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

Advice Memorandum

DATE: October 13, 2011

TO : Elbert F. Tellem, Acting Regional Director
Region 2

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

SUBJECT: Schulte, Roth & Zabel 524-0183-3333
Case 02-CA-060476

We agree with the Region that this charge should be dismissed, absent withdrawal, because the Charging Party was discharged for his unprotected LinkedIn posting rather than as he contends the protected concerted activity of discussing overtime with other employees.

In early 2010, an IT supervisor in Charging Party's department invited him to join LinkedIn, a professional & business related networking site. The invitation identified the Employer and asked the Charging Party for his job title. As a joke that the Charging Party believed only his supervisor would see, he replied "fucktard."

In February 2011, the Charging Party discussed with unnamed coworkers a successful employee wage and hour lawsuit elsewhere which involved employees getting comp time instead of paid overtime. Although they all concurred that the Employer's similar overtime policy may also be unlawful, no one wanted to complain to management. In mid-March, the Employer revised its policy and began paying overtime instead of giving comp time.

In late April, as part of the Employer's study about setting up its own LinkedIn site, it began viewing its own employees' posts on LinkedIn. After discovering the Charging Party's "fucktard" post, the Employer informed him on April 28 that this was in violation of its Electronic Communication Policy as it disparaged the company, and therefore it was discharging him.

We reject the Charging Party's contention that he was in fact being discharged for the protected concerted conversations he initiated about overtime. In this regard, he notes that the timing of the discharge was suspicious since the posting had been on LinkedIn for over a year, whereas its alleged discovery by the Employer occurred only about 2 months after the overtime conversations. However, timing alone does not establish a *prima facie* case under *Wright Line*; part of the General Counsel's burden of proof is to demonstrate employer knowledge of and animus towards the protected activity. See *Caribe Ford*, 348 NLRB 1108,

1109 (2006). Here, there is no evidence that the Employer was even aware of this activity, and certainly no demonstrated animus towards employees discussing their working conditions. Moreover, the LinkedIn posting was not a pretextual reason for discharging the Charging Party; the Employer has demonstrated that it only discovered the posting in its April review of prior employee posts as part of its assessment of problems with its new LinkedIn page. Finally, no one contends that the Charging Party's posting in violation of the electronic usage policy -- the stated reason for his discharge -- was protected by Section 7.[1] Accordingly, the Employer did not violate Section 8(a)(1) by discharging the Charging Party, and the charge should be dismissed, absent withdrawal.

B.J.K.

[redacted]

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[1] The Employer asserts that the discharge was only due to the Charging Party's violation of its electronic Communications Usage policy which, forbids material that is "obscene defamatory, harassing or abusive" to any person or entity associated with the company. We note that the inclusion of the word "harassing" arguably could be construed to preclude protected online content, since such a broad term would commonly apply to protected criticism of the employer's labor policies, and the Board has consistently stated that discipline imposed under an unlawfully overbroad rule violates the Act (the "*Double Eagle* rule"). See *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enfd*. 414 F.3d 1249 (10th Cir. 2005), *cert. denied* 546 U.S. 1170 (2006); *Opryland Hotel*, 323 NLRB 723 (1997). Recently, however, in *Continental Group, Inc.*, the Board outlined limits to the application of the *Double Eagle* rule. 357 NLRB No. 39, slip op. at 4 (Aug. 11, 2011). The Board held there that discipline imposed under an unlawfully overbroad rule only violates the Act where an employee violated the rule by (1) engaging in protected conduct (e.g., concerted solicitation, distribution, or discussion of terms and conditions of employment); or (2) engaging in conduct that "implicates the concerns underlying Section 7 of the Act" (e.g. conduct that seeks higher wages) but is not protected by the Act because it is not concerted. *Id.*, slip op. at 3-4. The LinkedIn "joke" clearly is not protected regardless of whether it can be considered "concerted". Therefore, under a *Continental Group* analysis, the discharge is still valid. In any event, there is no allegation that the rule here is unlawful.