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

# Advice Memorandum

DATE: July 19, 2011

TO : Daniel L. Hubbel, Regional Director
Region 17

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

SUBJECT: Wal-Mart
Case 17-CA-25030

506-2017-0800
506-4033-1200
506-4067-1000
506-6090-4200
512-7550-7000

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by disciplining an employee for posting profane comments on Facebook that were critical of local store management. We conclude that the charge should be dismissed because there is insufficient evidence that the employee engaged in concerted activity.

## FACTS

Wal-Mart (the "Employer") operates retail stores throughout the country. The Charging Party is a customer service employee in an Oklahoma store.[1] In October 2010,[2] the Employer appointed a new Assistant Manager to the store.

On October 28, after an interaction with the Assistant Manager, the Charging Party posted the following comment into his Facebook page: "Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit!" The Charging Party limited his observations to his Facebook friends, which were largely composed of coworkers rather than third parties. Two coworkers responded to the Facebook post as follows:

**[Employee 1]:** bahaha like! :)

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[1] The Charging Party's job title is Customer Service Manager. The Region has concluded that the Charging Party is not a Section 2(11) supervisor.

[2] All dates are in 2010 unless otherwise indicated.

> **[Employee 2]:** What the hell happens after four that gets u so wound up??? Lol

The Charging Party responded to his coworkers' postings with the following entry:

> You have no clue [Employee 1]...[Assistant Manager] is being a super mega puta! Its retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price...that's false advertisement if you don't sell it for that price...I'm talking to [Store Manager] about this shit cuz if it don't change walmart can kiss my royal white ass!

The Charging Party asserts that two other coworkers also made supportive comments. One of those coworkers has confirmed that she made a "hang in there" type of remark.

At least one coworker who viewed the Charging Party's Facebook postings provided a printout to the Employer Store Manager. On about November 4, the Store Manager called the Charging Party into her office to discuss the Facebook postings. The Store Manager told the Charging Party that his Facebook comments were slander, that he could be fired, and that he would be required to take a "decision day."[3] She also prepared a discipline report in which she stated that the Charging Party had "put some real bad things on Facebook about Wal-Mart and [Assistant Manager]," and that the Charging Party's behavior "look[s] bad on the company and i[s] not with in [sic] company g[u]ide lines"; that the Charging Party was expected to "have respect of the Individual"; and that the Charging Party would be terminated if such behavior continued.

The Charging Party subsequently deleted the Facebook postings.

The Employer contends that the charge should be dismissed because the Facebook postings were not concerted activity for mutual aid or protection and, even assuming otherwise, the Charging Party's use of profanity was so opprobrious as to deprive him of the Act's protection.[4]

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[3] A decision day is a one-day paid suspension that precludes opportunities for promotion for 12 months.

[4] The Employer also alleges that the Charging Party is a statutory supervisor, a contention the Region has rejected and which it did not submit for Advice.

**ACTION**

We conclude that the charge should be dismissed, absent withdrawal because there is insufficient evidence that the Charging Party engaged in concerted activity. Accordingly, we need not address whether his comments were so opprobrious that they lost the Act's protection.

An individual employee's conduct is concerted when he or she acts "with or on the authority of other employees,"[5] when the individual activity seeks to initiate, induce, or prepare for group action, or when the employee brings "truly group complaints to the attention of management."[6] Such activity is concerted even if it involves only a speaker and a listener, "'for such activity is an indispensable preliminary step to employee self-organization.'"[7] On the other hand, comments made "solely by and on behalf of the employee himself" are not concerted.[8] Comments must look toward group action; "mere griping" is not protected.[9]

Here, we conclude that the Charging Party's Facebook postings were an expression of an individual gripe. They contain no language suggesting the Charging Party sought to initiate or induce coworkers to engage in group action; rather they express only his frustration regarding his individual dispute with the Assistant Manager over mispriced or misplaced sale items. Moreover, none of the coworkers' Facebook responses indicate that they otherwise interpreted the Charging Party's postings. Employee 1 merely indicated that he found Charging Party's first Facebook posting humorous, while Employee 2 asked why the Charging Party was so "wound up." Another coworker's "hang

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[5] *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd. 755 F.2d 941 (D.C. Cir. 1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987).

[6] *Meyers II*, 281 NLRB at 887.

[7] *Holling Press, Inc.*, 343 NLRB 301, 302 (2004), citing *Meyers II*, 281 NLRB at 887. See also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) ("Activity which consists of mere talk must, in order to be protected, be talk looking toward group action").

[8] *Meyers I*, 268 NLRB at 497.

[9] See *Mushroom Transportation Co. v. NLRB*, 330 F.2d at 685.

in there"-type comment suggests that she only viewed his postings to be a plea for emotional support. Nor is there evidence that establishes that the Charging Party's postings were the logical outgrowth of prior group activity.

Accordingly, the Employer did not violate Section 8(a)(1) by disciplining the Charging Party. The charge should be dismissed, absent withdrawal.

B.J.K.