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

DATE: March 1, 2012

TO: Robert Chester, Regional Director
Region 6

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

SUBJECT: McKesson Corporation 506-0170
Cases 06-CA-066504 and 06-CA-070189 512-5012-0125

This case was submitted for advice on whether the Employer violated Section 8(a)(1) of the Act by giving the Charging Party a low performance rating and putting her on a personal improvement plan because of a negative comment she posted on Facebook, and whether the Employer maintains overly broad social media rules. We conclude that the Charging Party was not engaged in protected concerted activity when she posted a comment on Facebook; therefore, the Employer did not violate the Act by giving the Charging Party a low performance rating and putting her on a personal improvement plan. We further conclude that some of the Employer's social media guidelines are overly broad in violation of Section 8(a)(1) of the Act.

The Charging Party Did Not Post Her Facebook Comments in Concert with Other Employees

The Employer is a large, international health care services company that manages billing and other services for health care institutions. The Charging Party has been employed by the Employer for approximately eight years as a refund processor. At least since the summer of 2010, the Charging Party was outspoken about concerns she had over her job. In June and July, 2010, she wrote several emails to her management expressing concern that her workload increased and, as a result, she would not be able to comply with the Employer's time requirements. During the same period, she spoke up at a meeting to complain about the wage scale and that employees had to purchase their own office supplies.

In the fall of 2010, the Charging Party became increasingly concerned that the Employer would outsource her job. The Employer had outsourced some of its accounts, but there was no indication that the Charging Party was at risk of losing her account. According to the Charging Party, she had

conversations with other employees about outsourcing and she was aware that other employees also had similar conversations. She related one conversation she had with another employee in which they laughed about whether to let a client know that the Employer might outsource its work.

On November 10, 2010, the Charging Party posted a statement on Facebook stating, "Help! I am being outsourced. . anyone know of a company who is hiring that doesn't outsource??" She did not identify herself on her Facebook page as an employee of the Employer, but apparently other employees were her "friends" on Facebook. A few days later she sent an email to her manager inquiring about the Employer's severance policy in the event her work was outsourced.

The Charging Party was disliked by many of her colleagues. Some of those colleagues alerted management to the Charging Party's November 10 Facebook posting. Management met with her on November 17 and accused her of creating a panic about outsourcing and severance benefits. They also told her to never mention outsourcing to anyone, and that if she divulged outsourcing information to any client or patient it could lead to termination. Management also accused the Charging Party of posting a comment on Facebook about the Employer outsourcing.[1] She denied posting a statement on Facebook about the Employer and accused her accusers of libel, slander, and defamation. The next day, the Charging Party wore a t-shirt to work bearing the slogan, "Trust No One."

Toward the end of December, 2010, an anonymous employee wrote a two-page letter to the Employer's Chief Executive Officer purporting to be on behalf of many coworkers. The letter was entitled, "A Bully Works Among Us," and its purpose was to complain about the Charging Party. The letter stated that she is a bully in the workplace because she is cruel, vicious, and intimidating toward her coworkers; that she threatens her co-workers that she can get them fired, and has threatened that management should not "f" with her because she knows people who can blow up cars. The letter also stated that the Charging Party's co-workers felt threatened when she wore the "Trust No One" t-shirt, because they interpreted it as a threat to retaliate against her coworkers (presumably for alerting management to her Facebook post). The letter complained that "people can only take so much" and "we have had enough." It concluded by stating that one of the author's coworkers was contemplating contacting a lawyer about working in a hostile

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[1] The Charging Party filed the charge in this case on October 12, 2011. These conversations are therefore provided as background and cannot be alleged as unlawful, because they fall outside the Section 10(b) period.

environment, and that many other employees would bear witness to substantiate the hostility that the Charging Party creates in the Employer's workplace.

Management met with the Charging Party on February 4, 2011, and told her about the anonymous letter. They indicated that upper management had been sent to interview employees and they repeated the complaints in the letter. The managers told her that she needs to stop making negative comments, and blamed her for causing low morale.

On June 2,[2] the Employer issued the Charging Party her annual review. Her overall rating was lower than in previous years, particularly the aspect pertaining to her conduct, though her production numbers had also decreased. Her rating affected the amount of her wage increase, and the rating was low enough to automatically put her on a personal improvement plan (PIP). The review document stated that her low rating was based, in part, on her openly discussing rumors of outsourcing and her negative behaviors. At a meeting with management to discuss her review, a manager told the Charging Party that she could not discuss any aspect of her review, such as her rating or the amount of her pay increase, with any other employee.

The Employer did not formally issue the Charging Party her PIP until September 21, 2011. Among other things, the form stated that it "is strictly confidential and is not to be shared" with any other employees.

We conclude that the Charging Party was not engaged in protected concerted activity at any time, including when she posted her comment on Facebook. It is clear that the Charging Party had many concerns about her workplace and frequently voiced those concerns both to her colleagues and management. She also states that she had conversations with employees about outsourcing, and claims that other employees had such conversations among themselves. However, there is no evidence that any of her colleagues shared her concerns or had any interest in voicing them together with her. The sole conversation she described did not demonstrate an employee's concern about her job being outsourced. Rather, the employee in that one conversation expressed concern for the client whose work might be outsourced, and that concern was stated in a joking manner. Indeed, it is apparent that this Charging Party had no allies among her coworkers and, in fact, had alienated them to such an extreme degree that one of them wrote a letter to the CEO of this large, international corporation, complaining of her

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[2] This and all following events occurred within the Section 10(b) period.

threats, bullying, and other "negative" behaviors, and indicating that a fellow employee was on the verge of filing a lawsuit over the hostile work environment she creates. Therefore, even though she had spoken up at a meeting in June 2010 and complained about wages and other working conditions, and she claims to have talked with other employees about their concerns about outsourcing, it appears that she was alone in these crusades.

Moreover, there is no evidence to show that the Charging Party posted her comment on Facebook in furtherance of concerted activity for mutual aid and protection. There is no evidence of other posts regarding outsourcing and no other employee responded to hers. Thus, in the absence of evidence of prior group conversations or activity, her lone Facebook post was not concerted; nor can it be characterized as a continuation or logical outgrowth of prior group activity.

Because the Charging Party was not engaged in protected concerted activity, we also conclude that the Employer did not violate the Act by issuing her a negative performance review and placing her on a PIP. The Employer stated that her low rating was based, in part, on her openly discussing rumors of outsourcing and her "negative behaviors." To the extent the Employer was referring to her prior complaints and Facebook post, the review of her based on that conduct was not unlawful since we concluded that that conduct was not protected concerted activity. Even if the negative review was based in part on the Employer's mistaken belief that she was engaged in protected concerted activity, the Employer still had a valid and lawful concern that the Charging Party was spreading false rumors not only among her colleagues, but to the Employer's clients as well. We also conclude that the Employer's statements that she should stop being negative, and that her low rating was based in part on her spreading of false rumors of outsourcing, were not unlawful, since they were in response to her unprotected conduct and merely warned her against engaging in similar conduct in the future.[3]

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[3] We also would not rely on *The Continental Group*, 357 NLRB No. 39, slip op. at 4 (2011), to allege that the Employer violated Section 8(a)(1) by giving the Charging Party a negative review and PIP pursuant to unlawful social media rules. The Charging Party claims that her managers told her, in a meeting she requested on September 7 to discuss her review, that she should not post anything on Facebook that could violate the social media policy. However, although, as discussed further below, we conclude that the Employer maintains unlawful social media rules, it did not act pursuant to those unlawful rules. The investigation disclosed that the local managers who met with her on that date were not aware of the contents of the social media policy. Therefore, we agree with the Region that there is insufficient evidence

Notably, it is apparent that the "negative behaviors" the Employer complained of included her long-term behavior that led employees to send an anonymous letter to the CEO asking for relief from her conduct. Therefore, *assuming arguendo* that she was engaged in protected concerted activity, the Employer had a legitimate basis to issue her a negative performance review and place her on a PIP based on the anonymous letter and subsequent employee interviews, which confirmed improper conduct by the Charging Party.

On the other hand, we conclude that the Employer violated Section 8(a)(1) by telling the Charging Party that she could not discuss any aspect of her review, including her rating or pay increase, with anyone. Also unlawful was the statement on her PIP that "[t]his form is strictly confidential and is not to be shared with any other employees."[4]

Some of the Employer's Social Media Rules are Unlawful

The Charging Party alleges that the Employer's social media policy contains unlawful provisions.

An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule would "reasonably tend to chill employees in the exercise of their Section 7 rights."[5] The Board has developed a two-step inquiry to determine if a work rule would have such an effect.[6]

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to argue that the Employer's treatment of the Charging Party was based on an unlawful policy.

[4] *See, e.g., Reynolds Electric, Inc.*, 342 NLRB 156, 166 (2004) (discussion of wages constitutes protected concerted activity), *quoting Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995). *See also*, *Champion Home Builders*, 343 NLRB 671, 671, 680 (2004), *enforced in relevant part,* 209 Fed.Appx. 692, 2006 WL 3487113 (9th Cir. 2006) (employer violated Section 8(a)(1) by terminating employee for discussing employees' bonuses with his co-workers); *Williams Contracting*, 309 NLRB 433, 438 (1992) (employer unlawfully terminated employees for complaining about wages).

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

[6] *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004).

First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, it will violate the Act only 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]

We conclude that portions of the social media policy the Employer implemented on December 22, 2011, violate Section 8(a)(1) because employees would reasonably construe them to chill Section 7 activity.[8]

> **Respect Privacy. If during the course of your work you create, receive or become aware of personal information about McKesson's employees, contingent workers, customers, customers' patients, providers, business partners or third parties, don't disclose that information in any way via social media or other online activities. You may disclose personal information only to those authorized to receive it in accordance with McKesson's Privacy policies.**

The portion of the rule prohibiting disclosure of personal information about the Employer's employees and contingent workers is unlawful because, in the absence of clarification, employees would reasonably construe it to include information about employee wages and their working conditions.[9] The portion of the rule prohibiting employees from disclosing personal information only to those authorized to receive it is not, in these circumstances, unlawful. An employer cannot require employees to obtain supervisory approval prior to engaging in activity that is protected under the Act,[10] Here, however, the Employer's rule requiring prior approval to dislose

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[7] *Id.*

[8] The Employer maintained an earlier policy that arguably contained unlawful provisions. However, since the Employer has replaced that policy, and the charge includes the December 22 policy, it would not effectuate the purposes and policies of the Act to allege that the prior rules were unlawful.

[9] *See cases cited in* fn.4*, supra.*

[10] *See Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (rule requiring authorization to distribute literature on employee's own time in non-work areas); *Brunswick Corp.*, 282 NLRB 794, 794–95 (1987) (rule requiring

personal information will not prohibit protected disclosures once the Employer removes the unlawful restriction regarding personal information about employees and contingent workers.

> **Legal matters. Don't comment on any legal matters, including pending litigation or disputes.**

The prohibition on employees from commenting on any legal matters, including pending litigation or disputes is unlawful because it specifically restricts employees from discussing the protected subject of potential claims against the employer, including this charge.

> **Adopt a friendly tone when engaging online. Don't pick fights. Social media is about conversations. When engaging with others online, adopt a warm and friendly tone that will encourage others to respond to your postings and join your conversation. Remember to communicate in a professional tone. (For example, is your post written in a way that is appropriate when communicating with a supervisor or customer?) Don't be afraid to be yourself, but do so in an ICARE[11] manner. This includes not only the obvious (no ethnic slurs, personal insults, obscenity, etc.) but also proper consideration of privacy and topics that may be considered objectionable or inflammatory—such as politics and religion. Don't make any comments about McKesson's customers, suppliers or competitors that might be considered defamatory.**

This rule is unlawful for several reasons. It cautions employees against "picking fights," and reminds them to communicate in a "professional tone." It also cautions them to avoid "topics that may be considered objectionable or inflammatory—such as politics and religion." The overall thrust of this rule is to caution employees against online discussions that could become heated or controversial. Discussions about working conditions or unionism have the potential to become just as heated or controversial as discussions about politics and religion. Without further clarification of what is "objectionable or inflammatory," employees would therefore reasonably construe this rule to

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permission to engage in solicitation during non-work times in non-work areas).

[11] The Employer's acronym for Integrity, Customer first, Accountability, Respect, and Excellence.

prohibit robust but protected discussions about working conditions or unionism.[12]

> **Respect all copyright and other intellectual property laws. For McKesson's protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including McKesson's own copyrights, trademarks and brands. Get permission before reusing others' content or images.**

Most of this rule urging employees to "respect all copyright and other intellectual property laws" is not unlawful. Unlike other cases where employers maintained rules that unlawfully prohibited employees from using copyrighted material in their online communications,[13] this rule does not prohibit the use, but merely urges employees to respect the laws. However, the portion of the rule that requires employees to "get permission before reusing others' content or images" is unlawful, as it would interfere with employees' protected right to take and post photos of, for instance, employees on a picket line, or employees working in unsafe conditions.[14]

> **You are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers. McKesson believes that individuals are more likely to resolve concerns about work by speaking directly with co-workers, supervisors or other management-level personnel than by posting complaints on the Internet. McKesson encourages employees**

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[12] *See, e.g. Three D, LLC d/b/a/ Triple Play Sports Bar & Grille,* Cases 34-CA-12915 and 34-CA-12926, Advice Memorandum dated August 3, 2011, at 10 (rule prohibiting "inappropriate discussions" unlawful due in part to lack of limiting terms or examples).

[13] *See, General Motors,* Case 7-CA-53570, Advice Memorandum dated December 20, 2011, at 7-8.

[14] *See, e.g., Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), *enforced,* 976 F.2d 743 (11th Cir. 1992) (employee tape recording at jobsite to provide evidence in a Department of Labor investigation considered protected). *Contrast with Flagstaff Medical Center,* 357 NLRB No. 65, slip op. at 4-5 (August 26, 2011) (holding lawful rule prohibiting employees from taking photographs of hospital patients or property in light of "weighty" privacy interests of hospital patients and "significant" employer interest in preventing wrongful disclosure of individually identifiable health information).

> **and other contingent resources to consider using available internal resources, rather than social media or other online forums, to resolve these types of concerns.**

This rule encouraging employees to "resolve concerns about work by speaking with co-workers, supervisors or managers" is unlawful. An employer may reasonably suggest that employees attempt to work out through internal procedures any concerns they may have over working conditions. However, by telling employees that they should use internal resources rather than airing their grievances online, the rule would have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress from alternative forums.[15]

> **Use your best judgment and exercise personal responsibility. Take your responsibility as stewards of personal information to heart. Integrity, Accountability and Respect are core McKesson values. As a company, McKesson trusts—and expects—you to exercise personal responsibility whenever you participate in social media or other online activities. Remember that there can be consequences to your actions in the social media world—both internally, if your comments violate McKesson policies, and with outside individuals and/or entities. If you're about to publish, respond or engage in something that makes you even the slightest bit uncomfortable, don't do it.**

We conclude that this rule is not unlawful. This section is potentially problematic because it refers to "consequences to your actions in the social media world," and advises that "statements you make while engaging in social media or other online activities could result in civil or criminal liability for you as an individual." These phrases could be interpreted as a veiled threat to discourage online postings, which includes protected activities. However, the phrases are unlawful only insofar as they are an outgrowth of the unlawful rules themselves, i.e., the Employer is stating the potential consequences to employees of violating the unlawful rules. Thus, rescission of the offending rules discussed above will effectively remedy the coercive effect of the potentially threatening statements in this rule.

Finally, we conclude that the Employer's "savings clause" does not cure the otherwise unlawful provisions of the Employer's social media policy. The Employer's new policy contains a savings clause that reads, "National Labor

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[15] *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990).

Relations Act. This Policy will not be construed or applied in a manner that improperly interferes with employees' rights under the National Labor Relations Act." An employer may not rely on a general disclaimer to escape the consequences of maintaining overbroad prohibitions that employees would reasonably interpret to prohibit protected activities; employees would not understand from the disclaimer that protected activities are in fact permitted.[16] Here, the savings clause merely mentions that the policy does not improperly interfere with employee rights under the Act. Although this clause is a helpful addition to the policy, it does not negate the chilling effect of the unlawfully overbroad provisions. Therefore, the ambiguous, overbroad provisions of the Employer's policy are not cured by this vague statement of employee rights.

In sum, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by:

(1) prohibiting the Charging Party from discussing any aspect of her review, including her rating or pay increase, with any other employees;

(2) stating on the Charging Party's PIP that "[t]his form is strictly confidential and is not to be shared with any other employees;"

(3) Maintaining the following rules in its social media policy:

(a) the rule prohibiting disclosure of personal information about the Employer's employees and contingent workers;

(b) the rule prohibiting employees from commenting on any legal matters, including pending litigation or disputes;

(c) the rule encouraging employees to adopt a friendly tone when engaging online, avoid picking fights, communicate in a professional tone, and avoid topics that may be considered objectionable or inflammatory—such as politics and religion;

(d) the rule requiring employees to "get permission before reusing others' content or images;" and

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[16] *Ingram Book Co.*, 315 NLRB 515, 516 (1994) (finding employer maintenance of a disclaimer that "[t]o the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law" did not salvage the employer's overbroad no-distribution policy); *McDonnell Douglas Corporation*, 240 NLRB 794, 802 (1979); *Ingram Book Co.*, 315 NLRB at 516 n.2 ("Rank-and-file employees do not generally carry law books to work or apply legal analysis to company rules . . . and cannot be expected to have the expertise to examine company rules from a legal standpoint"); A*llied Mechanical*, 349 NLRB at 1077 fn.1, then Member Kirsanow concurring ("[t]he problem with this release, as the judge observed, is that it assumes employees 'are knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion' of the release").

(e) the rule encouraging employees to "resolve concerns about work by speaking with co-workers, supervisors or managers."

The Region should dismiss all other allegations, absent withdrawal.

/s/
B. J. K.