From: (b) (6), (b) (7)(C)
To: Silverman, Joanna; Karmol, Erikson C.; Pierce, Danielle M.; Ochoa Diaz, Juan C.; Ta, Lynn
Cc: Compton, Kayce R.; Lussier, Richard; Dodds, Amy L.; Walters, Kimberly; Shorter, LaDonna
Subject: Cardenas Market #7, 31-CA-316331, Case Closing Email
Date: Monday, March 3, 2025 2:27:29 PM

This case was submitted for Advice regarding whether the Employer violated Section 8(a)(1) when it terminated the Charging Party for recording a conversation with (b) (6), (b) coworker without the coworker's knowledge. We conclude that the Charging Party was engaged in concerted activity for mutual aid and protection when (b) (6), (b) recorded (b) (6), (b) coworker, but that (b) (6), (b) conduct lost (b) (6), (b) the protection of the Act and therefore (b) (6), (b) termination did not violate the Act.

Background Facts

Prior to (b) (6), (b) termination, the purported Discriminatee (Discriminatee) worked for the Employer, a supermarket chain, as a (b) (6), (b) (7)(C). Shortly after starting (b) (6), (b) job, the Discriminatee and (b) (6), (b) coworker (Coworker 1) began discussing the fact that a (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) was sexually harassing them both. On (b) (6), (b) (7)(C), 2022, Coworker 1 complained to the Employer's human resources department about the (b) (6), (b) (7)(C) conduct. (b) (6), (b) (7)(C) was placed on leave on (b) (6), (b) (7)(C), and shortly thereafter a human resources representative (HR Representative) reached out to the Discriminatee as part of (b) (6), (b) investigation into Coworker 1's complaint. Initially concerned about retaliation, the Discriminatee denied experiencing any harassment, but after Coworker 1 encouraged (b) (6), (b) to divulge the (b) (6), (b) (7)(C) inappropriate conduct, the Discriminatee did so. On (b) (6), (b) (7)(C), 2023, the Employer terminated the (b) (6), (b) (7)(C) after concluding that (b) (6), had engaged in inappropriate conduct toward the Discriminatee and Coworker 1.

Shortly after the (b) (6), (b) (7)(C) was placed on leave, the Employer (b) (6), (b) (7)(C) manager (Manager 1) (b) (6), (b) (7)(C) Immediately, both the Discriminatee and Coworker 1 noticed that Manager 1 was treating them harshly. For example, (b) (6), (b) often sent them home early, causing them to lose hours, and (b) (6), (b) was unfairly critical of them. At various points, the Discriminatee and Coworker 1 discussed the possibility that Manager 1 was retaliating against them because of their complaints about the (b) (6), (b) (7)(C). They also noticed a change in behavior from a different store manager (Manager 2).

In (b) (6), (b) (7)(C) 2023, the Discriminatee went out to dinner with another coworker (Coworker 2), and they discussed what had happened over the previous few months with the (b) (6), (b) (7)(C). At some point during the dinner, Manager 2 (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) called Coworker 2. Coworker 2 answered the call and, without informing Manager 2 that the Discriminatee was present, put the call on

speakerphone. Coworker 2 asked Manager 2 if [redacted] knew what had happened to the [redacted], and [redacted] responded that [redacted] could not speak about it. However, [redacted] then proceeded to tell Coworker 2 that [redacted] should be careful with the Discriminatee because, although [redacted] had the face of an innocent person, [redacted] was dangerous. [redacted] stated further that it was the Discriminatee and Coworker 1's fault that the [redacted] had been fired, and that the Employer was going to bring in someone [redacted] who was tough so that the Discriminatee and Coworker 1 would calm down.

The Discriminatee shared with Coworker 1 what Manager 2 said over the phone during dinner, but the two were concerned that they did not have any evidence to support their contention that they were being retaliated against. Thus, the Discriminatee and Coworker 1 decided to have lunch with Coworker 2, ask [redacted] about Manager 2, and record [redacted] without [redacted] knowledge. During this lunch, which occurred around [redacted] 2023, the Discriminatee asked Coworker 2 to tell Coworker 1 what Manager 2 had said about them during the dinner a few weeks prior, and Coworker 2 did so. The Discriminatee secretly recorded the conversation.

Around this same time, Coworker 1 made a complaint to the HR Representative about Manager 2.[1] As part of the investigation into that complaint, the Discriminatee spoke to the HR Representative on several occasions. During these conversations, the Discriminatee shared what Manager 2 had said over the phone during [redacted] dinner with Coworker 2. [redacted] also disclosed that [redacted] and Coworker 1 had recorded Coworker 2 during lunch to document evidence about Manager 2. In response, the HR Representative said that it would have been better if the Discriminatee had recorded Manager 2 directly.

On [redacted], 2023, the Discriminatee was called into Manager 1's office. The HR Representative was present and was the only one to speak during the meeting. The HR Representative said that [redacted] had been investigating what the Discriminatee had told [redacted] about Manager 2 and said that the Employer was going to make sure that what Manager 2 had said about the Discriminatee was not going to happen again. The HR Representative then said that they had made the decision to terminate the Discriminatee. The Discriminatee asked for an explanation and the HR Representative said that it was because the Discriminatee had violated an Employer policy but would not say which one. At some point during this meeting, however, the HR Representative did mention that the Discriminatee had made a recording of a conversation with Coworker 2.

At the time, the Employer maintained written "Standards of Conduct." The document

lists examples of "infractions of rules of conduct" that the Employer claims could result in disciplinary actions, including termination of employment. Two of the approximately forty-three examples listed are: "[f]ailure to comply with all federal, state, and local regulations"; and "[r]ecording conversations, phone calls, images, or Company meetings with any recording device, or capturing videos or images using cellular telephones, cameras, and other similar devices without prior approval."[2]

The Employer claims it terminated the Charging Party because [redacted] recorded Coworker 2 without [redacted] consent in violation of both state law and the Employer's no recording policy. As part of its investigation, the HR Representative disclosed the existence of the recording to Coworker 2, and [redacted] was distressed to learn [redacted] had been secretly recorded. Thus, the Employer claims that it had to "balance the interests of all of its employees" in making its decision to terminate the Discriminatee.

Analysis

Where an employee is disciplined for union or other Section 7 activity, the employer's liability will turn on whether the employee's conduct was "so egregious" as to lose the employee the protection of the Act. *See Lion Elastomers LLC*, 372 NLRB No. 83, slip op. at 2 (2023) (returning to "setting-specific standards" for analyzing whether an employer was nonetheless privileged to discipline an employee for union or other Section 7 activity), *vacated and remanded,* 108 F.4th 252 (5th Cir. 2024). More specifically, "under Board law, an employee who makes an audio or video recording in the workplace may be engaged in activity protected by Section 7 of the Act depending on the facts and circumstances of a particular case." *Starbucks Corp. d/b/a Starbucks Coffee Co.*, 372 NLRB No. 50, slip op. at 6 (2023); *accord AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 4 (2021); *see also ADT, LLC*, 369 NLRB No. 23, slip op. at 1 n.3 (2020) (finding, under the facts and circumstances presented, that employees who recorded captive audience meeting were engaged in protected union activity and their conduct "did not lose the protection of the Act"); *Whole Foods Market, Inc.*, 363 NLRB 800, 802 (2015) ("Photography and audio or video recording in the workplace . . . are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present.") The Board has rarely found that employee recordings for mutual aid and protection lost the protection of the Act. *See, e.g., Starbucks Corp.*, 372 NLRB No. 50, slip op. at 6 (noting that "workplace recordings, often covert, have been an essential element in vindicating employees' Section 7 rights"). However, the Board has suggested that certain factors could weigh against protection such as where the recording violated state law and a workplace rule, *see Hawaii Tribune-Herald*, 356 NLRB 661, 661 (2011), or where the recording directly targeted an

employee as opposed to a supervisor, *see Starbucks Corp. d/b/a Starbucks Coffee Co.*, 372 NLRB No. 102, slip op. at 4 (2023) (on motion for reconsideration).

Here, the Discriminatee and Coworker 1 were acting in concert when they decided to record Coworker 2 talking about what Manager 2 said about them. *See, e.g., Phillips 66 Co.*, 373 NLRB No. 1, slip op. at 1 n. 2 (2023) (affirming judge's finding that employees were engaged in concerted activity when they made the decision, together, to photograph cars in the employer's parking lot). Further, the concerted activity was for mutual aid and protection given the two employees were concerned about documenting workplace issues including purported retaliation by managers. *See, e.g., Whole Foods Market, Inc.*, 363 NLRB 800, 802 (2015) (noting that employees engage in conduct protected by the Act when they "record[] evidence to preserve it for later use in administrative or judicial forums in employment-related actions"). Thus, the Employer's liability turns on whether the Discriminatee's conduct in recording Coworker 2 was so egregious as to lose [redacted] the protection of the Act.

We find, under all the circumstances, that the Discriminatee's conduct lost [redacted] the protection of the Act. Critically, the Discriminatee surreptitiously recorded [redacted] coworker, rather than a manager, which weighs strongly against protection because doing so implicates another employee's rights.[3] *Cf. Starbucks*, 372 NLRB No. 102, slip op. at 4 (declining to find that employee lost the protection of the Act under the circumstances because employee likely could not have avoided "incidentally" recording persons other than managers). At the time of the Discriminatee's disclosure, the Employer explicitly noted that it would have been better if the Discriminatee had recorded Manager 2 directly, rather than recording another employee, suggesting that its concerns about balancing employees' interests are not merely post-hoc rationalization. Indeed, a reasonable employee under the circumstances would find learning that they were recorded upsetting, and Coworker 2 *was* very upset. *See, e.g., Verizon Wireless,* 349 NLRB 640, 642 (2007) (noting that the severity of the conduct is an objective standard but that other employee's reaction, "although not determinative, provides some measure of its seriousness"). The reasonableness of Coworker 2's response is bolstered by the fact that the Discriminatee's conduct arguably violated state law, with the law providing the backdrop for Coworker 2's expectation of privacy. And while the Board has suggested that state law restricting surreptitious recording will be preempted where the recording constitutes Section 7 activity, *see Starbucks*, 372 NLRB No. 50, slip op. at 7, the existence of a state law nonetheless is one of the circumstances impacting the egregiousness analysis, *see id.* at n. 20 (citing and failing to overrule cases in which the Board has discussed "the presence or absence of potentially applicable state law" as part of the loss of protection analysis). Finally, the Employer had a rule that

complemented state law by explicitly restricting unapproved recording in the workplace, which also weighs against protection.[4] Thus, under all the circumstances, the Discriminatee's conduct lost (b) (6), (b the protection of the Act, and the Employer was privileged to terminate (b) (6), (b for that conduct.

This email concludes this case in Advice. Please reach out with any questions.

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[1] It's unclear whether this complaint directly alleged retaliation by Manager 2, or whether it was solely focused on the purported intimate relationship between Manager 2 and the Employee.

[2] We note there is no charge alleging this work rule violates the Act. Further, during the Region's investigation, the Employer amended its "Standards of Conduct" to add a catchall below the list of prohibited conduct which clarifies that "[n]othing contained herein will preclude a Team Member from engaging in conduct that is protected by Section 7 of the National Labor Relations Act."

[3] Indeed, such conduct has the potential to undermine the solidarity principle underlying Section 7. *See Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB 151, 155-56 (2014) (discussing the solidarity principle).

[4] We note that, prior to the Employer's addition of a Section 7 carveout to its "Standards of Conduct," this work rule likely violated the Act under extant law, *see Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 18-19 (2023), and thus the instant case would also implicate the Board's standard from *Continental Group, Inc.*, 357 NLRB 409 (2011), for analyzing the lawfulness of discipline based on overbroad work rules. However, cases applying *Continental Group* have clarified that the Board will fail to find a violation where the employee engaged in "gross" or "egregious" misconduct. *See, e.g., Butler Medical Transport, LLC*, 365 NLRB 1095, 1099 (2017) (finding termination did not violate the act because employee's social media post, even if a public statement about safety of ambulance, was "maliciously false"); *Food Services of America*, 360 NLRB 1012, 1012 n.4 (2014) (no violation where employee engaged in "egregious" misconduct), *vacated on other grounds*, 365 NLRB 820 (2017); *Flex Frac Logistics*, 360 NLRB 1004, 1005 (2014) (finding discipline imposed for overbroad confidentiality rule lawful given employee engaged in "gross misconduct," although conduct arguably implicated concerns underlying Section 7 rights). Accordingly, a *Continental Group* analysis would also turn on the egregiousness of the Discriminatee's conduct and would lead to the same result.

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

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