is between you and management and I don't care about it. They have been nothing but good and fair to me. As for [Exs. 6 & 7(C)], I consider him to be a good friend and most definitely not a wimp! He stands up for what he feels is right and he supports the nurses he works with. This will be the last time I communicate with you. Good luck with the things in your life."

Charging Party:

"My apologies for having offended you... You're right it has been some time since I left. Maybe things have changed? Who knows? As for [Exs. 6 & 7(C)], maybe he's changed also.. But there was a time before u arrived when there was a lack of support for nursing staff by him. My opinion, don't get upset. I will be returning soon to UM as [Exs. 6 & 7(C)] replacement...I can be a valuable resource.. So don't shut me out.. Yet... Ciaommm"

This was a private communication between Charging Party and Former Co-worker, not a Facebook "posting." Charging Party did not share these sentiments with his other Facebook friends or with other former co-workers at UM Hospital. Charging Party states that he never spoke to his current co-workers about UM Hospital's supervision or his working conditions at UM Hospital. As to his references to UM Hospital managers, Charging Party states only that the [Exs. 6 & 7(C)] had not been helpful to him when he worked at the hospital, and that he meant the entire communication as a joke.

The next day, when Charging Party reported for work, his supervisor and an HR representative met with him and told him that one of his former co-workers did not appreciate comments he had made to her in an email and that the [Exs. 6 & 7(C)] of UM Hospital, who had been told about the comments, was not happy about them. The supervisor informed Charging Party that this was a problem for the Employer because they were trying to get patients referred from UM Hospital and needed to maintain a professional image in order to be successful. The Charging Party was suspended pending investigation.

On September 28, Charging Party went to another meeting with his supervisor and the HR Director, who told him that while they were doing the investigation after the suspension, four female employees had come forward and asserted that they had been sexually harassed by Charging Party. Charging Party denied those allegations, stating that his admitted communications with those individuals were meant to be only "friendly in nature." All of the alleged harassment victims gave the Employer written statements supporting their allegations, and three of them have confirmed their statements to the Board agent and stated that the Employer had not coerced them in any way to file these allegations. Charging Party was discharged the following day for violation of the Employer's anti-harassment policy. The Region submitted the discharge allegation to Advice because it occurred close in time to Charging Party's emails with Former Co-worker.

ACTION

We agree with the Region that the suspension and discharge did not violate Section 8(a)(1) because the Charging Party was not engaged in conduct protected by Section 7.

The Charging Party's communication with Former Co-worker was not concerted activity for mutual aid and protection, but merely a personal gripe about Charging Party's former supervisors. The communication was not an attempt to initiate group action, and it did not involve a discussion among employees regarding their shared concerns about working conditions; indeed, the only recipient of the emails was Former Co-worker, and she not only did not share Charging Party's concerns but found the emails inappropriate and reported them to her manager. There is no evidence that the Charging Party's statements were a continuation of earlier concerted discussions or other activities. The Charging Party himself states that he meant the emails as a joke. Since the Charging Party was not engaged in protected concerted activity, his suspension for that conduct did not violate the Act. For the same reason, the discharge did not violate the Act, even assuming he was discharged for the emails rather than for the alleged harassment, which appears to have been the motivating factor.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

