ATTACHMENT C
Illustrative List of Social Media Concepts and Citations

March 6, 2013

By

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1The views expressed are solely those of the author and should not be attributed to the author’s firm or its clients.
Illustrative List of Social Media Concepts and Citations

Set forth below are some citations that might be of interest in terms of providing information. They relate to predictions and evaluations.

I. United States Supreme Court decisions in chronological order:

A. *O'Connor v. Ortega*, 480 U.S. 709 (1997) (public employers' intrusions on constitutionally privacy interests of governmental employees—for non-investigatory work-related purposes, as well as for investigations of work-related misconduct of reasonableness—should be judged by the standard of reasonableness)

B. *City of Ontario v. Quon*, (130 S.Ct. 2619 (2010) (City's review of officer's text message was reasonable and did not violate Fourth Amendment rights)

C. *United States v. Jones*, ___ U.S. __ (Case No. 10-1259) (January 23, 2012) (government's attachment of GPS device to vehicle and its use to monitor movements constituted a search under the Fourth Amendment; Justice Alioto, in a concurring opinion, at p. 12 noted: “In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory but practical. Traditional surveillance for an extended period of time was difficult and costly and therefore rarely undertaken.” Justice Alioto also noted “New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile” and technology can change “privacy expectations.”)

D. *Clapper etc., et al. v. Amnesty International etc., et al.* - U.S.- (Case No. 11-1025) (February 26, 2013) (rejecting standing of alleged Plaintiffs - human rights, labor legal and media representatives -- that they were subject to First and Fourth Amendment Violations due to Foreign Intelligence Surveillance Act monitoring of their communications).


A. Electronic Communications Privacy Act, 18 U.S.C. 2510-22

B. Stored Communications Act, 18 U.S.C. 2701

III. Agency Guidelines

A. Federal Trade Commission Guidelines (Attachment A)

B. Natural Labor Relations Act—NLRB cases and NLRB Memoranda of interest
(1) *Timekeeping Systems, Inc.*, 323 NLRB No. 30 (1997) (email as concerted activity)

(2) *Martin Luther Memorial Home*, 343 NLRB No. 5 (2004) (balancing confidentiality against Section 7 expression rights of employees)

(3) *NLRB Advice Memorandum re Facebook Postings* (Attachment B)

(4) *American Medical Response of Conn. 34-CA-12576*, NLRB Complaint (complaint involving a critical Facebook posting as alleged concerted activity).

(5) *NLRB Advice Memorandum for Twitter* (Attachment C).

(6) *NLRB General Counsel’s Memorandum* dated May 30, 2012 (Attachment D).

(7) NLRB Decision and Order in *Costco v. United Food, Local 371*, Case No. 34-CA-012421 dated September 7, 2012 (Attachment E).

(8) *Karl Knauz Motors, Inc. d/b/a Knauz BMW etc.*, 358 NLRB No. 164 (September 28, 2012) (rule to prevent injury to image or reputation of employer violated Section 7).

(9) *Hispanics United of Buffalo Inc.*, 359 NLRB No. 37 (Dec. 14, 2012) (employer violated Section 7 by terminating employees due to their Facebook comments in response to a co-workers criticisms of their job performance).

(10) NLRB, Division of Advice, *The Boeing Company*, No. 19-CA-088157. See *infra* (V. Social Media Mosaic: Using Your Problems as Solutions).

C. Department of Labor iTunes application which allows workers to keep track of their own hours worked and wages owed (Attachment F).

### IV. Court Decisions of Interest

A. *Blakey v. Continental Airlines*, 751 A. 2d. 538 (2000) / Jurisdiction: N.J. Sup. Ct. (employee's complaint about co-employees' defamatory posting on employer's electronic bulletin board outside the work area was related to workplace and the result may impose a duty on employer to remedy harassment)

B. *Konop v. Hawaiian Airlines*, 302 F.3d 868 (2001) / Jurisdiction: 9th Cir. (material issue as to whether employee's development of personal website was protected activity under the RLA and precluded a summary judgment)

C. *Mackelprang v. Fidelity Nat'l Title*, 2007 WL 119149 (Jan. 9, 2007) (permitting discovery of mySpace private messages)
D. *Held v. American Airlines*, 2007 U.S. Dist. Lexis 7665 (Jan. 31, 2007) / Jurisdiction: N.D. Ill. ("There is no ‘well-defined and dominant’ public policy protecting hate speech, even when uttered in the context of union activity. Under the National Labor Relations Act (‘NLRA’) and the RLA speech relating to union activity loses statutory protection if it is vulgar, offensive, abusive, or harassing"; involving an improper posting on a union password protected website forwarded by a union member to management, resulting in the posting employee’s termination)


F. *United Air Lines, Inc. v. ALPA*, 563 F.3d 257 (7th Cir. 2009) (analyzing e-mail evidence)


Attachment A
U.S. Code of Federal Regulations

TITLE 16 C.F.R. — Commercial Practices

CHAPTER 1 — FEDERAL TRADE COMMISSION

SUBCHAPTER B — GUIDES AND TRADE PRACTICES RULES

PART 255 — GUIDES CONCERNING USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

16 C.F.R. § 255.2 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Precision inconsistencies with those Guides may result in corrective action by the Commission under Section 5 of the Act. After investigation, the Commission has reason to believe that the prerequisites fail within the scope of conduct declared unlawful by the statute. The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement in issue.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the user, application, benefits, or other identifying personal characteristics of the user) that contains or is likely to be understood by the audience to contain, representations or opinions, beliefs, findings, or experiences of a party other than the advertising advertiser, even if the views expressed by that party are identical to those of the advertising advertiser. The party whose opinions, beliefs, findings, or experiences the message appears to reflect will be called the endorser and may be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used interchangeably to cover both terms and situations.

(d) For purposes of this part, the term product includes any product, service, company, or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to that ordinarily possessed by individuals generally engaged in the field of the expert's specialty.

Example 1: A film critic's review of a movie is excerpted in an advertisement. Where so used, the review meets the definition of an endorsement because it was prepared by critics as a statement of the critic's opinion and not those of the film producer, distributor, or exhibitor. Any alteration in or deletion from the text of the review that does not sufficiently reflect its substance would be a violation of the standards set by this part because it would distort the endorser's opinion. (See § 255.10(b).)

Example 2: A TV commercial duped two women in a supermarket buying laundry detergent. The women are not identified outside the context of the advertisement. Onecommercial makes a false claim to consumers except as a spokesperson for the advertising firm company states the drug's ability to deliver fast and lasting pain relief, the two women to speak, are not on the basis of the drug. Commercial.
personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver’s personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

Example 3: A television advertisement for a particular brand of golf balls shows a prominent and well-known professional golfer gauging numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

Example 4: An advertisement for a home fitness system is hosted by a well-known entertainer. During the introduction, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer’s views.

Example 5: A television advertisement for a household video system features a well-known female comedian and a well-known male baseball player engaging in high-handed banter about products each one intends to purchase for the other. The comedian says that she will buy him a brand X, portable, high-definition television as he once finally saw the video zone. He says that he will get her a brand Y television so she can make jokes with all the fruit and vegetables thrown at her during her performance. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.

Example 6: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes to her personal blog that she changed it and has made her dog happier and healthier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guidelines.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because she then evaluates the product and reviews it and that it was evaluated by the consumer. Assume that it was evaluated by the consumer. Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guidelines.

15 C.F.R. \(\S 255.1\) General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experiences of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptively misleading to any person.

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement is otherwise written in that way. This requirement may be satisfied by any reasonable interpretation of the endorsement message, provided that it is not deceptively misleading to any person.

15 C.F.R. \(\S 255.2\)

(c) The advertisement must state the name, title, and other relevant information about the endorser, unless the endorser is a public official, or the advertisement is otherwise written to state the name of the endorser.

(d) The advertisement must state the nature of the relationship between the endorser and the promoter of the product, if any.

(e) The advertisement must state the period of time during which the endorser has used the product, if any.

(f) The advertisement must state the period of time during which the endorser has been paid or has been otherwise compensated for the endorsement, if any.

(g) The advertisement must state the conditions under which the endorser has been compensated for the endorsement, if any.

Example 1: A building contractor states in an advertisement that he uses the advertiser's exterior house paint because of its reasonable quick-drying properties and durability. This endorsement must comply with the pertinent requirements of Section 255.3 (Report Endorsements). Subsequently, the advertiser may continue to use the paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of thepaint, the contractor must notify the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

Example 2: A television advertisement portrays a woman seated at a desk on which are two unmarked computer keyboards. An announcer says, "We asked X on administrative reasons. For over ten years, to copy these five unmarked keyboards and tell us which one she liked best.**" The advertisement portrays X typing on both keyboards and then picking the advertiser's brand. The announcer asks X why, and X gives her reasons. This endorsement would probably not represent that X necessarily uses the advertiser's keyboard at work. In addition, the endorsement also may be required to meet the standards of Section 325.3 (Endorsements).

Example 3: An ad for an aortic stent features a cardiologist who claims that the product is "efficiently proven" to work. Before giving the endorsement, she reviewed the scientific literature in question, which indicates that the device was significantly better than other existing devices. The cardiologist is subject to liability for the false statements she made in the advertisement. The cardiologist is also subject to liability for misrepresentations made through the endorsement.

Example 4: A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks vegetables in thirty minutes. During the shooting of the infomercial, the celebrity prepared five attempts to cook vegetables using the bag. In each attempt, the vegetables were undercooked after thirty minutes and required thirty minutes of cooking time. In the commercial, the celebrity gives an uncooked chicken in the oven roasting bag and places the bag in one oven. The chicken is roasted:

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bag from a second even, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for representations made through the endorsement.

Example 5: A skin care product's advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's product on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claims, in her review the blogger writes that she has cured severe acne and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations from the condition. The blogger is also subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. (See § 755.5.)

In order to limit its potential liability, the advertiser should assure the blogging service provides guidance and training to the bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

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16 C.F.R. § 255.3 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purposes depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly. A, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement continuing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the central or key attribute of the product or service in general will be achieved with the advertised product or service. Therefore, an advertiser should possess and objectively test and produce substantiation to support such representations, if the advertiser does not have substantiation that relies upon adequate substantiation for that representation. If the advertiser does not have substantiation that relies upon adequate substantiation for that representation, the advertisement the consumers' experience is representative of what consumers will generally achieve with the advertised product.

(c) Advertisements presenting endorsements by what are represented, directly or by implication, to be "actual consumers" should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The ad relies upon adequate substantiation for the representation. The ad's reliance on adequate substantiation for the representation is likely to be deceptive unless the advertisement has adequate substantiation that new users typically will experience results similar to those experienced by the testimonial.

Example 2: An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company's heat pump in their home, their monthly utility bills went down by $100, $125, and $150, respectively. The ad relies on adequate substantiation for the representation. The ad's reliance on adequate substantiation for the representation is likely to be deceptive unless the advertisement has adequate substantiation that new users typically will experience results similar to those experienced by the testimonial.

Example 3: An advertisement for a cholesterol-lowering product features an individual who claims that his

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serum cholesterol went down by 120 points and does not manifest having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this information. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not state that the average change is 15%. Moreover, the advertisement would be deceptive if the advertiser does not state that the average change is 15%.

Example 4: An advertisement for a weight-loss product features a former obese woman, who says in the ad, “Every day, I drank 3 WeightAway shakes, ate only raw vegetables, and exercised rigorously for six hours at the gym. By the end of six months, I had gone from 220 pounds to 140 pounds.” The advertisement accurately describes the woman's experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway daily, ate only raw vegetables, and exercised to the level to which the woman did. Because the consumer directly describes the limited and truly exceptional circumstance under which she achieved her results, the ad is not likely to mislead consumers who weigh substantially less or use WeightAway under less extreme circumstances who have the same results. If the advertisement merely states that the consumer lost 110 pounds in six months, the advertisement would be deceptive. The advertiser must also make it clear that WeightAway is an effective weight loss product.

Example 5: An advertisement features “before” and “after” pictures of a woman who says in the ad, “I lost 50 pounds in 6 months with WeightAway.” The ad is likely to convey that her experiences are representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what results they can expect to achieve, and the circumstances under which such results are likely to be achieved (e.g., “most women who use WeightAway for six months lose at least 15 pounds”).

Example 6: An advertisement features the same pictures but the testimonials simply state, “I lost 50 pounds with WeightAway,” and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (e.g., “most women who use WeightAway lose 15 pounds”).

Example 7: An advertisement presents the results of a poll of consumers who have used the advertiser's shakes as well as their own results. The results purport to show that their shakes work as well as their own results. The ad is likely to convey that their shakes work as well as their own results. If the results are representative of the overall population of consumers who have used the shakes, the ad should disclose that the results are not necessarily representative of the overall population of consumers who have used the shakes. If the results are not representative of the overall population of consumers who have used the shakes, the ad should disclose that the results are not necessarily representative of the overall population of consumers who have used the shakes.

Example 8: An advertisement purports to portray a “hidden camera” situation in a crowded suburb at a beach time. A spokesperson for the advertiser is a series of variant stories for the audience for their sponsorship. The spokesperson's opinions of the ad are not displayed on the screen, and even though some of the actual opinions in the audience are misidentified during the ad, the testimonials conveyed to consumers may be misleading.

Example 9: An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. Those individuals are actual consumers of the movie. The advertisement does not need to have substantiation that expressing their personal views about the movie. The advertisement is not likely to convey a typical message.

If the motion picture studio had approached these individuals outside the theater and offered them five tickets if they would talk about the movie to their friends, that arrangement would be clearly and conspicuously disclosed.

[A10] The Commission noted the communication of advertisements containing technicolor that clearly and prominently disclosed the statements of the opinion of at least five people. However, the Commission also noted that the statements of the opinion of at least five people are not necessarily representative of the overall population of people who have seen the movie. The variety and number of people who have seen the movie is not likely to be the subject of opinion of only one person, this advertisement is not likely to convey a typical message.

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endorser's experience in what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a few enumerated notions, the Commission notes that an advertiser possessing reliable empirical data demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.


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16 C.F.R. 255.1 - Exempt endorsements

16 C.F.R. §255.1 An exempt endorsement

16 C.F.R. §255.200 (c) Although the expert may, in endorsing a product, take into account features not within his or her expertise (e.g., matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer's use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product, at least as extensive as one that the average competent consumer would normally use in order to support the examinations presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison, such comparison must have been included in the expert's evaluation; and as a result of such comparison, the expert must have concluded that, with respect to those features or characteristics, the expert's product is superior to other products with respect to any such features or characteristics, the expert must have found such superiority. (See §255.100 regarding the liability of endorsers)

Example 1: An endorsement of a particular automobile by one described as an "engineer" implies that the endorser's professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: An endorsement of a hearing aid is simply referred to as "Doctor" during the course of an advertisement. This ad likely implies that the endorser is a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical "doctor" (e.g., an individual with a PhD in a field other than audiology) is unlikely to endorse the product, but if the endorser is referred to as "doctor," the advertisement must make clear the nature and limits of the endorser's expertise.

Example 3: A manufacturer of automobile parts advertises that its products are approved by the "American Institute of Science." From its name, consumers would infer that the "American Institute of Science," a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing it by its standards. If the American Institute of Science is not a bona fide independent testing organization (e.g., it is owned by an automobile parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent body, if the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

Example 4: A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has prepared each dose of the product separately. This package from the manufacturer is not generally available to the public. Under these circumstances, the endorsement would be deceptive because the basis for the hospital's choice — convenience of packaging — is neither relevant nor available to consumers, and the basis for the hospital's decision is not disclosed to consumers.

Example 5: A woman who is identified as the president of a commercial "home cleaning service" plates in a...
television advertisement that the service uses at least one brand of cleaner, instead of leading competitors.

It has tried, because of this brand's performance, because cleaning services extensively use cleaners in the

business, the ad likely conveys that the president has knowledge superior to that of ordinary

consumers. Accordingly, the president's statement will be deemed to be an expert endorsement. The service

must, of course, actually use the endorsed cleaner. In addition, because the advertisement implies that the

service has experience with a reasonable number of leading competitors to the advertised cleaner, the

decision service has experience with a reasonable number of leading competitors to the advertised cleaner.

The service must, in fact, have such experience, and, on the basis of its expertise, it must have determined

that the cleaning ability of the endorsed cleaner is at least equal (or superior, if such is the net impression

conveyed by the advertisement) to that of leading competitors' products with which the service has had

experience and which remain reasonably available to it. Because in this example the cleaning services

presumably no mention that the endorsed cleaner was "chose," "selected," or otherwise evaluated in

addition to the advertisement thus, the end user could reasonably infer that the endorsement would likely be

descriptive or comparative to the advertised cleaner.

Example 5: A modified doctor states in an advertisement for a drug that the product will safely allow

consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were mainly letters

from satisfied consumers or the results of a random study, the endorsement would likely be deceptive

because those materials are not what others with the same degree of expertise would consider adequate to

support the conclusion about the product's safety and efficacy.

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40 C.F.R. § 235.4 Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization’s endorsement must be reached by a process sufficiently broad to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if the endorsement is expressed as being expert, then, in conjunction with a proper recitation of the expertise in evaluating the product under 235.3 (expert endorsement), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products. (See 235.1 (a) regarding the liability of endorsers.)

Example: A Nationwide cellular advertiser has its product endorsed by an other cellular association. Because the association’s endorsement would be regarded as expert with respect to judging warranties, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of attributes in general and not designed with the unique features of the advertised attributes in mind.

[40 FR 23128, May 21, 1975; 40 FR 53125, Oct. 15, 2000]

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When there is a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorser (e.g., the endorser is not reasonably expected by the audience, such endorsement must be clearly disclosed. For example, when an endorser who appears in a television commercial is an actor or celebrity, any representation in the advertisement as an expert or in a position of authority is not disclosed, and the consumer should not be misled to believe that the endorsement is an endorsement based on personal experience. In the example, if the endorser has been paid for the endorsement, the consumer should know this information to avoid being misled.

Example 1: A drug company sponsors research on a product by an outside organization. The drug company determines the overall subject of the research (e.g., a new drug) to test the efficacy of a newly developed product and pays a substantial share of the expenses of the research project. However, the research organization determines the protocol for the study, and the company is responsible for conducting it. A subsequent advertisement by the drug company mentions the research organization and results as the "findings" of the research organization. Although the study is controlled by the outside research organization, the weight, consensus, or approval of the research should not be disclosed. The advertisement for the drug should disclose that the research was paid for by the drug company.

Example 2: A film-star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with §225.1 but regardless of whether the star's compensation for the endorsement is disclosed, the consumer should be aware of the compensation. The advertising practices should not mislead the consumer.

Example 3: During an appearance on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the ratings. She responds by attributing the improvement in her game to the fact that she is eating the best food. The company that manufactures the food and pays the host directly is responsible for disclosing this endorsement relationship.

Assume that instead of talking about the athlete in a television interview, the tennis player talks about her recovery — mentioning the athlete by name — on social networking sites that allow her to reach a wide audience. If the athlete does not want to give information about her condition, the consumer should be informed of the connection. If the athlete is a professional, the consumer should be informed of the compensation received by the athlete.

Assume that during a television interview, the athlete is wearing clothing bearing the insignia of an athlete's clothing line. The company's clothing line is advertised in the interview. However, the athlete herself does not endorse the product. If the company's clothing line is not available in the store, the information should be disclosed. If the information is not disclosed, the consumer should be informed that the athlete is not endorsing the product.
Example 4: An ad for an anti-aging product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the last one. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are entitled, however, to expect that the physician receives a percentage of the gross product sales or that he owns part of the company, and either of these facts would likely materially affect the weight or credibility of the physician's endorsement. Accordingly, a disclosure should clearly and conspicuously disclose such a connection between the company and the physician.

Example 5: A retail patron at a restaurant, who is neither known to the public nor presented as an expert, is shown at the counter. He is asked for his "assessment" opinion of a new food product served to him. The restaurant owner insists that the diner was not paid for this "assessment" only after interviews were completed. The customer had no reason to know or believe that his response was being recorded for use in an advertisement. Even if the patron were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

Example 6: An influential producer wants to include consumer endorsements for an automotive additive product in her commercial, but knowing the product has not yet been sold, there are no consumer users. The producer's staff reviews the profiles of individuals interested in working as "testers" in commercials and identifies several who are interested automobiles. The actors are asked to use the product for several weeks and then report back to the producer. The producers ask them to use the product for several weeks and then report back to the producer. The producers ask them to use the product for several weeks and then report back to the producer. The producers ask them to use the product for several weeks and then report back to the producer. The producers ask them to use the product for several weeks and then report back to the producer. The producers ask them to use the product for several weeks and then report back to the producer. 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Attachment B
The Region submitted these cases for advice as to whether the Employer: (1) violated Section 8(a)(1) and (3) by disciplining employees based on their Facebook postings and reporting those postings to state agencies; (2) violated Section 8(a)(1) by engaging in unlawful surveillance or creating the impression of surveillance by its review of Facebook pages and emails provided to it by other employees; (3) violated Section 8(a)(5) by unilaterally implementing an in-house anger management counseling program; and (4) violated Section 8(a)(1) by informing employees that it was providing their personal contact information to the NLRB.

We conclude that the Employer did not violate the Act by disciplining employees and reporting them to state regulatory agencies based upon postings that did not involve protected concerted activity or union activity. Moreover, the Employer did not engage in surveillance or unlawfully create the impression of surveillance because it made employees aware that their fellow employees had provided the Facebook postings and emails to the Employer. In addition, the Employer did not violate Section 8(a)(1) by informing employees that it was releasing their personal contact information because the Employer indicated it was complying with a Board request for the information. However, the Region should issue a Section 8(a)(1) and (5) complaint, absent settlement, based upon the Employer's unilateral implementation of an in-house anger management counseling program.
The Monmouth Ocean Hospital Service Corporation (MONOC or the Employer) is a non-profit company comprised of 19 New Jersey acute-care hospitals. MONOC also operates emergency medical services, including paramedic services, helicopter inter-facility and 911 services, mobile critical care services, basic life support inter-facility and 911 services, and an emergency medical services education department. On June 25, 2007, the Professional Emergency Medical Services Association of New Jersey (Union) was certified to represent a unit of MONOC's emergency medical services employees. The parties have not yet reached an agreement. Their first contract but have not yet reached an agreement. Since December 2007, the Union and the Employer have filed numerous unfair labor practice charges; they withdrew many of these charges after entering into two non-binding settlements. The Union has also filed complaints with other federal and state agencies and three employees, including the Union Secretary, have filed a state court lawsuit against MONOC alleging violation of state employment laws. As a result of these actions, OSHA issued a citation against the Employer and proposed a $9,000 penalty. An investigation by the New Jersey Department of Health, Office of Emergency Medical Services (OMES) is pending.

The Employer's Response to Employees Facebook Postings

Acting Union President Deborah Ehling maintains a profile on the social networking website known as Facebook. She uses her Facebook page to communicate information regarding bargaining and other Union activities and to criticize management policies. Only her authorized "friends" can access her postings. These include Chris Dalto, a Union member, and Ken Baker, a Union delegate who represented another employee in the appeal of his termination. Ehling works for MONOC as a registered nurse, and Baker is an EMT and paramedic. Dalto is a paramedic, and Baker is an EMT.

An unidentifiable employee or employees have provided copies of Ehling's Facebook profile pages to management periodically. In June 2009, MONOC Regional Director Andy Caruso was handed printouts of her Facebook page; he passed them on to the Executive Director of Administration, Stacy Quagliana. Senior Vice President and COO Jeff Bahn received them from another manager at about the same time.

1 All dates are in 2009 unless otherwise noted.
Cases 22-CA-29008, et al. - 3 -

Quaglina became concerned about postings that indicated that Ehling, Baker, and Dalton might withhold care if they were personally offended by the patients. She was concerned in particular about the following four postings:

- Ehling's June 7 posting:
  [FOIA Exemptions 6 and 7(C)

- Baker's response:
  [FOIA Exemptions 6 and 7(C)

- Ehling's June 11 posting:
  [FOIA Exemptions 6 and 7(C)

- Dalton's response:
  [FOIA Exemptions 6 and 7(C)

Caruso was concerned about a statement that Ehling [FOIA Exemptions 6 and 7(C)

Shortly after receiving these Facebook printouts, MONOC upper management and attorneys met and agreed to suspend Ehling, Baker, and Dalton with pay, pending a psychological exam to determine if they were fit for duty. The employees were notified of this decision on June 16. Ehling specifically asked a manager how the Employer had obtained the postings, and he told her that a concerned employee had brought them to MONOC's attention. Quaglina sent letters to Ehling, Baker, and Dalton on June 18.
formally advising them of their suspensions due to "disparaging written comments made by you regarding patients and patient care that were brought to our attention."

Meanwhile, on June 17, Employer General Counsel Margaret Keaveny sent letters to the state Board of Nursing and OEMS, along with all the Facebook printouts. She noted that the Employer was investigating the comments that showed "a disregard for patient safety and an attitude at odds with the compassion one usually associates with the nursing profession." She called attention in particular to Ebling's June 11 posting regarding the Holocaust Museum.

In her letter to the OEMS, Keaveny stated that the Employer believed MONOC should take with regard to Ebling. Employer Policy 923 provides that "credible evidence" of a violation of criminal, civil, or administrative law will be "immediately disclosed[d] ... to the appropriate law enforcement or regulatory agency" if deemed necessary after consultation with counsel.

Within two weeks of the suspensions, the psychologist found Ebling, Baker, and Dalton fit for duty. The Employer found that the charts of patients whom Ebling and Baker had also reviewed showed no Dalton had intubated in the past six months and found no problems. (Baker does not perform the intubation procedure.) On July 20, all three received memos to the effect that they had violated MONOC Employee Behavior Policy 109, which states that: "Any conduct that adversely affects the operations of MONOC or MONOC's reputation, or is determined to be offensive to MONOC's employees, is deemed intolerable. This policy applies to employees, management, members, professional colleagues, or the general public, will not be tolerated." Although no similar incidents or violations of this policy would lead to progressive disciplinary procedures.

The Employer submitted the following evidence regarding discipline for comparable employee misconduct:

On July 3, an EMT posted a banner at her post that read: "Be Nice to Me or I May Circle the Block a Few More Times." "Not Nice to Me Or I May Circle the Block A Few More Times." She was suspended with pay pending a psychological evaluation and when she was cleared to return to duty, the Employer gave her ten disciplinary points but stayed her termination because she had no prior discipline and was honest during the investigation. She received harsher
discipline than Ehling, Baker, and Dalton because her breaches were found at the workplace. On the other hand, the Employer did not discipline an employee who posted comments on MySpace (another social networking website) in 2006 that criticized the Employer for failing to give raises and supported the Union campaign because her postings did not interfere with her patient care responsibilities.

On September 14, CMS notified the Employer that the Facebook postings did not provide sufficient evidence that the certified individuals involved were violating CMS rules or failing to meet standards of patient care.

The Employer's Reaction to Ehling's E-mails

Ehling often sent e-mails regarding workplace issues to Union members registered on the Union website. On June 15, MONOC’s labor attorney, John Vreeland, e-mailed the Union’s Attorney, Ray Heineman, asking to discuss two attached e-mails from Ehling to Union members regarding vehicle safety issues and disciplinary memos. In follow-up conversations on June 15 and June 16, Vreeland told Heineman that employees had been forwarding Ehling’s e-mails to managers; those e-mails were accusatory and insulting and suggested that employees should not follow MONOC policy; and this was angering management and adversely affecting contract negotiations.

On August 24, the Employer’s labor attorney again wrote to Union counsel, attaching various Ehling e-mails to Union members, including one that stated “Remember, if MONOC management lips are moving, they are lying.” In his e-mail and a subsequent phone conversation on August 25, Vreeland suggested that Ehling sent these e-mails just prior to scheduled bargaining sessions in order to sabotage those sessions. A similar exchange occurred prior to a bargaining session held October 13, regarding e-mails Ehling sent October 12.

2 There were two other incidents involving the Employer’s observation of employees’ internet communications. In late spring, Caruso saw a picture of Flight Team employee David Aromin in his MONOC flight suit on a website entitled “Down Aromin in his MONOC flight suit.” He forwarded the screen shots to Chief Flight Paramedic Steve Olson, stating that he thought it inappropriate for employees to post photos of themselves in uniform on a website “bashing” volunteers. Then, on June 17, Olson and another manager confronted Aromin’s Facebook page to assure that he had not posted any pictures of himself in uniform. Krot reluctantly
The Employer's Anger Management Counseling Program

In September 2006, managers Caruso, Quagliana, and Robert McClinton had received training and were certified as anger management resolution therapists. In July, MONOC informed the Union during negotiations that it was now providing anger management counseling internally. At about the same time, the Employer required an employee to attend in-house anger management counseling after a second incident of road rage. The Employer claims that it previously used a law firm to provide anger management counseling; the Union disputes that such a program ever existed.

In August, Ehling complained to Behm about the unilateral implementation of an internal anger management counseling program. In particular, the Union believes that the use of managers as counselors is intimidating and could lead to harassment of Union members. Behm responded that the Employer was trying to save money and the use of a trained therapist would not lead to intimidation or harassment. In the fall, Caruso and Quagliana conducted a one-hour course for a unit employee who had received two disciplinary points for using profanity while driving an ambulance.

The Employer's Release of Private Information

On October 2, the Region requested guidance from the Employer in response to several pending charges, including contact information for "educators" employed in the past two years. By letters dated November 9, Quagliana informed the Education Department employees that the Region had requested their names, addresses, and phone numbers and the Employer's attorney had advised that it should comply and release the information. The Employer has an established policy of informing employees that it is releasing personal information anytime that an agency or the Union requests such information. The Union confirms that similar letters were sent in the past when it requested employee information.

ACTION

We conclude that the Region should issue a Section 8(a)(1) and (5) complaint, absent settlement, based upon the Employer's unilateral implementation of an in-house action.
anger management counseling program and dismiss the remaining allegations, absent withdrawal.

Discipline of Employees

The Board has held that an employer’s discipline of an employee based on statements relating to terms or conditions of employment and/or a labor dispute is unlawful. In Valley Hospital Medical Center, the Employer violated Section 8(a)(1) and (3) by suspending an employee for statements regarding patient staffing levels that disparaged the level of patient care because those statements related to terms and conditions of employment and a labor dispute and therefore were protected. The Board determined that the statements at issue were not “so disloyal, reckless, or maliciously untrue” as to lose protection; they were intended “to pressure the Employer to increase staffing rather than to harm the Employer.” Similarly, in Endicott Interconnect Technologies, Inc., the Employer violated Section 8(a)(1) by discharging an employee who criticized the Employer’s new owner in the press for layoffs that left “gaping holes” and stated on a public website that the company was “being tanked by a group of people that have no good ability to manage it.” The Board found the “requisite nexus” between the statements and ongoing labor disputes and determined that the statements were “not so egregious” as to lose the Act’s protection.

On the other hand, the Board has dismissed allegations of a discriminatory discharge based upon an employee’s workplace Internet activity that was not linked to working

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3 See Valley Hospital Medical Center, 351 NLRB 1250, 1252-54 (2007), enfd. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 209 F.3d 1282 (9th Cir. 2000) (discipline based on statements made on website and at press conference; discharge based on statements in flyer distributed to the public); Endicott Interconnect Technologies, Inc., 345 NLRB 448, 450-52 (2005), enfd. 433 F.3d 532 (D.C. Cir. 2006) (discharge based on statements in newspaper article and on newspaper’s public-forum website).

4 Id. at 1252.

5 Id. at 1252-53.

6 345 NLRB at 449.

7 Id. at 450.
conditions. In Amcast Automotive, the employee had searched for information regarding the company purchasing the facility, and the Board held that Section 7 does not extend to employee activities regarding ownership of the employer absent evidence of a “direct impact” on terms and conditions of employment.\(^9\)

Here, the Employer disciplined three employees for Facebook postings that suggested those employees might not provide appropriate care to the Employer’s patients. While other postings on Ehling’s Facebook page clearly involved protected communications regarding terms and conditions of employment and ongoing labor disputes, the specific comments cited by the Employer as the basis of the employees’ suspensions did not involve Section 7 concerns and were in no way related to the postings that did. Moreover, there is no evidence that these employees were treated disparately based upon their union or protected concerted activity. An employee who made similar comments, but at the workplace, was disciplined more severely; an employee who posted comments on MySpace regarding union activity and terms and conditions of employment was not disciplined at all. We therefore conclude that Ehling, Baker, and Dalton were not disciplined for any protected activity and, consequently, their discipline did not violate the Act.

Reports to State Agencies

An employer may violate the Act by reporting employees to state regulatory agencies in retaliation for union or protected activity.\(^10\) There cannot be a violation, however, where an employer reports conduct that was not protected.


\(^9\) Id. at 839.

\(^10\) Nursing Center at Vineland, 314 NLRB 947, 954-56 (1994), enf’d. 790 F.2d 354 (3d Cir. 1986) (employer violated Section 8(a)(1), (3), and (4) by disparately and discriminatorily reporting patient abuse allegations to state agency); Read Memorial Hospital, 265 NLRB 789, 797 (1982) (employer violated Section 8(a)(1) and (4) by refusing discharged nurse’s file to state agency to consider license revocation, in retaliation for her unfair labor practice charge); see also Wergenoen’s Inn, 227 NLRB 1500, 1503-04 (1977), enf’d mem. 588 F.2d 822 (3d Cir. 1978) (employer violated Section 8(a)(1) by threatening to report waitress’s to IRS for underreporting tip income if union campaign succeeded).
Thus, in Hygen Corp., the Board held that the employer did not violate Section 8(a)(1) by summoning the police where union representatives caused a two-hour disruption of work and persistently refused demands to leave.11

Here, the Employer's reports to the state regulatory agencies were based on the unprotected Facebook postings discussed above and therefore did not violate the Act. Although the Employer's reporting occurred in the context of its concerns about protected e-mails that it found offensive, there is no evidence establishing that the Employer's reporting was in retaliation for that activity. Instead, the evidence supports the Employer's assertion that it felt bound to report conduct that indicated an inappropriate attitude and possibly inappropriate conduct in the administration of patient care.

Monitoring of Employee Facebook Postings and E-mails

Employer surveillance or creation of an impression of surveillance constitutes unlawful interference with Section 7 rights because employees should feel free to participate in union activity "without the fear that members of management are peering over their shoulders[]."12 An employer creates an impression of surveillance when it employees would reasonably assume from the Employer's statement that their union activities had been placed under surveillance.13 In general, the Board finds that such surveillance is not generally known, and does not reveal its source.14 In such circumstances,

13 Ibid. (violation found where personnel manager informed employee on two occasions that he had heard a rumor that the employee instigated the union campaign and was passing out authorization cards).
14 See, e.g., Stevens Creek Chrysler Jeep Dodge, 333 NLRB No. 132, slip op., at 3 (2005) (manager told employees that he "already knew" about the union meeting and distribution of cards and did not reveal that he had learned the information from another employee); Sam's Club, 342 NLRB 620, 620-21 (2004) (store manager told employee he had heard the employee was circulating a petition about wages without revealing how he came by the information); Avondale without revealing how he got his information, responded that he "couldn't say").
employees reasonably conclude that the information was obtained through employer monitoring.\textsuperscript{15}

On the other hand, no impression of surveillance is created where the employer explains that it obtained the information from other employees, particularly in the absence of evidence that the employer solicited the information.\textsuperscript{16} For example, in Bridgestone Firestone South Carolina, a manager’s plant-wide letter thanking “the many team members who have chosen to provide information to me” regarding an organizing campaign did not create an unlawful impression of surveillance because it merely reported information that employees had provided voluntarily.\textsuperscript{17}

Here, the Employer did not actually engage in surveillance; instead it obtained Ehling’s Facebook pages and e-mails from other employees without soliciting them. Moreover, the Employer made that clear to the three involved employees. When Ehling asked how the Employer obtained her postings, she was told that a concerned employee had produced them. Moreover, since Ehling had employee access to her “friends,” she would not reasonably conclude that the Employer was directly monitoring her Facebook page. Similarly, Guagliano’s letters to Ehling, Baker, and Dalton formally advising them of their suspensions reference comments “brought to” the Employer’s attention. Likewise, the Employer’s labor attorney told the Union’s attorney that employees had been forwarding Ehling’s e-mails to managers. In these circumstances, the employees could not reasonably believe that the Employer itself was monitoring these communications.\textsuperscript{18} Accordingly, the Employer did not unlawfully create an impression of surveillance.

\textsuperscript{15} See, e.g., Stevens Creek Chrysler Jeep Dodge, 353 NLRB No. 132, slip op., at 9 (employer’s failure to identify “the ‘gravamen’ of an employee’s source of information was ‘the impression of surveillance violation’).\textsuperscript{15}

\textsuperscript{16} See, e.g., North Hills Office Services, 346 NLRB 1099, 1103-04 (2006) (supervisor told employees that two of her coworkers had reported on her distribution of union literature during working hours); Park ‘N Fly, Inc., 349 NLRB 132, 133 (2007) (supervisor told employee that another named employee had reported that the employee spoke with a “union guy”).

\textsuperscript{17} Bridgestone Firestone South Carolina, 390 NLRB 526, 526-27 (2007).

\textsuperscript{18} The Employer’s investigation of flight team employees’ Facebook pictures also did not create the impression of
Changes in the Anger Management Counseling Program

The Board has long held that an employer's disciplinary system and work rules that involve the imposition of discipline constitute mandatory subjects of bargaining. Thus, any unilateral changes that materially affect such terms and conditions of employment violate Section 8(a)(1) and (5).

The Employer's anger management counseling program was part of its disciplinary system and, presumably, could lead to further discipline if an employee refused to submit to required counseling. Therefore, any material change in the program was subject to bargaining. While there is a dispute as to whether the Employer had a pre-existing anger management counseling program, the Employer admitted that in July, for the first time, it required a disciplined employee to undergo counseling by its own manager, since this requirement was a material change in the disciplinary system, the Employer violated Section 8(a)(1) and (5) by failing to provide the Union notice or an opportunity to bargain.

Letter Regarding Release of Private Information

An employer makes an unlawful coercive statement if "under all the circumstances[,]" the statement "reasonably tends to restrain, coerce or interfere" with Section 7 rights. In this case, the Employer truthfully informed surveillance. Caruso came across Kromin's pictures on a presumably public website of a group named "down with Jersey Volunteers"; and the Employer only viewed Kromin's pictures with his cooperation.

19 See Toledo Blade Co. v. NLRB, 345 NLRB 385, 387 (2004), and cases cited therein; Union-Tribune Publishing Co. v. NLRB, No. 2, slip op. at 1, fn. 2 (2008) (unlawful unilateral change requiring employees who suffered possible hearing injuries to undergo drug and alcohol testing); Good Hope Refineries, 245 NLRB 369, fn. 5 (1979), enf'd. 620 F.2d 57 (9th Cir. 1980), cert. denied 450 U.S. 1012 (1980) (unlawful change disallowing employee representation during absence counseling).

20 Toledo Blade Co. v. NLRB, 343 NLRB at 387 (employer violated Section 8(a)(1) by unilaterally changing work rules regarding work errors and discipline for such errors).

employees that the NLRS had requested their contact information and that, pursuant to advice of counsel, the Employer was going to provide it. The Employer has sent similar letters in advance of responding to Union information requests. No employee would reasonably conclude that he or she would be subject to employer coercion or reprisals on the basis of the Employer's announcement that it was complying with an information request from the Board.

Accordingly, the Region should dismiss, absent withdrawal, the charges in Case 22-CA-29088, 22-Ch-29084, and 22-Ch-29234, alleging unlawful discipline of Ebling, Baker, and Dalton, retaliatory reports to the New Jersey Board of Nursing and OEMS, unlawful surveillance, and intimidation and coercion. However, the Region should issue complaint in Case 22-CA-29083, absent settlement, based upon the Employer's unilateral implementation of an in-house anger management counseling program.

B.J.K.
Attachment C
TO:       Cornele A. Overstreet, Regional Director
          Region 28

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

SUBJECT:  Lee Enterprises, Inc., d/b/a Arizona Daily Star
          Case 28-CH-23267  512-5012-0100
          512-5012-0125

DATE:     April 21, 2011

REvised

This case was submitted for advice as to whether
the Employer violated Section 8(a)(1) by terminating the
Charging Party for posting unprofessional and inappropriate
tweets to a work-related Twitter account. We conclude that
the Charging Party's discharge did not violate Section
8(a)(1) because he was terminated for writing inappropriate
and offensive Twitter postings that did not involve
protected concerted activity.

FACTS

Lee Enterprises, Inc., d/b/a The Arizona Daily Star
("Employer") owns and publishes regional newspapers
throughout the country, including The Arizona Daily Star, a
daily newspaper published in Tucson, Arizona. Along with
its paper publication, the Daily Star maintains a website

The Charging Party worked as a reporter for the Daily
Star from 1999 until September 30, 2010, when he was
terminated based on the content of messages that he was
posting on Twitter, a social media network. At the time of
his discharge, the Charging Party was assigned to cover the
crime and public safety beat.

The Employer has no written social media policy for
its employees. It does provide employees with an employee
handbook, containing various rules of conduct.1

1 The Region has determined that some of the rules in the
employee handbook are unlawful. These rules are not at
issue here because they were not cited by the Employer in
its termination of the Charging Party, and the Region has
not submitted them for advice.
In the spring of 2009, the Daily Star began encouraging its reporters to open Twitter accounts and to attend a "webinar" about how Twitter and other social network tools could be used to disseminate information to the public. The Daily Star wanted reporters to use social media to get news stories out to people who might not read the newspaper and to drive readers to the Daily Star's website. The Charging Party attended the webinar, and subsequently opened a Twitter account under the screen name "[FOIA Exemptions 6 and 7(C)]." The Charging Party then started seeking out coworkers and others who had Twitter accounts, started following them on Twitter, and accumulated a group of his own followers, including coworkers and some of his supervisors.

Although the Employer encouraged reporters to use social media, the Charging Party opened the account, decided his own screen name and password, and controlled the content of his tweets. In the biography section of his Twitter account, the Charging Party stated that he was a reporter for the Daily Star and included a link to the Daily Star's website. In his tweets, he at times referred followers to the Daily Star's website for stories.

The Charging Party tweeted using his work computer, his home computer, his cell-phone, and his home computer. At various times the Charging Party's Twitter account was open to everyone, and at other times he restricted access to his followers. The Charging Party had linked his Twitter account to his Facebook and MySpace pages. Therefore, whenever he tweeted something, the same message would be posted on Facebook and MySpace. The Charging Party's Twitter account was not linked to the Daily Star's Twitter feed; none of his tweets were posted automatically to the Daily Star's feed.

Sometime in late January or early February of 2010, the Charging Party posted a tweet saying "The Arizona Daily Star's copy editors are the most witty and creative people in the world. Or at least they think they are." The tweet was in response to a series of sports headlines, using play on words, such as "shuck and aw," describing the University of Arizona's loss to the University of Nebraska. Before the tweet, the Charging Party had raised his concerns about the sport department's headlines with the Executive Editor. However, there is no evidence that the Charging Party had discussed his concerns about the sports department headlines with any of his coworkers.

About a week after that tweet, the Charging Party was called into a meeting with the Human Resources Director, who advised the Charging Party why he tweeted about the sports department, why he felt the need to post his
concerns on Twitter instead of simply speaking to people within the organization, and whether he thought it was appropriate to be posting these types of tweets. The Charging Party asked if the Daily Star had a social media policy. The Human Resources Director replied that the policy was being worked on.

About a week after the meeting with the Human Resources Director, the Charging Party was called into a meeting with the Managing Editor, the Executive Editor, and the City Editor, concerning his tweet. During the meeting the Managing Editor told the Charging Party that he was prohibited from airing his grievances or commenting about the Daily Star in any public forum. The Charging Party replied that he understood the directive and left the meeting.

The Charging Party continued tweeting, but refrained from making public comments about the Daily Star. He tweeted, and used other social media, to post about various matters he found interesting, including matters occurring in Tucson relating to his beat as a public safety reporter. Some tweets were simply factual, and others included commentary. Between August 27 and September 19, the Charging Party's tweets included the following:

- August 27 - "You stay homicidal, Tucson. See Star Not for the bloody deets."
- August 30 - "What?!?!? No overnight homicide? WTF? You’re slackin’ Tucson."
- September 10 - "Suggestion for new Tucson-area theme song: Drowning [sic] pool's 'let the bodies hit the floor'."
- September 10 - "I'd root for daily death if it always happened in close proximity to Gus Balon's."
- September 10 - "Hope everyone's having a good Homicide Friday, as one Tucson police officer called it."
- September 14 - "[FOIA Exemptions 6 and 7(C) Exemption 6 and 7(C)]"
- September 15 - "[FOIA Exemptions 6 and 7(C) Exemption 6 and 7(C)]"
- September 19 - "My discovery of the Red Zone channel is like an adolescent boy's discovery of his ... let's just hope I don't end up going blind."

On September 21, Tucson area television news station KOLD posted the following tweet on its Twitter feed: "Drug
smuggler tries to peddle his way into the U.S. The Charging Party saw the tweet, reposted it on his Twitter site, and tweeted the following: "Um, I believe that's PEDAL. Stupid TV people."

A KOLD Web Producer took issue with the Charging Party's tweet, particularly with him calling TV people "stupid." On September 22, the Web Producer emailed the Daily Star Reader Advocate regarding the Charging Party's tweet. The email reads, in part, as follows:

What I take issue with is calling TV people stupid. Clearly [he] is entitled to his opinion, but I feel since this particular account is affiliated with the Star, a tweet like that becomes unprofessional. I felt compelled to send this letter to the reader advocate and metro editor so key members were aware of this.

Again, not a big deal for us over here. And, considering [he] reaches an audience of less than 200, the impact is minimal. I just wanted to foster an environment of mutual respect as we both move forward and evolve on the social media scene.

The Daily Star's Reader Advocate replied to the KOLD Web Producer on the same day, thanking him for bringing this to her attention. The Reader Advocate copied the Charging Party and the City Editor on her email. Thereafter, the Charging Party emailed the KOLD Web Producer apologizing for the tweet.

During the afternoon of September 22, shortly after he arrived at work, the Charging Party was called into a meeting with the Managing Editor, the City Editor, and his team leader. The meeting started with the Managing Editor making a short reference to the KOLD tweet, and then asking the Charging Party why he was tweeting about homicides. The Managing Editor started reading the Charging Party's various tweets about homicides in Tucson, asking him what he was thinking when he posted these tweets. She then told him that it was not OK for him to be making these types of tweets and asked how he would feel if this was his family (who had been victims of a homicide). The Charging Party said he was sorry if the tweets offended anyone, because his intent was not to offend but to relay information. The Managing Editor told the Charging Party there were other ways of relaying information, and that because the Executive Editor and the Human Resources Director were not in the office, she could not fully discuss everything with him, and they would have another meeting about his tweets. Until then, she told the Charging Party that he was not allowed to tweet. The Charging Party replied "excuse me?"
and the Managing Editor said that he was not allowed to tweet about anything work-related. The Managing Editor told the Charging Party that, because his Twitter screen name was "[FOIA Exemptions 6 and 7(C)]" and his Twitter biography referenced that he worked at the Daily Star and had a link to the Daily Star's website, the Employer considered this to be a work Twitter account, and that he was drawing negative attention to the Daily Star when he made the various tweets about homicides in Tucson. The Charging Party asked whether the Daily Star had a social media policy. The Managing Editor replied that it had not yet been established, that it was almost complete, and that the policy would include the phrase "common sense." The Charging Party then asked whether he would still be working at the Daily Star. The Managing Editor replied that she did not know the status of his job, but that he should complete his assignment for the day, which included a late-night ride along with the Tucson police department.

After the meeting, the Charging Party returned to his desk, and changed his Twitter screen name to "[FOIA Exemptions 6 and 7(C)]." He also removed some of his supervisors from his list of followers and changed his account settings so that he had to approve anyone before they could view his tweets. The Charging Party then warned them to be careful about what they write on Facebook and Twitter.

On September 24, the Charging Party arrived at work to begin his regular shift at 7:00 a.m. About four hours into his shift, he was called into a meeting with the Managing Editor, the Assistant Managing Editor, and the City Editor. During the meeting, the Managing Editor told the Charging Party that he would be suspended for three days without pay, returning to work the following Thursday. During his time off, the Managing Editor told the Charging Party to think about what he wanted to do, because the Managing Editor had no confidence in his ability to comply with the Employer's respectful workplace policies. The Managing Editor then discussed the Charging Party's tweets about homicides in Tucson, and asked him whether he felt he had done anything wrong. The Charging Party replied that he understood how someone could consider the tweets to be offensive or inappropriate, but that he was just trying to do his job of getting information out to the public. He apologized if the manner in which he was doing his job was not what the Employer wanted. The Charging Party then left the meeting.

On September 30, the Charging Party returned to work. The Human Resources Director escorted him into a conference room. When the Charging Party entered the conference room,
the Daily Star's publisher handed him a letter and told him that "we are terminating your employment with the Arizona Daily Star effective today, for cause." The Charging Party's termination letter reads, in relevant part, as follows:

Your employment with the Arizona Daily Star is terminated effective today, September 30, 2010. We have provided repeated training on our Respectful Workplace Guidelines, a high level of supervision and regular feedback, yet you continue to disregard professional courtesy and conduct expectations.

Despite the multiple warnings, suspension and final verbal notice issued as recently as February 2010, when you were told to refrain from using derogatory comments in any social media forums that may damage the goodwill of the company, you have again disregarded that guidance.

After careful review of last week's inappropriate Twitter posting along with other concerning postings, we have no confidence that you can sustain our expectation of professional courtesy and mutual respect therefore, you give us no alternative but to terminate your employment immediately.

ACTION

We conclude that the Charging Party's discharge did not violate Section 8(a)(1) because he was terminated for writing inappropriate and offensive Twitter postings that did not involve protected concerted activity.

The Charging Party's conduct was not protected and concerted: it did not relate to the terms and conditions of his employment or seek to involve other employees in issues related to employment. The Employer warned the Charging Party that his comments were inappropriate, but he ignored the warning and continued to post additional inappropriate tweets while covering his beat as a public safety reporter. Those tweets included: "What?!?!?! No overnight homicide? WTF? You're slacking Tucson" and "FOIA Exemptions 6 and 7(G)."
The Charging Party's discharge did not violate the Act because he was discharged for this misconduct, which did not involve protected activity.

The Charging Party alleges that he was disciplined pursuant to an unlawful rule that prohibited certain Section 7 activities. The Board has consistently held that an employer's imposition of discipline pursuant to an unlawfully overbroad policy or rule constitutes a violation
of the Act. However, we conclude that the Employer did not implement an unlawful rule. In this regard, we acknowledge that, in warning the Charging Party to cease his inappropriate tweets, and then discharging him for continuing to post inappropriate tweets, the Employer made statements that could be interpreted to prohibit activities protected by Section 7. For example, after the Human Resources Director had met with the Charging Party and warned him to stop making inappropriate comments, and the Charging Party persisted, the Managing Editor called him in and warned him to stop airing his grievances or commenting about the Employer in any public forum. And after the Charging Party persisted in writing his offensive messages, the Managing Editor told him that he was not allowed to tweet about anything work related. Finally, the Charging Party’s termination letter refers to the fact that he was told “to refrain from using derogatory comments in any social media forums that may damage the goodwill of the company.” However, those statements did not constitute orally-promulgated, overbroad “rules.” Thus, the statements were made solely to the Charging Party in the context of discipline, and in response to specific inappropriate conduct, and were not communicated to any other employee or proclaimed as new “rules.” In fact, the Employer indicated that it was in the process of developing a written social media rule, but that it did not yet have one.

Finally, although the statements arguably constituted unlawful restrictions on the Charging Party’s own Section 7 activities, it would not effectuate the purposes and policies of the Act to issue a complaint where the statements were directed to a single employee who was lawfully discharged.

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

B.J.K.

Attachment D
MEMORANDUM OM 12-59

TO: All Regional Directors, Officers-In-Charge and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Report of the Acting General Counsel Concerning Social Media Cases

Attached is an updated report from the Acting General Counsel concerning recent social media cases.

/s/
A. P.

Attachment

cc: NLRBU
Release to the Public
REPORT OF THE GENERAL COUNSEL

In August 2011 and in January 2012, I issued reports presenting case developments arising in the context of today's social media. Employee use of social media as it relates to the workplace continues to increase, raising various concerns by employers, and in turn, resulting in employers' drafting new and/or revising existing policies and rules to address these concerns. These policies and rules cover such topics as the use of social media and electronic technologies, confidentiality, privacy, protection of employer information, intellectual property, and contact with the media and government agencies.

My previous reports touched on some of these policies and rules, and they are the sole focus of this report, which discusses seven recent cases. In the first six cases, I have concluded that at least some of the provisions in the employers' policies and rules are overbroad and thus unlawful under the National Labor Relations Act. In the last case, I have concluded that the entire social media policy, as revised, is lawful under the Act, and I have attached this complete policy. I hope that this report, with its specific examples of various employer policies and rules, will provide additional guidance in this area.

/s/
Lafe E. Solomon
Acting General Counsel
Rules on Using Social Media Technology and on Communicating Confidential Information Are Overbroad

In this case, we addressed the Employer's rules governing the use of social media and the communication of confidential information. We found these rules unlawful as they would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.

As explained in my previous reports, 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." Lafayette Park Hotel, 326 NLRB 624, 625 (1998), enf'd. 203 F.3d 52 (D.C. Cir. 1999). The Board uses a two-step inquiry to determine if a work rule would have such an effect. Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004). First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) 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.

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. See University Medical Center, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003). In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful. See Tradesmen International, 338 NLRB 460, 460-462 (2002).

The Employer in this case operates retail stores nationwide. Its social media policy, set forth in a section of its handbook titled "Information Security," provides in relevant part:

Use technology appropriately

* * * * *

If you enjoy blogging or using online social networking sites such as Facebook and YouTube, (otherwise known as Consumer Generated Media, or CSM) please note that there are guidelines to follow if you plan to mention [Employer] or your employment with [Employer] in these online vehicles. »
- Don't release confidential guest, team member or company information...

We found this section of the handbook to be unlawful. Its instruction that employees not "release confidential guest, team member or company information" would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves—activities that are clearly protected by Section 7. The Board has long recognized that employees have a right to discuss wages and conditions of employment with third parties as well as each other and that rules prohibiting the communication of confidential information without exempting Section 7 activity inhibit this right because employees would reasonably interpret such prohibitions to include information, concerning terms and conditions of employment. See, e.g., Cintas Corp., 344 NLRB 943, 943 (2005), enf'd. 462 F.3d 463 (D.C. Cir. 2007).

The next section of the handbook we addressed provides as follows:

Communicating confidential information

You also need to protect confidential information when you communicate it. Here are some examples of rules that you need to follow:

- Make sure someone needs to know. You should never share confidential information with another team member unless they have a need to know the information to do their job. If you need to share confidential information with someone outside the company, confirm there is proper authorization to do so. If you are unsure, talk to your supervisor.
- Develop a healthy suspicion. Don't let anyone trick you into disclosing confidential information. Be suspicious if asked to ignore identification procedures.
- Watch what you say. Don't have conversations regarding confidential information in the breakroom or in any other open area. Never discuss confidential information at home or in public areas.

Unauthorized access to confidential information: If you believe there may have been unauthorized access to confidential information or that confidential information may have been misused, it is your responsibility to report that information...

We're serious about the appropriate use, storage and communication of confidential information. A violation of [Employer] policies regarding confidential
information will result in corrective action, up to and including termination. You also may be subject to legal action, including criminal prosecution. The company also reserves the right to take any other action it believes is appropriate.

We found some of this section to be unlawful. Initially, we decided that the provisions instructing employees not to share confidential information with coworkers unless they need the information to do their job, and not to have discussions regarding confidential information in the breakroom, at home, or in open areas and public places are overbroad. Employees would construe these provisions as prohibiting them from discussing information regarding their terms and conditions of employment. Indeed, the rules explicitly prohibit employees from having such discussions in the breakroom, at home, or in public places—virtually everywhere such discussions are most likely to occur.

We also found unlawful the provisions that threaten employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information. Those provisions would be construed as requiring employees to report a breach of the rules governing the communication of confidential information set forth above. Since we found those rules unlawful, the reporting requirement is likewise unlawful.

We did not, however, find unlawful that portion of the handbook section that admonishes employees to "[d]evelop a healthy suspicion[,]" cautions against being tricked into disclosing confidential information, and urges employees to "[b]e suspicious if asked to ignore identification procedures." Although this section also refers to confidential information, it merely advises employees to be cautious about unwittingly divulging such information and does not prescribe any particular communications. Further, when the Employer rescinds the offending "confidentiality" provisions, this section would not reasonably be construed to apply to Section 7 activities, particularly since it specifically ties confidential information to "identification procedures." [Turley Corp., Case 29-CA-030713]

Several Policy Provisions Are Overbroad, Including Those on 'Non-Public Information' and 'Friendships Co-Workers.'

In this case, we again found that certain portions of the Employer's policy governing the use of social media would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.
The Employer—a motor vehicle manufacturer—maintains a social media policy that includes the following:

USE GOOD JUDGMENT ABOUT WHAT YOU SHARE AND HOW YOU SHARE
If you engage in a discussion related to [Employer], in addition to disclosing that you work for [Employer] and that your views are personal, you must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site. If you are in doubt, review the [Employer’s media] site. If you are still in doubt, don’t post. Non-public information includes:

- Any topic related to the financial performance of the company;
- Information directly or indirectly related to the safety performance of [Employer] systems or components for vehicles;
- [Employer] Secret, Confidential or Attorney-Client Privileged information;
- Information that has not already been disclosed by authorized persons in a public forum; and
- Personal information about another [Employer] employee, such as his or her medical condition, performance, compensation or status in the company.

When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it’s a good idea. Failure to stay within these guidelines may lead to disciplinary action.

- Respect proprietary information and content, confidentiality, and the brand, trademark and copyright rights of others. Always cite, and obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally sharable or that you have the owner’s permission. If you are unsure, you should not use.
- Get permission before posting photos, video, quotes or personal information of anyone other than you online.
- Do not incorporate [Employer] logos, trademarks or other assets in your posts.

We found various provisions in the above section to be unlawful. Initially, employees are instructed to be sure that their posts are "completely accurate and not misleading and that they do not reveal non-public information on any public site." The term "completely accurate and not misleading" is overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of,
the Employer's labor policies and its treatment of employees that would be protected by the Act so long as they are not maliciously false. Moreover, the policy does not provide any guidance as to the meaning of this term by specific examples or limit the term in any way that would exclude Section 7 activity.

We further found unlawful the portion of this provision that instructs employees not to "reveal non-public company information on any public site" and then explains that non-public information encompasses "[a]ny topic related to the financial performance of the company" and "[p]ersonal information about another [Employer] employee, such as ..., performance, compensation or status in the company." Because this explanation specifically encompasses topics related to Section 7 activities, employees would reasonably construe the policy as precluding them from discussing terms and conditions of employment among themselves or with non-employees.

The section of the policy that cautions employees that "[w]hen in doubt about whether the information you are considering sharing falls into one of the [prohibited] categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea," is also unlawful. The Board has long held that any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities violates the Act. See Brunswick Corp., 282 NLRB 794, 754-755 (1987).

The Employer's policy also unlawfully prohibits employees from posting photos, music, videos, and the quotes and personal information of others without obtaining the owner's permission and ensuring that the content can be legally shared, and from using the Employer's logos and trademarks. Thus, in the absence of any further explanation, employees would reasonably interpret these provisions as proscribing the use of photos and videos of employees engaging in Section 7 activities, including photos of picket signs containing the Employer's logo. Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, we found that employees' non-commercial use of the Employer's logo or trademarks while engaging in Section 7 activities would not infringe on that interest.

We found lawful, however, this section's bulleted prohibitions on discussing information related to the "safety performance of [Employer] systems or components for vehicles" and "Secret, Confidential or Attorney-Client Privileged information." Neither of these provisions refers to employees, and employees would reasonably read the safety

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provision as applying to the safety performance of the Employer's automobile systems and components, not to the safety of the workplace. The provision addressing secret, confidential, or attorney-client privileged information is clearly intended to protect the Employer's legitimate interest in safeguarding its confidential proprietary and privileged information.

We also looked at the following provisions:

TREAT EVERYONE WITH RESPECT

Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional. We expect you to abide by the same standards of behavior both in the workplace and in your social media communications.

OTHER [EMPLOYER] POLICIES THAT APPLY

Think carefully about 'friending' co-workers... on external social media sites. Communications with co-workers on such sites that would be inappropriate in the workplace are also inappropriate online, and what you say in your personal social media channels could become a concern in the workplace.

[Employer], like other employers, is making internal social media tools available to share workplace information within [Employer]. All employees and representatives who use these social media tools must also adhere to the following:

- Report any unusual or inappropriate internal social media activity to the system administrator.

[Employer's] Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act).

As to these provisions, we found unlawful the instruction that "offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline." Like the provisions discussed above, this provision prescribes a broad spectrum of communications that would include protected criticisms of the Employer's labor policies or treatment of employees. Similarly, the instruction to be aware that "communications with co-workers... that would be inappropriate in the workplace are also inappropriate online" does not specify which communications the Employer would deem inappropriate at work and, thus, is ambiguous as to its application to Section 7.

The provision of the Employer's social media policy instructing employees to "think carefully about
'friend,'ing co-workers" is unlawfully overbroad because it would discourage communications among co-workers, and thus it necessarily interferes with Section 7 activity. Moreover, there is no limiting language clarifying for employees that it does not restrict Section 7 activity.

We also found unlawful the policy's instruction that employees "[r]eport any unusual or inappropriate internal social media activity." An employer violates the Act by encouraging employees to report to management the union activities of other employees. See generally Greenfield Die & Mfg. Corp., 327 NLRB 237, 238 (1998) and cases cited at n. 6. Such statements are unlawful because they have the potential to discourage employees from engaging in protected activities. Here, the Employer's instruction would reasonably be construed by employees as applying to its social media policy. Because certain provisions of that policy are unlawful, as set forth above, the reporting requirement is also unlawful.

Finally, we concluded that the policy's "savings clause," under which the Employer's "Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)," does not cure the ambiguities in the policy's overbroad rules. [General Motors, Case 07-CA-053570]

Guidelines on Privacy, Legal Matters, Online Tone, Prior Permission, and Resolving Concerns Are Overbroad

In this case, we again found that some of the Employer's social media guidelines were overly broad in violation of Section 8(a)(1) of the Act.

The Employer is an international health care services company that manages billing and other services for health care institutions. We addressed challenges to various provisions in its social media policy, as set out below.

Respect Privacy. If during the course of your work you create, receive or become aware of personal information about [Employer'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 [Employer's] Privacy policies.

We found that 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. We found, however, that the portion of the rule prohibiting employees from disclosing personal information only to those authorized to receive it is not, in these circumstances, unlawful. Although an employer cannot require employees to obtain supervisory approval prior to engaging in activity that is protected under the Act, the Employer’s rule here would 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.

We found that the prohibition on employees’ commenting on any legal matters is unlawful because it specifically restricts employees from discussing the protected subject of potential claims against the Employer.

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. . . . 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 [Employer’s] customers, suppliers or competitors that might be considered defamatory.

We found this rule unlawful for several reasons. First, in warning employees not to “pick fights” and to avoid topics that might be considered objectionable or inflammatory—such as politics and religion, and reminding employees to communicate in a “professional tone,” 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 reasonably construe this rule to prohibit robust but protected discussions about working conditions or unionism.

Respect all copyright and other intellectual property laws. For [Employer’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 [Employer]’s own 
copyrights, trademarks and brands. Get permission 
before reusing others’ content or images.

We found that most of this rule is not unlawful since 
it does not prohibit employees from using copyrighted 
material in their online communications, but merely urges 
employees to respect copyright and other intellectual 
property 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.

You are encouraged to resolve concerns about work by 
speaking with co-workers, supervisors, or managers. 
[Employer] 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. 
[Employer] encourages employees and other contingent 
resources to consider using available internal 
resources, rather than social media or other online 
forums, to resolve these types of concerns.

We found that 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 try to work out concerns 
over working conditions through internal procedures. 
However, by telling employees that they should use internal 
resources rather than airing their grievances online, we 
found that this rule would have the probable effect of 
precluding or inhibiting employees from the protected 
activity of seeking redress through alternative forums.

Use your best judgment and exercise personal 
responsibility. Take your responsibility as stewards 
of personal information to heart. Integrity, 
Accountability and Respect are core [Employer] values. 
As a company, [Employer] 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 [Employer] 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 concluded that this rule was not unlawful. We noted 
that this section is potentially problematic because its
reference to "consequences to your actions in the social media world" could be interpreted as a veiled threat to discourage online postings, which includes protected activities. However, this phrase is unlawful only insofar as it is 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 statement here.

Finally, we looked at the Employer's "savings clause":

National Labor 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.

We found that this clause does not cure the otherwise unlawful provisions of the Employer's social media policy because employees would not understand from this disclaimer that protected activities are in fact permitted. [McKesson Corp., Case 06-CA-066504]

Provisions on Protecting Information and Expressing Opinions Are Too Broad, But Bullying Provision Is Lawful

In another case, we concluded that several portions of the Employer's social media policy are unlawfully overbroad, but that a prohibition on online harassment and bullying is lawful.

We first looked at the portion of the Employer's policy dealing with protection of company information:

Employees are prohibited from posting information regarding [Employer] on any social networking sites (including, but not limited to, Yahoo, finance, Google finance, Facebook, Twitter, LinkedIn, MySpace, LifeJournal and YouTube), in any personal or group blog, or in any online bulletin boards, chat rooms, forum, or blogs (collectively, 'Personal Electronic Communications'), that could be deemed material non-public information or any information that is considered confidential or proprietary. Such information includes, but is not limited to, company performance, contracts, customer wins or losses, customer plans, maintenance, shutdowns, work stoppages, cost increases, customer news or business related travel plans or schedules. Employees should avoid harming the image and integrity of the company and any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not
permissible between co-workers online, even if it is
done after hours, from home and on home computers. .

We concluded that the rule prohibiting employees from
posting information regarding the Employer that could be
deemed "material non-public information" or "confidential or
proprietary" is unlawful. The term "material non-public
information," in the absence of clarification, is so vague
that employees would reasonably construe it to include
subjects that involve their working conditions. The terms
"confidential or proprietary" are also overbroad. The Board
has long recognized that the term "confidential
information," without narrowing its scope so as to exclude
Section 7 activity, would reasonably be interpreted to
include information concerning terms and conditions of
employment. See, e.g., University Medical Center, 335 NLRB
at 1320, 1322. Here, moreover, the list of examples
provided for "material non-public" and "confidential or
proprietary" information confirms that they are to be
interpreted in a manner that restricts employees' discussion
about terms and conditions of employment. Thus, information
about company performance, cost increases, and customer wins
or losses has potential relevance in collective-bargaining
negotiations regarding employees' wages and other benefits.
Information about contracts, absent clarification, could
include collective-bargaining agreements between the Union
and the Employer. Information about shutdowns and work
stoppages clearly involves employees' terms and conditions
of employment.

We also found that the provision warning employees to
"avoid harming the image and integrity of the company" is
unlawfully overbroad because employees would reasonably
construe it to prohibit protected criticism of the
Employer's labor policies or treatment of employees.

We found lawful, however, the provision under which
"harassment, bullying, discrimination, or retaliation that
would not be permissible in the workplace is not permissible
between co-workers online, even if it is done after hours,
from home and on home computers." The Board has indicated
that a rule's context provides the key to the
"reasonableness" of a particular construction. For example,
a rule proscribing "negative conversations" about managers
that was contained in a list of policies regarding working
conditions, with no further clarification or examples, was
unlawful because of its potential chilling effect on
protected activity. Claremont Resort and Spa, 344 NLRB 832,
836 (2005). On the other hand, a rule forbidding
"statements which are slanderous or detrimental to the
company" that appeared on a list of prohibited conduct
including "sexual or racial harassment" and "sabotage" would
not be reasonably understood to restrict Section 7 activity.
Trademen International, 338 NLRB at 462. Applying that reasoning here, we found that this provision would not reasonably be construed to apply to Section 7 activity because the rule contains a list of plainly egregious conduct, such as bullying and discrimination.

Next, we considered the portion of the Employer’s policy governing employee workplace discussions through electronic communications:

Employees are permitted to express personal opinions regarding the workplace, work satisfaction or dissatisfaction, wages hours or work conditions with other [Employer] employees through Personal Electronic Communications, provided that access to such discussions is restricted to other [Employer] employees and not generally accessible to the public.

This policy is for the mutual protection of the company and our employees, and we respect an individual’s rights to self-expression and concerted activity. This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.

We found that the provision prohibiting employees from expressing their personal opinions to the public regarding "the workplace, work satisfaction or dissatisfaction, wages hours or work conditions" is unlawful because it precludes employees from discussing and sharing terms and conditions of employment with non-employees. The Board has long recognized that "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute." Valley Hospital Medical Center, 351 NLRB 1250, 1252 (2007), enf’d. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 358 F. App’x 783 (9th Cir. 2009).

We concluded that the Employer’s "savings clause" does not cure the otherwise unlawful provisions. The Employer’s policy specifically prohibits employees from posting information regarding Employer shutdowns and work stoppages, and from speaking publicly about "the workplace, work satisfaction or dissatisfaction, wages hours or work conditions." Thus, employees would reasonably conclude that the savings clause does not permit those activities. Moreover, the clause does not explain to a layperson what the right to engage in "concerted activity" entails.

[Clearwater Paper Corp., Case 19-CA-064418]

In this case, we found that the Employer unlawfully maintains an overly broad rule requiring employees who receive "unsolicited or inappropriate electronic communications" to report them. We found, however, that a prohibition on "unauthorized postings" is lawful.

The Employer is a nonprofit organization that provides HIV risk reduction and support services. The Employer's employee handbook contains an "Electronic Communications" policy, providing as follows:

**Improper Use:** Employees must use sound judgment in using [Employer's] electronic technologies. All use of electronic technologies must be consistent with all other [Employer] policies, including [Employer's] Professional Conduct policy. [Employer] management reserves the right to exercise its discretion in investigating and/or addressing potential, actual, or questionable abuse of its electronic technologies. Employees, who receive unsolicited or inappropriate electronic communications from persons within or outside [Employer], should contact the President or the President's designated agent.

We concluded that the provision that requires employees to report any "unsolicited or inappropriate electronic communications" is overly broad under the second portion of the Lutheran Heritage test discussed above. We found that employees would reasonably interpret the rule to restrain the exercise of their Section 7 right to communicate with their fellow employees and third parties, such as a union, regarding terms and conditions of employment.

The policy also sets forth the following restriction on Internet postings:

**No unauthorized postings:** Users may not post anything on the Internet in the name of [Employer] or in a manner that could reasonably be attributed to [Employer] without prior written authorization from the President or the President's designated agent.

We found that this provision is lawful. A rule that requires an employee to receive prior authorization before posting a message that is either in the Employer's name or could reasonably be attributed to the Employer cannot reasonably be construed to restrict employees' exercise of their Section 7 right to communicate about working conditions among themselves and with third parties. [U.S. Helping Us, Case 05-CA-036595]
Portions of Rules on Using Social Media and Contact with Media and Government Are Unlawful

In this case, we considered the Employer's rules governing employee use of social media, contact with the media, and contact with government agencies. We concluded that certain portions of these rules were unlawful as they would reasonably be interpreted to prohibit Section 7 activity.

Relevant portions of the Employer's rules are as follows:

[Employer] regards Social Media—blogs, forums, wikis, social and professional networks, virtual worlds, user-generated video or audio—as a form of communication and relationship among individuals. When the company wishes to communicate publicly—whether to the marketplace or to the general public—it has a well-established means to do so. Only those officially designated by [Employer] have the authorization to speak on behalf of the company through such media.

We recognize the increasing prevalence of Social Media in everyone's daily lives. Whether or not you choose to create or participate in them is your decision. You are accountable for any publication or posting if you identify yourself, or you are easily identifiable, as working for or representing [Employer].

You need to be familiar with all [Employer] policies involving confidential or proprietary information or information found in this Employee Handbook and others available on Starbase. Any comments directly or indirectly relating to [Employer] must include the following disclaimer: 'The postings on this site are my own and do not represent [Employer]'s positions, strategies or opinions.'

You may not make disparaging or defamatory comments about [Employer], its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services. Remember to use good judgment.

Unless you are specifically authorized to do so, you may not:
- Participate in these activities with [Employer] resources and/or on Company time; or
- Represent any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer].
Should you have questions regarding what is appropriate conduct under this policy or other related policies, contact your Human Resources representative or the [Employer] Corporate Communications Department.

We concluded that several aspects of this social media policy are unlawful. First, the prohibition on making "disparaging or defamatory" comments is unlawful. Employees would reasonably construe this prohibition to apply to protected criticism of the Employer's labor policies or treatment of employees. Second, we concluded that the prohibition on participating in these activities on Company time is unlawfully overbroad because employees have the right to engage in Section 7 activities on the Employer's premises during non-work time and in non-work areas. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945).

We did not find unlawful, however, the prohibition on representing "any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer]." Employees would not reasonably construe this rule to prohibit them from speaking about their terms and conditions of employment. Instead, this rule is more reasonably construed to prohibit comments that are represented to be made by or on behalf of the Employer. Thus, an employee could not criticize the Employer or comment about his or her terms and conditions of employment while falsely representing that the Employer has made or is responsible for making the comments. Similarly, we concluded that the requirement that employees must expressly state that their postings are "my own and do not represent [Employer]'s positions, strategies or opinions" is not unlawful. An employer has a legitimate need for a disclaimer to protect itself from unauthorized postings made to promote its product or services, and this requirement would not unduly burden employees in the exercise of their Section 7 right to discuss working conditions.

We also considered the Contact with Media portion of the Employer's rules, which provides:

The Corporate Communications Department is responsible for any disclosure of information to the media regarding [Employer] and its activities so that accurate, timely and consistent information is released after proper approval. Unless you receive prior authorization from the Corporate Communications Department to correspond with members of the media or press regarding [Employer] or its business activities, you must direct inquiries to the Corporate Communications Department. Similarly, you have the
obligation to obtain the written authorization of the Corporate Communications Department before engaging in public communications regarding [Employer] of its business activities.

You may not engage in any of the following activities unless you have prior authorization from the Corporate Communications Department:

- All public communication including, but not limited to, any contact with media and members of the press; print (for example newspapers or magazines), broadcast (for example television or radio) and their respective electronic versions and associated web sites. Certain blogs, forums and message boards are also considered media. If you have any questions about what is considered media, please contact the Corporate Communications Department.

- Any presentations, speeches or appearances, whether at conferences, seminars, panels or any public or private forums; company publications, advertising, video releases, photo releases, news releases, opinion articles and technical articles; any advertisements or any type of public communication regarding [Employer] by the Company’s business partners or any third parties including consultants.

If you have any questions about the Contact with Media Policy, please contact the [Employer] Corporate Communications Department.

We concluded that this entire section is unlawfully overbroad. While an employer has a legitimate need to control the release of certain information regarding its business, this rule goes too far. Employees have a protected right to seek help from third parties regarding their working conditions. This would include going to the press, blogging, speaking at a union rally, etc. As noted above, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. An employer rule that prohibits any employee communications to the media or, like the policy at issue here, requires prior authorization for such communications, is therefore unlawfully overbroad.

Finally, we looked at the rules’ provisions on contact with government agencies:

Phone calls or letters from government agencies may occasionally be received. The identity of the individual contacting you should be verified. Additionally, the communication may concern matters involving the corporate office. The General Counsel
must be notified immediately of any communication involving federal, state or local agencies that contact any employee concerning the Company and/or relating to matters outside the scope of normal job responsibilities.

If written correspondence is received, notify your manager immediately and forward the correspondence to the General Counsel by PDF or facsimile and promptly forward any original documents. The General Counsel, if deemed necessary, may investigate and respond accordingly. The correspondence should not be responded to unless directed by an officer of the Company or the General Counsel.

If phone contact is made:
- Take the individual’s name and telephone number, the name of the agency involved, as well as any other identifying information offered;
- Explain that all communications of this type are forwarded to the Company’s General Counsel for a response;
- Provide the individual with the General Counsel’s name and number . . . if requested, but do not engage in any further discussion. An employee cannot be required to provide information, and any response may be forthcoming after the General Counsel has reviewed the situation; and
- Immediately following the conversation, notify a supervisor who should promptly contact the General Counsel.

We concluded that this rule is an unlawful prohibition on talking to government agencies, particularly the NLRB. The Employer could have a legitimate desire to control the message it communicates to government agencies and regulators. However, it may not do so to the extent that it restricts employees from their protected right to converse with Board agents or otherwise concertedly seek the help of government agencies regarding working conditions, or respond to inquiries from government agencies regarding the same.

[DISH Network, Case 16-CA-066142]

Employer’s Entire Revised Social Media Policy—With Examples of Prohibited Conduct—Is Lawful

In this case, we concluded that the Employer’s entire revised social media policy, as attached in full, is lawful. We thus found it unnecessary to rule on the Employer’s social media policy that was initially alleged to be unlawful.
As explained above, rules that are ambiguous as to their application to Section 7 activity and that contain no limiting language or context to clarify that the rules do not restrict Section 7 rights are unlawful. In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.

Applying these principles, we concluded that the Employer's revised social media policy is not ambiguous because it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity. For instance, the Employer's rule prohibits "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct." We found this rule lawful since it prohibits plainly egregious conduct, such as discrimination and threats of violence, and there is no evidence that the Employer has used the rule to discipline Section 7 activity.

Similarly, we found lawful the portion of the Employer's social media policy entitled "Be Respectful." In certain contexts, the rule's exhortation to be respectful and "fair and courteous" in the posting of comments, complaints, photographs, or videos, could be overly broad. The rule, however, provides sufficient examples of plainly egregious conduct so that employees would not reasonably construe the rule to prohibit Section 7 conduct. For instance, the rule counsels employees to avoid posts that "could be viewed as malicious, obscene, threatening or intimidating." It further explains that prohibited "harassment or bullying" would include "offensive posts meant to intentionally harm someone's reputation" or "posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy." The Employer has a legitimate basis to prohibit such workplace communications, and has done so without burdening protected communications about terms and conditions of employment.

We also found that the Employer's rule requiring employees to maintain the confidentiality of the Employer's trade secrets and private and confidential information is not unlawful. Employees have no protected right to disclose trade secrets. Moreover, the Employer's rule provides sufficient examples of prohibited disclosures (i.e., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications) for employees to understand that it does not reach protected communications about working conditions. [Walmart, Case 11-CA-067171]
Social Media Policy

Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer] or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else’s web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer’s] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolved work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably
could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone’s reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a “tip” on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as “The postings on this site are my own and do not necessarily reflect the views of [Employer].”

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.
Media contacts

Associates should not speak to the media on [Employer’s] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.
Attachment E
NOTICE: This opinion is subject to formal revision before publication in the bound volume of NLRB decisions. Readers are requested to notify the Editorial Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volume.

Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371, Case 34–CA–012421

September 7, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On August 11, 2010, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief. Additionally, the Acting General Counsel filed limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief.1

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,2 and conclusions only to the extent consistent with this Decision and Order.3

I. INTRODUCTION

For the reasons stated by the judge, we adopt his findings that the Respondent violated Section 8(a)(1) of the Act by maintaining rules4 stating that:

(a) “unauthorized posting, distribution, removal or alteration of any material on Company property” is prohibited;
(b) employees are prohibited from discussing “private matters of members and other employees... including topics such as, but not limited to, sick calls, leaves of absence, PMLA call-outs, ADA accommodations, workers’ compensation injuries, personal health information, etc.”;
(c) “[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval”; and
(d) employees are prohibited from sharing “confidential” information such as employees’ names, addresses, telephone numbers, and email addresses.

We also adopt, for the reasons stated in his decision, the judge’s dismissal of the complaint alleging that the Respondent violated Section 8(a)(1) by maintaining a rule requiring employees to use “appropriate business decorum” in communicating with others.

Contrary to the judge, however, and as explained below, we find that the Respondent violated Section 8(a)(1) by maintaining a rule prohibiting employees from electronically posting statements that “damage the Company... or damage any person’s reputation.” Further, and also contrary to the judge, we find that the Respondent did not violate Section 8(a)(1) by maintaining a rule prohibiting employees from “[l]eaving Company premises during working shift without permission of management.”

II. RULE PROHIBITING STATEMENTS THAT DAMAGE THE COMPANY OR ANY PERSON’S REPUTATION

The judge found that the Respondent’s maintenance of the following rule, in section 11.9 of its employee handbook (Employee Agreement), did not violate Section 8(a)(1):

Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to]nline message boards or discussion groups) that damage the Company, defame any individual or damage any person’s reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

In dismissing this allegation, the judge found that employees would not reasonably construe this rule as regulating, and thereby inhibiting, Section 7 conduct. Citing Lutheran Heritage Village–Livonia, 345 NLRB 646
(2004), the judge instead found that employees would reasonably infer that the Respondent’s purpose in promulgating the rule was to ensure a “civil and decent workplace.”

Contrary to the judge, we find employees would reasonably construe this rule as one that prohibits Section 7 activity.

In determining whether the maintenance of a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf’d. 203 F.3d 52 (D.C. Cir. 1999). If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia*, supra. If it does not, “the violation is dependent upon a showing of one of the following: (1) employee 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.” Id. at 647.

Here, the Respondent’s rule does not explicitly reference Section 7 activity. However, by its terms, the broad prohibition against making statements that “damage the Company, defame any individual or damage any person’s reputation” clearly encompasses concerted communications protected by the Respondent’s treatment of its employees. Indeed, there is nothing in the rule that even arguably suggests that protected communications are excluded from the broad elements of the rule. In these circumstances, employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (i.e., those that are critical of the Respondent or its agents). See *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enf’d. in relevant part 916 F.2d 932, 940 (4th Cir. 1990) (rule prohibiting “derogatory attacks on . . . hospital representative[s]” found unlawful); *Claremont Resort & Spa*, 344 NLRB 832 (2005) (rule prohibiting “negative conversations about associates and/or managers” found unlawful); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000), enf’d. 297 F.3d 468 (6th Cir. 2002) (rule that prohibited “[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates” found unlawful).

The cases relied on by the judge are distinguishable. Most involved rules addressing conduct that is reasonably associated with actions that fall outside the Act’s protection, such as conduct that is malicious, abusive, or unlawful. See, for example, *Lutheran Heritage Village-Livonia*, supra, 343 NLRB at 647–649 (rule addressing “verbal abuse,” “abusive or profane language,” and “harassment”); *Palms Hotel & Casino*, 344 NLRB 1363, 1367–1368 (2005) (rule addressing “conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with” other employees).5

In *Tradesmen International*, 338 NLRB 460, 460–463 (2002), also cited by the judge, the Board found unlawful a rule that prohibited “statements which are slanderous or detrimental to the company or any of the company’s employees.” We note however, that this rule was among a list of 19 rules which prohibited egregious conduct such as “sabotage and sexual or racial harassment.” In finding that the maintenance of the rule did not violate Section 8(a)(1), the Board’s analysis followed the dictates of *Lutheran Heritage*, which require that the rule be considered in context. 343 NLRB at 647 fn. 6.

In contrast, the Respondent’s rule does not present accompanying language that would tend to restrict its application. Therefore it allows employees to reasonably assume that it pertains to — among other things — certain protected concerted activities, such as communications that are critical of the Respondent’s treatment of its employees. The Respondent’s maintenance of the rule thus has a reasonable tendency to inhibit employees’ protected activity and, as such, violates Section 8(a)(1).6

III. RULE PROHIBITING EMPLOYERS FROM LEAVING PREMISES

Section 11.3 of the Respondent’s handbook lists a number of actions that may lead to an employee’s immediate discharge. One such action is “[l]eaving Company premises during working shift without permission of management.” The judge found that the Respondent’s maintenance of this rule violated Section 8(a)(1) because it “inhibits the employees’ rights to engage in Section 7 activity (i.e., strike).” We disagree.

In *Sisters Food Group*, 357 NLRB No. 168 (2011), the Board held that the maintenance of a similar rule, prohibiting “[l]eaving a department or the

5 Other cases cited by the judge are similarly distinguishable, as they addressed conduct rather than merely addressing statements, or because they addressed the use of abusive, threatening or slanderous statements. See *Lafayette Park Hotel*, supra, 326 NLRB at 825–826; *Address ABB Daehler Bente et. al.* NLRB, 253 F.3d 19, 24–28 (D.C. Cir. 2001); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1291–1292 (2001), enf’d. 334 F.3d 99 (D.C. Cir. 2003); *Albertson’s, Inc.*, 351 NLRB 254, 258–259 (2007).

6 Although no party argues its applicability, we note that this rule does not violate the Board’s holding in *Register Guard*, 351 NLRB 1110 (2007), enf’d. in relevant part 571 F.3d 53 (D.C. Cir. 2009). The issue in *Register Guard* was whether employees had a statutory right to use their employer’s email system for non-job purposes. The Board found that the employer did not violate Sec. 8(a)(1) by prohibiting the use of the employer’s email for “non-job-related solicitations.” Here, the rule at issue does not prohibit using the electronic communications system for all non-job purposes, but rather is reasonably understood to prohibit the expression of certain protected viewpoints. In doing so, the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1).
plant during a working shift without a supervisor’s permission,” did not violate Section 8(a)(1). The Board found that this rule was not unlawful on its face and that employees would not reasonably construe it to prohibit Section 7 activity. The Board explained that the rule was distinguishable from a rule, found unlawful in Labor Ready, Inc., 331 NLRB 1656, 1656 fn. 2 (2000), prohibiting employees from “walking off” the job. The Board found that whereas a rule’s reference to a term similar to “walk out” (a synonym for a strike) would reasonably lead employees to believe that the rule prohibited a strike, the mere reference to leaving a department or plant would not be similarly construed as pertaining to Section 7 activity. 2 Sisters, supra, slip op. at 2–3.

Here, the Respondent’s rule is similar to the rule found lawful in 2 Sisters, as it prohibits “[l]eaving Company premises during working shift without permission,” and does not include a reference to any term that would reasonably be construed as similar to the term strike or “walk out.” In those circumstances, the reference to leaving the premises during worktime would be reasonably understood as pertaining to employees leaving their posts (for reasons unrelated to concerted activity) without first seeking permission. Accordingly, there is no meaningful distinction between the Respondent’s rule and the rule in 2 Sisters.

Therefore, we shall dismiss this complaint allegation.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the Judge’s Conclusion of Law 3.

“The Respondent has violated Section 8(a)(1) of the Act by maintaining rules in its “Employee Agreement” that prohibit the unauthorized posting, distribution or alteration of any material on Company property, that may reasonably be interpreted as prohibiting employees from discussing their wages and other terms and conditions of employment with other employees and third parties, including union representatives, that may reasonably be interpreted as prohibiting employees from sharing or storing wage information or information relating to other terms and conditions of employment of employees without permission of management, that prohibit employees from posting messages that “damage any person’s reputation,” and that prohibit the removal of confidential material from Company premises, which Respondent has defined as conduct that may reasonably be interpreted as including wages and other terms and conditions of employment of its employees.”

ORDER

The National Labor Relations Board orders that the Respondent, Costco Wholesale Corporation, Milford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining provisions in its Employee Agreement that prohibit the unauthorized posting, distribution, or alteration of any material on company property;

(b) Maintaining provisions in its Employee Agreement that may reasonably be interpreted as prohibiting employees from discussing their wages and conditions of employment with other employees and third parties, including union representatives;

(c) Maintaining provisions in its Employee Agreement that may reasonably be interpreted as prohibiting its employees from sharing or storing wage information or information relating to other terms and conditions of employment of employees without permission of management;

(d) Maintaining provisions in its Employee Agreement that prohibit employees from electronically posting statements that damage any person’s reputation;

(e) Maintaining provisions in its Employee Agreement that prohibit the removal of confidential material from company premises, which the Respondent has defined as conduct that may reasonably be interpreted as including wages or other terms and conditions of employment of its employees;

(f) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Rescind or modify the language in the following provisions of its Employee Agreement.

1. Sections 11.3.4 and 4(a) and 11.3.22.
2. Section 11.7 to the extent that it defines the names, addresses, phone numbers and email addresses of employees as confidential and prohibits disclosure of such information to any third parties.

3. The portions of Section 11.7 that provide that "all Costco employees shall refrain from discussing private matters of other employees. This includes topics such as, but not limited to sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers' comp. injuries... etc."

4. Section 11.9 to the extent that it prohibits employees from making statements that damage the Company or damage any person's reputation.

5. Section 11.9 to the extent that it provides that all information relating to Costco's employees must not be disseminated, that payroll information may not be shared or transmitted and unauthorized removal of confidential material (as defined over broadly by the Respondent in its Employee Agreement) from Company premises is prohibited.

(b) Furnish all current employees with inserts for the current Employee Agreement that

1. advise that the unlawful provisions have been rescinded, or
2. provide the language of lawful provisions or publish and distribute revised Employee Agreements that
   a. do not contain the unlawful provisions, or
   b. provide the language of lawful provisions.

(c) Within 14 days after service by the Region, post at each of its facilities in the United States, where its Employee Agreement is in effect, copies of the attached notice in English and Spanish, marked "Appendix" Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 3, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 34 a sworn certification of a responsible officer on a form provided by the Region attesting to the steps that the Respondent has taken to comply.


Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain provisions in our Employee Agreement that prohibit the unauthorized posting, distribution or alteration of any material on company property.

WE WILL NOT maintain provisions in our Employee Agreement that may reasonably be interpreted as prohibiting you from discussing your wages and conditions of employment with other employees and third parties, including union representatives.

WE WILL NOT maintain provisions in our Employee Agreement that may reasonably be interpreted as prohibiting you from sharing or storing wage information or information relating to other terms and conditions of employment of employees without permission of management.

16 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."
COSTCO WHOLESALE CORP.

We will not maintain provisions in our Employee Agreement that prohibit you from electronically posting statements that damage any person’s reputation.

We will not maintain provisions in our Employee Agreement that prohibit the removal of confidential material from Company premises, which we have defined as conduct that may reasonably be interpreted as including your wages or other terms and conditions of employment.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will rescind or modify the language in the following provisions of our Employee Agreement:

1. Sections 11.3.4 and 4(a) and 11.3.22.
2. Section 11.7 to the extent that it defines your names, addresses, phone numbers and email addresses as confidential and prohibits disclosure of such information to any third parties.
3. The portions of Section 11.7 that provide that "[a]ll Costco employees shall refrain from discussing private matters of other employees. This includes topics such as, but not limited to sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers' comp. injuries... etc."
4. Section 11.9 to the extent that it prohibits you from making statements that damage the Company or damage any person’s reputation.
5. Section 11.9 to the extent that it provides that all information relating to Costco’s employees must not be disseminated, that payroll information may not be shared or transmitted and unauthorized removal of confidential material (as defined broadly by the Respondent in its Employee Agreement) from Company premises is prohibited.

We will furnish all of you with inserts for the current Employee Agreement that

1. Advise that the unlawful provisions, above, have been rescinded, or
2. Provide the language of lawful provisions or publish and distribute revised Employee Agreements that
   a. Do not contain the unlawful provisions, or
   b. Provide the language of lawful provisions.

COSTCO WHOLESALE CORPORATION

Richard T. Connel, Esq., for the General Counsel.
P. Paul Galligan, Esq. (Seigfried Shaw LLP), of New York, New York, for the Respondent.

DECISION

STEVEN FISCH, Administrative Law Judge. Pursuant to charges and amended charges filed by United Food and Commercial Workers, Local 371 (the Union), the Regional Director for Region 34 issued a complaint and notice of hearing on November 30, 2009, alleging that Costco Wholesale Corporation (Respondent or Costco), violated Section 8(a)(1) of the Act.

On March 4, 2010, a hearing was held before me in Hartford, Connecticut, with respect to the allegations in said complaint. At the hearing, the General Counsel amended the complaint by withdrawing an 8(a)(1) interrogation allegation concerning Manager Jeff Dawson and added an allegation that Respondent violated the Act by maintaining Rule 11.3.24 in its employee agreement. Briefs have been filed and have been carefully considered.

Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a Washington State corporation engaged in the retail operation of wholesale club stores at various facilities throughout the United States, including a facility in Milford, Connecticut, herein called the Milford facility.

During the 12-month period ending November 30, 2009, Respondent derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 at its Milford warehouse directly from points located outside the State of Connecticut.

It is admitted, and I so find, that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background

Respondent’s facility in Milford, Connecticut, is a warehouse employing various employees, including a meat department consisting of eight employees. Jeff Dawson was the general warehouse manager, who was in charge of the facility. Reporting to Dawson was Jim Mager, assistant general warehouse manager, who was responsible for overseeing the meat, bakery, and dairy departments. Dave Simpson, the meat department manager, reported to Mager, as well as to Dawson. Mager, in the course of his duties, visits the meat department four to five times a day to “check and make sure everything is going all right back there, running smoothly.” During these visits, Mager will speak with Simpson and/or the employees about various work related issues.

B. The Alleged Interrogation

The Union began a campaign to organize the meat department employees at Respondent’s Milford warehouse in June or July. A petition was filed by the Union to represent such employees on August 4. There is little dispute that the
chief union supporter was Anthony Chiappe, who openly expressed his union support in the presence of Simpson.

Eddie Ramirez, a meat cutter, testified that on either Monday, July 27, or Monday, August 3, he attended a union meeting at the Stonebridge Restaurant. 1

Ramirez also testified that he signed a union authorization card at that meeting, 4 and that on the day after the meeting, August 4, he had a conversation with Mager about the meeting and the cards. According to Ramirez, in the early afternoon, he observed Mager speaking with Simpson. Ramirez could not hear what they were saying to each other. About 5 minutes later, Ramirez asserts that Mager entered the meat room, and addressed Ramirez and Jule Voss, another meat cutter. Ramirez contends that Mager said, "Oh, I hear that you guys are trying to get the union in the meat room." Voss then allegedly answered, "Yeah, we've been talking about it." Ramirez then asserts that Mager said to him, "Oh, Eddy, I hear that you signed a paper for the union." Ramirez claims that he responded, "Yeah, I signed the paper because I think we need a little security back here and signing such a paper is not illegal." Mager then allegedly replied, "Do you know that the union only takes your money; they don't do anything for you."

Ramirez also testified that on the day after the alleged conversation, Mager again entered the meat room. One of the packages of sausage was upside down in the case. Mager started to fix it but then stopped, and said to Ramirez, "Oh, Eddy, I can't touch this because the union won't let me. The union won't let me straighten this out." Ramirez himself straightened out the package, and Mager then walked away.

On cross-examination, at one point, Ramirez testified that employees, including Chiappe, did not talk openly about the Union in the meat department. However, at another point, Ramirez testified that he and other employees did discuss the Union in front of Simpson. More specifically, Ramirez testified in regard to Simpson and union discussions by employees as follows: "Oh, yes, he knew about it. Yeah, we used to talk about it in the back there."

At another time in his testimony, Ramirez testified that on the day that Mager allegedly spoke to him and Voss about the union the signing of cards, Simpson heard Ramirez and Voss discussing the Union, and then had a conversation with Mager, 5 minutes before Mager allegedly spoke to the employees.

Upon further questioning by the undersigned, Ramirez asserted that he and Chiappe were discussing the Union when Simpson allegedly walked by and possibly overheard the employees' discussion about the Union. 3

Ramirez was also, as noted, uncertain about the date of the alleged conversation. In his affidavit taken on August 17, Ramirez asserted that the conversation took place about a month ago. The complaint alleges that the incident occurred in "late July." In his testimony, Ramirez admitted that the affidavit must be wrong about the date but he was sure that it was a day after the Union meeting. He further testified that the conversation was on the same day as the incident where Respondent alleged that Chiappe and Ramirez "trashed" the meat room, which ultimately led to their suspensions and discharges. 5

Mager testified that sometimes in June, Simpson informed him that there was some union activity in the meat department, and that some employees in the department were trying to form a union. 7 Mager further testified that this information was not a concern to him because if a union came in "we'd just be business as usual." He denied making any efforts to determine who was organizing the union or who was signing cards because "it wasn't a concern of mine." Mager denied asking Ramirez or any employee whether they had signed union cards. Mager also denied making the comments attributed to him by Ramirez. ("I hear that you want the Union in here" or "I hear you signed a paper for the Union.")

Mager did admit that he had one conversation with employees concerning the Union in early July. According to Mager, at that time, he walked into the meat room and heard Chiappe talking to Ramirez and employee Mark Lindquist, and Chiappe said that when a union comes in here, he won't have to work nights. Mager asserts that he commented, "You know you're working for a good place here, you know, if you get the union in, that's fine, in my opinion it's just the union taking money out of your cheek and you're working for a good organization here." According to Mager, this was the only conversation that he ever had with any employee concerning the Union.

On cross-examination, Mager admitted that he had conversations with Ramirez on August 4, as he does every day, but could not recall what he said to Ramirez on that day. Mager also testified that neither Ramirez nor Lindquist made any comments during the July conversation, discussed above, and that he did not know anything about Ramirez's position on the Union. Mager also testified that he was unaware of any conversations between Simpson and Ramirez regarding the Union. Finally, Mager also denied telling Ramirez (as Ramirez testified) that he (Mager) couldn't touch meat because union rules wouldn't allow him or any type of conversation along these lines.

Jack Voss was called as a witness by Respondent. Voss is still employed by Respondent and is still under the supervision of Mager and Simpson. According to Voss, Chiappe was the primary employee attempting to bring in the Union, but that Ramirez "worked together" with Chiappe in organizing union meetings and talking to employees about bringing the union into the meat department. Voss added that Chiappe and Ramirez did not try to hide the organizing from anyone and that it "was all out in the open."

Voss was asked about Ramirez's testimony that in Voss' presence, Mager told Ramirez "I hear you signed a paper for the Union" or any words to that effect. Voss testified, "No, not that I am aware of. That wasn't said in front of me."

On cross-examination, Voss admitted that he was not in favor of the Union, and he had neither signed a card nor at-

1 Although Ramirez was uncertain about the date of the meeting, other evidence indicates, and I find, that the date was August 3.

4 The authorization card was not introduced into the record.

I note that this was the first time, and the only time, Ramirez mentioned that Chiappe was present at the time of Mager's alleged questioning.

7 The Union's charges alleged that the suspensions and discharges were in violation of the Act. The Region disagreed, apparently concluding that the discharges were caused by the conduct of the employees in connection with damage to the meat in the meat room.

* Mager did not testify whether Simpson informed him of which employees were involved in trying to bring in a union.
tended any union meetings. Further, on the last union meeting, presumably on August 4, he saw a text message announcing the union meeting, inviting everyone to attend except for the "two scabs," Voss and another employee. Further, Voss admitted that both Ramirez and Chiappello made derogatory comments about Voss.

Voss was also asked on cross-examination about his testimony that everyone in the meat room talked openly about the union in the presence of management. Voss continued to insist that both Chiappello and Ramirez spoke about the Union in the presence of Simpson. However, his affidavit states only that he recalled one time that Chiappello spoke about the Union in Simpson's presence, and that the affidavit made no mention of whether Voss had observed Ramirez discussing the Union in the presence of Simpson or any other management representative.

Voss also testified that he spoke with both Simpson and Mager about the Union in July and August. In each of these discussions, Voss initiated the conversations and informed both Simpson and Mager that he (Voss) was not interested in the Union and/or that he didn't sign any papers for the Union. Neither Simpson nor Mager made any response to Voss's comments other than "Ok, it's your decision."

C. The Allegedly Unlawful Rules

1. The employee handbook

Respondent maintains a nationwide employee agreement entitled "Costco's Employee Agreement," which sets forth terms and conditions of employment at all its nationwide facilities, including its Milford facility, but not at its facilities where the employees are represented by a union and where a union contract is in effect.

The employee agreement, and its handbook, provides for an "open door policy," which encourages employees "access to ascending levels of management to resolve issues." The agreement is also a comprehensive document that spells out all the terms and conditions of employment for all Costco employees, including rights under various Federal statutes, holidays, vacations, breaks, meal periods, paid sick leave, leave of absence, scheduling, transfers, and promotions.

Section 5 of the agreement is entitled "How do I get paid? Compensation and Payroll." It then references "see tab in back for specific wages." Section 5 then defines the workweek, scheduling, travel, supplemental pay, premium pay, overtime, double time, breaks, and meal periods.

The complaint alleges and the General Counsel contends that several sections of the agreement are unlawful. Section 11.3 is entitled "Causes for Termination," which lists actions that can result in immediate termination. Three of these "causes" are alleged to be unlawful.

4. Unauthorized collection, disclosure or misuse of confidential information relating to Costco, its members, employees, suppliers or agents including, but not limited to:

a. Unauthorized removal of confidential information from Company premises.

b. Unauthorized posting, distribution, removal, or alteration of any material on Company property.

c. Leaving Company premises during working shift without permission of management.

Section 11.7 is entitled "Privacy Policy." Portions of this section alleged to be unlawful read as follows:

Costco respects our members' and employees' right to privacy, and it is up to each employee to take every precaution to ensure we respect this right.

- In the course of our business, we collect from our members and employees a substantial amount of personal information (such as name, address, phone number, e-mail address, social security number, membership numbers and credit card numbers). All of this information must be held strictly confidential and cannot be disclosed to any third party for any reason, unless (1) we have the person's prior consent or (2) a special exception is allowed that has been approved by the legal department.

All Costco employees shall refrain from discussing private matters of member and other employees. This includes topics such as, but not limited to, sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers' comp injuries, personal health information, etc.

Section 11.9 is entitled "Electronic Communications and Technology Policy." The portions of this section alleged to be unlawful are as follows:

Costco recognizes the benefits associated with electronic communications for business use. All employees are responsible for communicating with appropriate business decorum whether by means of e-mail, the Internet, hard-copy, in conversation, or using any other technology or electronic means. Misuse or excessive personal use of Costco technology or electronic communications is a violation of Company policy for which you may be disciplined, up to and including termination of employment. Your use of Costco technology and electronic communication systems represents your agreement with the following policies:

- Every employee is responsible for ensuring that all information relating to Costco, its members, suppliers, employees, and operations is secure, kept in confidence, and not disseminated or misused.

- Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

8 Respondent's counsel modified the above stipulation at the hearing by stating that in some of Respondent's unionized facilities, parts of the employee agreement are in effect, where there do not conflict with union contracts in existence.

9 This apparently refers to sec. 10 entitled "How much am I paid," which includes wage rates for all titles and classifications.
DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

SENSITIVE INFORMATION SUCH AS MEMBERSHIP, PAYROLL, CONFIDENTIAL FINANCIAL, CREDIT CARD NUMBERS, SOCIAL SECURITY NUMBERS, OR EMPLOYEE PERSONAL HEALTH INFORMATION MAY NOT BE SHARED, TRANSMITTED, OR STORED FOR PERSONAL OR PUBLIC USE WITHOUT PRIOR MANAGEMENT APPROVAL. ADDITIONALLY, UNAUTHORIZED REMOVAL OF CONFIDENTIAL MATERIAL FROM COMPANY PREMISES IS PROHIBITED.

III. ANALYSIS AND CONCLUSIONS

A. THE ALLEGED INTERROGATION

The General Counsel asserts, consistent with the complaint’s allegations, that Respondent unlawfully interrogated its employee by Mager’s alleged comment to Ramirez and Voss that he (Mager) said “I heard that you signed a paper for the Union.” Continental Bus System, 229 NLRB 1252, 1264–1265 (1977) (“I heard that you (were) getting people signed-up for the union”); Ready Mix Inc., 357 NLRB 1183, 1190 (2002) (“I heard that you were passing out union cards”).

However, before assessing whether Mager’s alleged comments were coercive or unlawful, consistent with the above precedent, it is essential to resolve the significant credibility dispute between Mager and Ramirez as to whether or not Mager made the quoted comment to Ramirez.

I am not persuaded that the General Counsel has met its burden of proof that Mager made the statement to Ramirez, as Ramirez so testified. In addition to comparative demeanor considerations, I rely on several other factors in coming to that conclusion. The principal factor that I have relied upon is the testimony of Voss, who did not corroborate Ramirez’s testimony, and in fact corroborated Mager’s testimony that the alleged statement by Mager, was testified to by Ramirez, was not made. I recognize, as argued by the General Counsel that Voss, not a union supporter, is still employed by Respondent and is under the supervision of Mager. I have considered those factors, but, nonetheless, found Voss to be an impressive and credible witness. He is still in my view a “neutral” witness with no stake in the proceeding, and I believe that he was candid and believeable in his testimony.

I also found Mager to be a more credible witness than Ramirez for several reasons. I found his testimony sincere and reliable, that while he did find out about the fact that the meat department employees were trying to organize from Simpson, “it was not a concern” to him, and I find that it is not likely that he would ask Ramirez or any employee whether they signed union cards. I also rely on the fact that Mager was candid in his testimony that he had been told about the organizers in June by Simpson, as well as his admission that in July, after hearing Chieppolo and Ramirez discussing the Union, he (Mager) told the employees in his opinion the Union “just takes money out of you’re [sic] check” and that the employees were working for a good organization here. While the General Counsel does not, as he should not, allege that these comments are violative of the Act, these admissions could, in some circumstances, reflect negatively upon Respondent. Thus, I conclude that Mager’s candid admissions that he made such comments, and that he was told about the union organizing by another supervisor, reflects positively on his testimony in general and on his denial that he made the statement to Ramirez, as Ramirez testified.

I have also considered the General Counsel’s arguments that Mager and Voss should not be credited because their memory was hazy, as to precisely what conversations Mager had with Ramirez on August 4. I find little significance to these alleged “decontextualized” in the recollection of Mager and Voss. The evidence reveals that Mager and Ramirez have conversations every day, usually about work related matters. Thus, it is not surprising that they would not be able to recall precisely what was said in these conversations on August 4. What is significant is that Mager and Voss were unequivocal and corroborative in stating that Mager did not say anything to Ramirez about signing cards or “paper” for the Union.

I was, on the other hand, less impressed with Ramirez’s testimony. His testimony was uncertain as to the date of the alleged interrogation. This is important since Ramirez insisted that the conversation took place the day after the union meeting and that at said meeting, he (Ramirez) allegedly signed a union card. However, the card, allegedly signed by Ramirez on August 3 (so argued by the General Counsel) was not introduced as evidence, which tends to shed some doubt on Ramirez’s testimony. Further, the comments that Mager allegedly made to Ramirez accompanying the alleged interrogation (i.e. Mager’s opinion that the Union only takes dues out of the employees’ salaries and that the employees were working for a good organization) were made by Mager to Ramirez (and two other employees) in July. This evidence suggests that Ramirez might have been confused about the date, as well as the substance of the conversation with Mager about the Union.

Further, Ramirez was also inconsistent in his testimony concerning the “presence” of Chieppolo during the events in question. In his direct testimony, as well as on cross and redirect, he made no mention of Chieppolo being present at all on that day or at any of the events in question. However, when pressed during an examination by undersigned concerning the details on the discussions about the Union that Simpson allegedly overheard on August 4, and allegedly immediately communicated to Mager 5 minutes before the alleged interrogation, Ramirez for the first time asserted that he was speaking with Chieppolo about the Union. Thus, Ramirez’s credibility is further undermined by this inconsistency.

Accordingly, based on the foregoing, I do not credit Ramirez’s testimony vis-à-vis Mager’s denials, corroborated by Voss, and therefore shall recommend dismissal of the complaint that Respondent unlawfully interrogated its employees.

B. THE ALLEGEDLY UNLAWFUL RULES

1. Applicable law


[An employer violates Section 8(a)(1) if it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. Lafayette Park Hotel, 326 NLRB 824, 825 (1998). In dete- 10 Voss testified that in response to whether he heard Mager make such a comment to Ramirez, “No, not that I am aware of. That wasn’t said in front of me.”]
mining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful.

If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (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 exercises of Section 7 rights.

352 NLRB at 383, citing 343 NLRB at 646-647.

Here, there is no contention by the General Counsel that any of Respondent's rules that are alleged to be unlawful were promulgated in response to union activity or that any of the rules have applied to restrict the exercises of Section 7 rights.

Thus, the issues are whether any of the rules in question explicitly restricts Section 7 activity and/or whether the employees would reasonably construe the language to prohibit Section 7 activity.

It is to these issues that I now turn.

2. Rule 11.3.22

This rule, as detailed above, provides that one of the causes for immediate termination is the "unauthorized posting, distribution, removal or alteration of any material on Company property.

The General Counsel contends that this rule is unlawful since it explicitly prohibits protected activity, such as posting or distribution of any material on company property and such a prohibition is overbroad. MDU Products, 310 NLRB 723 (1993); Bruinswick Corp., 282 NLRB 794, 795 (1987); Crown Plaza Hotel, supra, 352 NLRB at 384-385.

Respondent does not dispute the general principles cited above that establishes that restrictions on distribution or posting must be confined to "work areas." Thus, Respondent argues that since no evidence was adduced regarding what areas of the Milford warehouse are not "work areas," the General Counsel has not satisfied its burden of proof since company property could well be synonymous with its work area. I disagree. When a rule, such as Respondent's is presumptively unlawful on its face, the employer has the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution in non-working areas. Goodale & Co., Inc., 412 NLRB 122 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994); Pontiac Osteopathic Hospital, 284 NLRB 442, 445 (1987); J. C. Penney, 256 NLRB 1223, 1224 (1983). Further, where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees, who are required to obey it. Norris/O'Barro, 307 NLRB 1236, 1245 (1992) (rule prohibiting distribution "anywhere on the company premises" overbroad and unlawful).

Accordingly, based on the above precedent and analysis, I conclude that by maintaining this rule in its employee agreement, Respondent has violated Section 8(a)(1) of the Act.11

3. Rule 11.3.24

Respondent also prohibits employees from "leasing company premises without permission of management."

It is well-settled that employees, who conversely refuse to work in protest over wages, hours or working conditions, are engaged in "concerted activities" for "mutual aid or protection" within the meaning of Section 8(a)(1) of the Act. Odyssey Capital Group LP III, 357 NLRB 1110, 1111 (2002); NLRA v. Washington Aluminum, 370 U.S. 9 (1962). It is also clear that the Act protects the right of employees to strike without notice. Bethany Medical Center, 328 NLRB 1094 (1999). Finally, it is equally well-settled that an employer may not require an employee to obtain permission from management before engaging in protected activity since such a requirement is an impediment to the full exercise of an employee's Section 7 rights. Trump Marina Casino Resort, 354 NLRB No. 123, slip op. at 3 (2009); Bruinswick, supra, 282 NLRB at 798; Enterprise Products, 265 NLRB 54, 555-554 (1982); American Cast Iron Pipe, 234 NLRB 1126, 1131 (1978).

Therefore, Respondent's rule requiring the permission of management before employees leave "Company premises" inhibits the employees' right to engage in Section 7 activity (i.e. strike) and is violative of Section 8(a)(1) of the Act. Crown Plaza Hotel, supra, 352 NLRB at 386-387 (rule prohibiting employees from leaving their work area without authorization before the completion of their shifts); Labor Ready Inc., 351 NLRB 1656, 1656 fn. 2 (2000).

Respondent, however, relies on Wilshire at Lakewood, 343 NLRB 141, 144 (2004), vacated in part in other grounds 343 NLRB 1050 (2005), reversed and remanded sub nom. Jochims v. NLRB, 480 F.3d 1161 (DC Cir. 2007), and argues that an "almost identical rule" was found to be lawful. Respondent is correct that the rule in Wilshire, supra, was nearly identical to the rule here.11 Respondent is also correct that the Board found such a provision lawful because in the context of that case "employees could not reasonably read the rule as prohibiting them from engaging in all strikes or similar protected concerted activity." Id. at 144. However, Respondent conveniently ignores that the context of the rule therein was that the employer was "a nursing home with many elderly patients, who are sick or infirm." Id. Therefore, the Board concluded "employees would necessarily read the rule intended to insure that nursing home patients are not left without adequate care during an ordinary workday ... Considering the fact that the respondent's mission is to ensure adequate care for its patients, employees would necessarily read the rule as intended to avert such imminent danger, not to prohibit protected conduct." Id.

11 Respondent also asserts in its brief that "since Complaint was issued, Costco has revised the language to conform with applicable Board case law, only restricting distribution of materials in work areas." I note that no record evidence has been adduced confirming this assertion. In any event, even if true, it would not preclude the finding of a violation. Respondent's alleged revision of the language in its agreement will be dealt with in the compliance phase of this case.

12 The rule prohibited employees from "abandoning your job by walking off the shift without permission of your supervisor or administrator."
Here, of course, Respondent is not a nursing home or a health care facility so the considerations relied upon by the Board in Wisconsin, supra, are not present. Therefore, Wisconsin, supra, is clearly distinguishable and not dispositive. Crown Pizza, supra, 352 NLRB at 387, distinguishing Wisconsin, supra on that basis.

Accordingly, I find that Respondent has further violated Section 8(a)(1) of the Act by maintaining Rule 11.3.24.

4. Rule 11.7

Under this rule, Respondent states that “All Costco employees shall refrain from discussing private matters of members and other employees. This includes topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers’ compensation injuries, personal health information, etc.”

The General Counsel contends, and I agree, that this rule explicitly prohibits the exercise of Section 7 activity and therefore is unlawful. I note that Respondent defines “private matters” of members and other employees as including sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers compensation injuries, which cannot be discussed with anyone. All of these “private” matters clearly are terms and conditions of employment of Respondent’s employees, and Respondent’s explicit prohibition of employees discussing these matters with anyone, which would include other employees or union representatives, is overbroad and unlawful. Double Eagle Hotel & Casino, 341 NLRB 112, 113–116 (2004), enfd. in modified part, 414 F.3d 1249 (10th Cir. 2005) (rule explicitly restricts discussion of terms and conditions of employment as defined by employer as “confidential information”).

Alternatively, I also conclude that employees would reasonably conclude that Respondent’s rule prohibits them from discussing terms and conditions of their employment with other employees or with a union. NLS Group, 352 NLRB 744, 745 (2008) (rule states that terms of employment including compensation are confidential and disclosure of such terms to other parties may constitute grounds for dismissal); Citrus Corp., 344 NLRB 943 (2005), enfd. 482 F.3d 463 (DC Cir. 2007) (employer deemed any information concerning its “partners” confidential and prohibited disclosure); Flamego Hilton—Langdon, 330 NLRB 287, 288 fn. 3 (1999) (prohibition on employees revealing confidential information about “fellow employees” overbroad and unlawful. IRIS U.S.A., Inc., 336 NLRB 1013 (2001) (rule in handbook instructing employees to keep information about employees strictly confidential).

Respondent argues, however, that its policy says nothing about Section 7 rights and that its privacy policy “simply modifies Costco’s obligations (in some cases, legal obligations) to its members and employees, who have given personal information to Costco.” It argues that the rule must be read in context, and that the privacy policy (11.7) mentions information that Respondent collects from employees, which must be kept strictly confidential and additional rules apply to personal health information collected in its pharmacists and centers, as well as personal health information related to employees, such as benefits and leaves of absence for medical reasons. Since these sections immediately precede the allegedly offending paragraph, Respondent argues that a reasonable employee would read its policy to prohibit only the disclosure of information such as medical information about himself that he has given to Respondent and that is now stored on Respondent’s database or in the employee’s medical or personnel file. I cannot agree.

While all of the terms and conditions of employment listed in the rule can be construed as relating to medical issues, that does not change the fact that the rule explicitly prohibits employees from discussing terms and conditions of employment. Thus, an employee would reasonably be constrained by this rule from discussing any complaint that he may have about how Respondent is interpreting or enforcing its policies with regard to these issues with other employees or a union, or indeed informing a union of what Respondent’s policies are concerning these terms.

The best that can be said for Respondent’s position is that its rule is somewhat ambiguous, but in my view, if Respondent intended to prohibit only discussion of private medical information in its files, it could easily have done so. Instead, it included a separate paragraph precluding discussions of topics, including terms and conditions of employment. Thus, even if the rule could be considered ambiguous, any ambiguity must be construed against Respondent as the promulgator of the rule. Lafayette Park Hotel, supra, 326 NLRB at 828; Norris/O’Donnell, supra, 397 NLRB at 1245; Crown Plaza Hotel, supra, 352 at 386. (“At the very least, the second sentence renders the rule ambiguous, and as such, it is susceptible to the reasonable interpretation that it bars Section 7 activity.”)

Respondent cites a number of cases, which it asserts are dispositive. It argues that Windstream Corp., 352 NLRB 510 (2008), “could not be more directly on point” and the facts therein are “impossible to distinguish from the facts involved here.” Respondent notes that in Windstream, as here, the rule in question referred to information collected by employees through the employee’s records. It also asserts that the Board held that the rule as modified by the employer clearly identifies the target audience of the rule and makes it clear as well that employees can discuss among themselves personal information as long as that information did not come into their possession through access to company records in the course of their job duties.” 352 NLRB at 514. However, Respondent’s reliance is misplaced for several reasons. Firstly, the Board did not “hold” what Respondent claims in Windstream since there “no party has excepted to the judge’s findings with respect to the underlying complaint allegations.” fn. 3 at 510. Therefore, the case has no precedential value concerning the particular cited by Respondent, which comes from the ALJ’s decision. Trump Marina, supra, 354 NLRB No. 123, fn. 2 at p 1.

More importantly, an examination of the facts in Windstream, even considering the judge’s decision as persuasive, does not support Respondent’s reliance on the opinion. To the contrary, the facts there support the finding of a violation here. The judge relied on the employer’s modification of its original rule, which he viewed as clearly identifying the target audience, and making it clear that employees can discuss among themselves personnel information, as long as that information did not come into their possession through access to company records in the course of their job duties. The precise “modification” referred to by the judge added the following to the rule, previously found by the judge to be

10 Partners at said employer were its employees.
unlawful. "This does not prohibit you from disclosing or discussing personal, confidential information with others, so long as you do not come into possession of such information through access, which you have as a part of your formal company duties."

Here, Respondent, unlike the employer in Windstream, did not issue any such modification, which clarifies the intent of the rule and makes clear to employees that they are free to discuss their terms and conditions of employment with others. Indeed, as I observed below, it was Respondent's obligation to clarify any ambiguities in its rule, which it has not done. Thus, I find that Windstream, supra is supportive of my finding that Respondent's rule is overbroad and unlawful.14

Respondent also places considerable reliance on Palms Hotel & Casino, 344 NLRB 1263 (2005). Once again, its reliance on Palms Hotel & Casino is misplaced. While Respondent argues that the Board upheld the judge's finding that the employer's confidentiality rule was lawful,15 this assertion is incorrect. In fact, there were no exceptions to the judge's dismissal of the complaint alleging violations to this rule. 344 NLRB at 1363 fn. 1. Thus, the Judge's decision concerning this rule, as well as language cited by Respondent in discussing this rule, has no precedential value. Trump Marina, supra. Therefore, the judge's reliance on the fact that the employer there, similar to Respondent here, published information concerning its wages and benefits to conclude in part that therefore, employers would not reasonably conclude that they are prohibited from discussing these matters is not persuasive precedent. Moreover, in my view, this fact, contrary to Respondent's contentions, has little significance in assessing what an employee would reasonably believe was being prohibited by Respondent's rules. The fact that Respondent publishes in its manual its employees' wages and benefits, including the benefits that it specifically prohibits employees from discussing, says nothing about whether it was appropriate for employees to discuss these benefits with other employees or outsiders, such as a union. Notably, in this regard, there is no evidence that Respondent not reasonably construe the language of the rule to prohibit Section 7 activity. Alternatively, I also find that employees would reasonably conclude that the language of the rule to prohibit Section 7 activity. Therefore, I find that Respondent has further violated Section 8(a)(1) of the Act by maintaining this rule in its employees agreement.16

5. Rule 11.9
(Prohibition on Sharing Payroll Information)

Rule 11.9 of the agreement entitled "Electronic Communications and Technology Policy," includes the following section. "Sensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted or stored for personal or public use without prior management approval. Additionally, unauthorized removal of confidential material from Company premises is prohibited."

The General Counsel asserts that two portions of this rule are unlawful. The first concerns the prohibition against sharing payroll information. Secondly, it is asserted that the portion of the rule prohibiting "unauthorized removal of confidential information" is also unlawful. The latter contention

14 I express no opinion on precisely what "modification of" Respondent's rules would be sufficient to render its rule lawful. Therefore, I do not necessarily conclude that the modification issued by the employer in Windstream would be sufficient to lawfully clarify Respondent's rule. I shall leave that issue to compliance.
15 The rule in question prohibited employees from "revealing, discussing or discussing such matters with outsiders or non-privileged team members." The matters referred to were the "company's operational, financial and business affairs and activities."
16 Further, as I observed above, a reasonable employee would infer from the prohibition that he was precluded from discussing with fellow employees any complaints that he may have about any of these benefits or how Respondent has implemented such benefits.
tion will be dealt with below when the issue of Respondent’s
definition of confidential information and its effect on vari-
cous rules are discussed.

With regard to the rule’s prohibition against sharing pay-
roll information, it does not define with whom such informa-
tion can be shared. Thus, it is clear, and I find, that a reason-
able employee would construe the rule as prohibiting sharing
(or discussing) payroll information with other employees or
with outsiders, such as a union. However, that is not the end
of the inquiry. The meaning of the term “payroll” in this
context is in dispute and must be determined.

I agree with the General Counsel that a reasonable em-
ployee would read that term as encompassing their wages or
other terms and conditions of employment and that the rule
inhibits the exercise of Section 7 conduct. Indeed, similar
rules have been found to be unlawfully broad, and to be rea-
sonably construed by employees to restrict discussion of
wages and other terms and conditions of employment with
their fellow employees and with the union. Cintas, supra,
344 NLRB at 943 (prohibition on disclosing any information
concerning its partner employees); NLS Group, 352 NLRB
744, 745 (2008) (rule states that terms and conditions of
employment including compensation are confidential and
may not be disclosed to “other parties”); Double Eagle Hotel
& Casino, supra, 341 NLRB at 115 (information concerning
“any of its employees”); Flamingo Hilton, supra, 330 NLRB
at 288 (prohibiting disclosing information about “fellow
employees”); Bigg’s Food, 342 NLRB 425 fn. 3 (2006) (pro-
hibiting disclosure of salaries to anyone outside the com-
pany); Pontiac Osteopathic Hospital, supra, 284 NLRB at
466 (rule bans discussion of employee problems).

Respondent argues that the term “payroll” in its rule refers
only to “the confidential business information component
of payroll, such as budgeted payroll and expenses and the like,
which Costco does not wish to share with its competitors and
has nothing to do with terms and conditions of employment
of its employees.” Respondent also cites a number of cases,
where it contends that the Board, as well as the courts, has
found rules similar to Respondent’s rule not to be unlawful.
Aroostook County Regional Ophthalmology, 81 F.3d 209,
213 (O.C. Cir. 1996) (rule prohibiting discussion of “offici-
als business”); Mediatone of Greater Florida, 340 NLRB 277,
279 (2003) (rule prohibits disclosure of “employees informa-
tion”); Safeway, Inc., 338 NLRB 523, 527 (2002) (rule pro-
hibiting providing “sensitive information” to others, which
includes “financial information” and “personal informa-
tion”); Lafayette Park, supra, 326 NLRB at 826 (prohibition
on divulging “hotel-private information”); Super K-Mart,
supra, 330 NLRB at 253–259 (disclosure of “company busi-
ness and documents”).

Respondent also asserts that viewing the rule in the con-
text of other portions of the rule makes it clear that Section 7
rights are not implicated by its prohibition on discussion of
“payroll.” Aroostook v. NLRB, supra, 81 F.3d at 212–213
(rule read in context designed only to prevent employees
from providing medical information, relying on placement of
term “office business” in manual in relation to discussion of
confidential medical information); Mediatone, supra, 340
NLRB at 520 (term “employee information” appears within
larger provision prohibiting disclosure of “proprietary informa-
tion”; thus, Board concludes that employees “reading rule
as a whole would reasonably understand that it was designed
to protect the confidentiality of respondent’s proprietary
business information rather than to prohibit discussion of
employee wages”); Safeway, supra, 338 NLRB at 527 (“per-
sonal records” and “payroll data” must read in context of
entire rule, which included numerous categories that do not
implicate any Section 7 rights; Board finds it improbable that
employees would infer that the rule referred to their own
wages or working conditions).

While I agree with Respondent that the rule must be read
in the context of other portions of the Agreement, I do not
agree that such an analysis supports Respondent’s contention
that employees would reasonably view the prohibition on
disclosure of “payroll” information as referring only to the
“confidential business information component of payroll,”
which Respondent does not want to share with its competi-
tors. While some portions of Rule 11.9 are clearly non-
Section 7 items, such as “confidential financial,” “credit card
numbers,” “social security numbers” or “employee personal
health” in the same sentence as “payroll,” other portions of
the rule and the agreement shed a different light on how em-
ployees would perceive the term “payroll.” Thus, another
portion of Rule 11.9 states that employees are responsible for
ensuring that “all” information relating to Respondent, its
“employees” (emphasis supplied) is secure and not be dis-
seminated. This overbroad provision would reasonably be
construed to cover wages or working conditions of its em-
ployees. Cintas, supra.

Further and more importantly, Section 5.0 of the agree-
ment is entitled as follows: “How do I get Paid? Compensation
and Payroll.” It then makes reference to tab in the back
for specific wages and goes on to state “for payroll and ac-
counting purposes, the work week is Monday through Sun-
day and the workday is midnight to midnight.” The agree-
ment then goes on to define scheduling, minimum work
hours and work schedule. Thus, Respondent’s agreement
itself limits the term payroll with compensation. In these
circumstances, considering the term “payroll” in the context
of the agreement, I find that employees would reasonably
construe the language to prohibit Section 7 activity. Cintas,
supra; 34 Flamingo Hilton, supra; Double Eagle Hotel & Ca-
 sino, supra.

The above findings demonstrate that Respondent’s reli-
ance on Aroostook County, supra, 20 Mediatone, supra and
Palms Hotel & Casino, supra is misplaced since in each of these

19 I note the Court of Appeals’ decision affirming the Board up-
proved the Board’s reliance therein on the principle that “any ambig-
ous rule must be construed against the promulgator of the rule.” 452
F.3d at 469 citing Lafayette Park, supra, 326 NLRB at 826. That
principle is equally applicable here. At best, the rule is “ambiguous
and must be construed against Respondent.

20 I note that Aroostook County, supra is a Court of Appeals case
reversing the Board’s decision in 317 NLRB 218 (1995), that the
rule therein was overbroad and unlawful. Ordinarily, I am bound by
the Board’s view notwithstanding the Court of Appeals’ reversal.
However, the court decision in Aroostook County, supra was favor-
duly discussed and relied upon by the Board in Lafayette Park, supra,
326 NLRB at 826. I find that the court’s views on this issue to be
more reflective of current Board law, although the Board decision in
Aroostook County was not specifically overruled. Nonetheless, as
detailed above and below, Aroostook County is clearly distinguish-
able from the instant case.

21 As I observed above in discussing earlier rules, the portion of
the judge’s decision discussing the complaint allegation concerning
cases, the context and placement of the rules in question were substantial reasons for finding them unlawful.

Respondent's reliance on Safeway, supra is also misplaced. Respondent is correct that the rule in question therein did include prohibition on disclosure of "payroll data" and "salary information." However, Safeway, supra was a representation case, and the Board was reviewing a hearing officer's decision that the rule was overbroad and that its maintenance warranted the setting aside of the election. The Board decision found it unnecessary to pass on the hearing officer's finding that the rule was overbroad. See footnote 3, 338 NLRB at 226.

The Board did reverse the hearing officer's decision concerning the effect of the maintenance of the rule on the election. In that connection, the Board majority22 principally relied on the fact that the employees were represented by a union in a RD election. It also stressed that the rule was never enforced and that to the extent that any employee was confused about their statutory right to discuss terms and conditions of employment with the union or with other employees, "the union was ideally placed to advise employees of their rights." Further, when making some of the comments quoted by Respondent, where it rejected finding that the rule had a chilling effect on Section 7 rights because it depended on "a chain of inferences upon inferences," the majority concluded that "that it is highly improbable that the employees in this unit, who have been represented by the union for several years would draw these inferences under the circumstances of this case." Id at 327. Therefore, it is clear the basis for the majority's decision in Safeway that the rule in question did not warrant setting aside the election was the presence of the union on the scene, which could advise the employees about any confusion concerning the meaning of the rule. Since there is no union here, Safeway, supra, has minimal precedential significance and is not dispositive.

Respondent also argues, as it did in regard to other rules in issue, that there is no evidence that it ever enforced the rule to prohibit or punish protected activity. As I have observed above, Board precedent supported by the courts consistently find that such evidence does not preclude a finding that employees would reasonably conclude rules inhibit Section 7 activity. Cintron v. NLRB, supra, 482 F.3d at 375; Guardsmark v. NLRB, supra at 374-375 (D.C. Cir. 2007); Double Eagle Hotel, supra, 341 NLRB at 115; Radisson Plaza, supra. I so find.

Accordingly, based on the foregoing analysis and precedent, I conclude that employees would reasonably construe Respondent's prohibition on disclosure of "payroll" to inhibit their exercise of Section 7 activity and that its maintenance by Respondent is violative of Section 8(a)(1) of Act.

6. Rule 11.9

(Requiring Employees to use "Appropriate Business Decorum"
In Communicating with Others and Prohibiting Employees From Damaging Another Employee's Reputation)

The General Counsel argues that Respondent's rules requiring employees to use "appropriate business decorum" in communications (including conversations) and prohibiting employees from posting messages that "damage any person's reputation" are overbroad and unlawful because they do not define the term "appropriate business decorum" or explain actions that that might "damage any person's reputation."

The General Counsel argues that the failure of the rules to define what conduct is prohibited leads to the conclusion that employees could reasonably view various protected activities23 as violative of Respondent's policies. Lutheran Heritage Village, supra, 343 NLRB at 650;24 University Medical Center, 335 NLRB 1316, 1321 (2001), enf'd. denled 335 F.3d 1079 (D.C. Cir. 2003); Southern Maryland Hospital, 293 NLRB 1209, 1222 (1989), enf'd. In pertinent part 916 F.2d 932, 940 (4th Cir. 1990); Ridgeview Industries, 333 NLRB 1096 (2009) (rule prohibiting employees from engaging in behavior designed to create discord or lack of harmony found unlawful).

Respondent, on the other hand, argues that employees are entitled to establish rules to maintain a civil workplace, and that a reasonable employee would view such rules as supporting that proposition, and would not view either of these rules as proscribing Section 7 activity. With respect to the General Counsel's assertion that the rules "could" be interpreted to prohibit Section 7 activity, this assertion is contrary to current law. Respondent cites Lutheran Heritage Village, "Whereas as here, the rule does not refer to Section 7 activities, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. To take a different analytical approach, would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even that reading is unreasonable. We decline to take that approach." 343 NLRB at 647. (Board finds rule prohibiting "abusive and profane language," "harassment" and "verbal, mental and physical abuse" to be lawful.)

In this instance, I agree with Respondent's analysis of relevant precedent, and that the General Counsel has not met its burden of proof that employees would (emphasis supplied) reasonably construe these rules as regulating or inhibiting Section 7 conduct. It is quite significant that the General Counsel cites the dissenting opinion of Members Liebman and Walsh in Lutheran Heritage Village, supra. The General Counsel seems to be anticipating that the views expressed in this dissenting opinion, which is consistent with dissenting opinions filed by those and other members in several cases,25 will now be changed in view of the new compo...

22 Member Liebman vigorously dissented from the majority opinion and would have adopted the hearing officer's report.

23 The inferences referred to are that employees would infer that the reference to personnel and payroll records in the context of the rule referred to their own wages and working conditions.

24 Such protected activities include (1) protests about the company during a walkout; (2) a concerted protest about a supervisor; or (3) calling a coworker a "slob" during a strike.

25 Dissenting opinion of Members Liebman and Walsh.

26 Palma Hotel & Casino, supra, 344 NLRB at 1368-1370; Trademarkers International, 338 NLRB 460, 463-465 (2002); Fla...
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Whether the General Counsel is correct or not in that assumption is not for me to decide. I must and shall apply current law and not rely upon dissenting opinions. The essence of these dissents is, as argued by the General Counsel, that where employers maintain rules that "could" be perceived as inhibiting Section 7 conduct, that there is an obligation to define permissible conduct and clarify for employees that the rule does not prohibit employees from engaging in Section 7 activities. Lutheran Heritage Village, supra at 647, 650; Palms Hotel & Casino, supra at 1369–1370; Flamingo Hilton, supra at 287; Tradesmen International, supra at 463–465; Lafayette Park, supra at 831. However, as the majority opinions in these and other cases makes clear, that is not the law. Indeed, these decisions have considered rules similar to the rules here and concluded, contrary to the General Counsel and the dissenting opinions therein, that where the rules in question on their face are clearly intended to promote "a civil and decent workplace," even though in some circumstances protected conduct might be restricted, reasonable employees would would (emphasis supplied) not infer that the rules restrict Section 7 activity. Lutheran Heritage Village, supra at 647–649 (rule prohibiting "abusive and profane language," "harassment" and "verbal, mental and physical abuse"); Palms Hotel & Casino, supra at 1367–1368 (rule forbids employees from engaging in "any type of conduct, which is or has the effect of being injurious, offensive, necerling or interfering with fellow team members or patrons"); Tradesmen International, supra at 460–463 (rule prohibiting "defensive, disruptive, competitive or damaging" conduct and prohibiting "verbal or other statements, which are unbecoming or detrimental to the company or any of the company’s employees"); Lafayette Park, supra at 825–826 (rules prohibiting engaging in conduct that does not meet employee’s "goals and objectives" and "improper conduct, which affects the employee relationship with the job, fellow employees, supervisors or the hotel’s reputation or good will in the community"). See also Ark Law Vegas Restaurant Corp., 335 NLRB 1284, 1291–1292 (2001) (rule prohibiting "conducting oneself unprofessionally or unethically with the potential of damaging the reputation or a department of the company" and "participating in any conduct that tends to bring discredit to or reflects adversely on yourself, fellow associates, the company or its guest, or that adversely affects job performance"); Adram ABB Datimere Bens v. NLRB, 253 P.3d 19, 25–29 (DC Cir. 2001), reversing 331 NLRB 291, 293 (2000) (rule prohibiting use of "abusive or threatening language to anyone on company premises").

I additionally rely on Albertson's Inc., 351 NLRB 254, 258–259 (2007), where the Board disapproved complaint allegations that rule prohibiting "disclosing confidential information or any other similar act constituting disregard for the company's best interest," and prohibiting employees from engaging in conduct, which has a negative effect on the company’s reputation or operation or employees morale or productivity, were overbroad or violative of the Act.

The Board emphasized that neither rule expressly covers Section 7 activity, and there is no evidence that the employer applied the rules to protected activity or that it was adopted in response to protected activity. The Board went on to observe that it "did not believe that either rule can reasonably be read as encompassing Section 7 activity. To ascribe such a meaning to these words is quite simply far-fetched. Employees would reasonably believe that these rules were intended to reach serious misconduct but not conduct protected by the Act." Id at 259. I find the above language applicable to the rules here that the General Counsel is attacking. I find in agreement with Respondent that a reasonable employee would infer that Respondent’s purpose in promulgating the challenged rules was to ensure a "civil and decent" workplace and not to restrict Section 7 activity. Lutheran Heritage, supra at 648.

The General Counsel’s reliance on University Medical Center, supra, and Ridegview Industries, supra, is unpersuasive. University Medical Center, supra did find, as the General Counsel correctly points out, that a rule prohibiting employees from engaging in "insubordination . . . or other disrespectful conduct toward a service investigator, service coordinator or other individual" was unlawful. 335 NLRB at 621. However, that decision was reversed by the D.C. Circuit in Community Hospitals v. NLRB, 335 P.3d 1079, 1088–1089 (D.C. Cir. 2003). The court agreed with the employer relying on Adramas, supra that the rule was lawful. The court viewed that the rule prohibiting disrespectful conduct applied to "indecency and outright insubordination" and that the Board’s suggestion that employees would consider such conduct prohibitive of Section 7 activity "is misplaced." The court added, "In short, to quote the Board itself in a more realistic moment ‘any arguable ambiguity’ in the rule ‘arises only through parsing the language of the rule, viewing the phrase . . . in isolation and attributing to the (employee) an intent to interfere with employees’ rights.’" Lafayette Park Hotel, 326 NLRB at 825. 335 P.3d at 1089.

While again, I am cognizant of the fact that ordinarily I am bound by Board rather than court law, once more I turn to the Board precedent establishing that the court’s view in University Medical Center, has been adopted by the Board. See Lutheran Heritage Village, supra at 647, where the Board relied on the court’s decisions in University Medical, as well as Adramas, to conclude that "a reasonable employee reading these rules would not construe them to prohibit conduct protected by the Act.

Finally, the General Counsel relies on the relatively recent case of Ridegview Industries, supra. While the General Counsel is correct that the judge found therein that a rule prohibiting employees from "engaging in behavior designed to create discord or disharmony" was unlawful, 335 NLRB 1096, slip. op. at 17, that finding has no precedent value here. Thus, there were no exceptions to the judge’s finding that the employee violated Section 8(a)(1) of the Act by maintaining rules prohibiting employees from engaging in behavior designed to create discord or lack of harmony. See 335 NLRB 1096 fn. 2. Thus, the judge’s finding, although affirmed by the Board, cannot be cited as authority for find-
ling the rule unlawful. Trump Marina, supra. Moreover, an examination of the facts in Ridgeview Industries, supra, establish that even under the judge’s analysis, Ridgeview does not support a finding of a violation here.

Thus, the judge emphasized in applying Lutheran Heritage Village, supra, that the rule in issue was utilized as a partial basis to discipline employee Balczak for his sarcastic remark to another employee via-a-vis Company President Nykamp’s earlier antiunion argument. Further, the rule was highlighted in disciplinary notices given to Balczak, and Plant Manager MacLaren told Balczak that his rule violations were highlighted (or circled). The judge then concluded that “Balczak’s conversations or attempt at a conversation with a fellow employee was clearly protected in that Balczak’s comments were directed at Nykamp’s earlier antiunion propaganda. Thus, inasmuch as the rule has been applied to restrict Section 7 rights, I conclude that it tends to chill the exercise of Section 7 rights and violates Section 8(a)(1).” Id. at 17. Therefore, it is clear that the judge in Ridgeview Industries, supra, based his finding of a violation solely on the fact that the rule has been applied to restrict Section 7 activity. That finding has no applicability here, where there is no evidence that Respondent applied these rules to restrict protected conduct.

Accordingly, based on the foregoing analysis and precedent, I recommend dismissal of these complaint allegations.

7. Rules relating to disclosure of confidential information (because of how respondent defines “confidential” information)

Rule 11.3.4 cites one of the causes for termination as “unauthorized collection, disclosure, or misuse of confidential information relating to Costco, its members, employees, suppliers or agents, including but not limited to: a) Unauthorized removal of confidential information.

Section 11.7, entitled privacy policy, and Section 11.9, entitled electronic communications and technology policy, read as follows:

11.7 Privacy Policy

Costco respects our members’ and employees’ right to privacy, and it is up to each employee to take every precaution to make sure we respect this right.

In the course of our business, we collect from our members and employees a substantial amount of personal information (such as name, address, phone number, e-mail address, social security number, membership numbers and credit card numbers). All of this information must be held strictly confidential and cannot be disclosed to any third party for any reason, unless (1) we have the person’s prior consent or (2) a special exception is allowed that has been approved by the legal department.

11.9 Electronic Communications and Technology Policy

Every employee is responsible for ensuring that all information relating to Costco, its members, suppliers, employees, and operations is secure, kept in confidence, and not disseminated or misused.

- Sensitive information such as membership, payroll, confidential financial, credit card numbers, social security numbers, or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval. Additionally, unauthorized removal of confidential material from Company premises is prohibited.

The General Counsel asserts that under all three rules employees would reasonably construe each rule dealing with confidentiality to prohibit activity protected by Section 7. In this connection, the General Counsel argues that Respondent defines “confidential” to include employees’ names, addresses, phone numbers and email addresses, which they otherwise have a protected right to share with each other or with outside entities, such as unions, in the course of protected activities.

I agree with the General Counsel that this provision is overly broad and would reasonably be perceived by employees as inhibiting Section 7 conduct. Albertson’s, supra, 351 NLRB at 259, 366 (unlawful to discipline employee for disclosing work schedule, including list of names of employees to the union). Ridgeley Mfg. Co., 207 NLRB 193, 197 (1973), enf’d. 510 F.2d 185 (D.C. Cir. 1975) (employee engaged in protected conduct by obtaining names of employees on timecards). Thus, the applicable rule is that employees are entitled to use for organizational purposes information and knowledge that comes to their attention in the normal course of their work activity but are not entitled to their employer’s private or confidential records. Ridgeley Mfg., supra at 197; Anserphone of Michigan, 184 NLRB 305, 306 (1970) (employee obtained names and addresses of employees from office manager, who was rightly in possession of such information); Cf. Roadway Express, 271 NLRB 1238, 1239–1240 (1984) (employee not engaged in protected activity when he removed business records from employer’s file not in the normal course of his work activity).

Here, this portion of Respondent’s rule is overbroad since it does not distinguish between information obtained in the normal course of work or information obtained from Respondent’s files or even between information obtained by employees from contact with or discussions with other employees. For example, as in Ridgeley, supra, or Albertson’s, supra, an employee obtained information concerning names of employees and possibly addresses from timecards or posted work schedules or other sources in the regular course of their employment. Yet, employees would reasonably perceive that Respondent’s rule prohibits them from disclosing such information to other employees or to the union.

Respondent cites Ashevile School, 347 NLRB 877 (2000), for the proposition that disclosure of confidential wage and salary information by a payroll accountant is unprotected. However, in that case, the judge concluded that the payroll accountant possessed special custody of such records and was aware that her job duties included keeping that information confidential. However, Respondent’s rule is still overbroad as it is not restricted to such an employee and to such information. It is, as I observed above, broad enough to include prohibiting any employee from disclosing information to the union concerning names and addresses of employees even where the employee obtained such information from respondent’s work schedule or timecards, and employees would, in my view, construe the rule.
The General Counsel also noted that Rule 11.9 defines confidential to include “all information relating to Costco and its employees.” I have concluded above that this rule is overbroad and unlawful. Cintas, supra; Double Eagle Hotel, supra; IRIS USA, supra. Similarly, I also concluded above that the mention of “payroll” in the rule is also overbroad and unlawful since the reasonable employee would believe that it prohibits him from engaging in Section 7 conduct. Cintas, supra; Bigg’s Foods, supra. In view of these findings, Respondent’s definition of confidential impinges on Section 7 rights. Therefore, its rule prohibiting the “unauthorized removal of confidential material from Company premises” is unlawful and violative of Section 8(a)(1) of the Act. Double Eagle Hotel, supra, 341 NLRB at 115 (communication rule unlawful in light of link between unlawful confidentiality rule and the communication rule); Bigg’s Foods, supra at 436 (consideration of confidentiality policy and confidentiality statement together).

Similarly, Section 11.2’s listing as one of the causes for termination as “unlawful removal of confidential information from Company premises” is also unlawful and violative of Section 8(a)(1) of the Act. I so find. Double Eagle Hotel, supra; Bigg’s, supra.

THE REMEDY

Having found that Respondent has violated Section (1) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the purposes and policies of the Act.

Where an employer’s overbroad or unlawful rules are maintained on a companywide basis, the Board will generally order the employer to post a notice at all of its facilities where the unlawful policy has been or is in effect. Longs Drug Stores California, 347 NLRB 500, 501 (2006); Cintas, supra at 943, 962; Guardmark LLC, 344 NLRB 809, 812 (2005); Albertson’s Inc., 300 NLRB 1013 fn. 2 (1990), enf. denied on other grounds, mem. NLRB v. Albertson’s Inc., 17 P.3d 395 (9th Cir. 1994).

Such an order is appropriate here since the rules found unlawful are in effect in most of Respondent’s facilities nationwide. I shall therefore recommend that the notice be posted at all facilities of Respondent’s, where the portions of its employee agreement that contain the unlawful rules are in effect.

I shall also recommend that Respondent’s obligation to rescind or modify the rules found to be unlawful shall be governed by the Board’s analysis and order in Guardmark LLC, supra.20

20 The record reflects that the agreement is not in effect at some of Respondent’s unlicensed facilities.

21 The Respondent may comply with our Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees.” Guardmark, supra at 812 fn. 8. Consistent with Guardmark, the Order will additionally provide the Respondent with the option of immediately rescinding the unlawful provisions or modifying the existing provisions to make clear that the discussion of wages and other terms and conditions of employment is not prohibited. Longs Drug Stores, supra at 501 fn. 5.

22 If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.
reasonably be interpreted as including wages or other terms and conditions of employment of its employees.

(f) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Rescind or modify the language in the following provisions of its "Employee Agreement."

1. Sections 11.3 and 4(a), 11.3.22 and 11.3.24,

2. Section 11.7 to the extent that it defines the name, address, phone number and e-mail address of employees as confidential and prohibits disclosure of such information to any third parties,

3. The portions of Section 11.7 that provides that "All Costco employees shall refrain from discussing private matters of other employees. This includes topics such as, but not limited to sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers comp, injuries . . . , etc."

4. Section 11.9 to the extent that it provides that all information relating to Costco’s employees must not be disseminated, that payroll information may not be shared or transmitted and unauthorized removal of confidential material (as defined broadly byRespondent in its Employee Agreement) from Company premises is prohibited.

(b) Furnish all current employees with inserts for the current "Employee Agreement" that

1. advise that the unlawful rules have been rescinded or modified, or

2. provide the language of lawful provisions or publish and distribute to all current employees a revised "Employee Agreement" that

   a. do not contain the unlawful provisions, or

   b. provide the language of lawful provisions.

(c) Within 14 days after service by the Region, post at each of its facilities in the United States, where its "Employee Agreement" is in effect, copy of the attached notice marked "Appendix."

24 Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 5, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible

official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

Dated, Washington, D.C. August 11, 2010

APPENDIX

NOTICE TO EMPLOYERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit

and protection

Choose not to engage in any of these protected activities

We will not maintain provisions in our Costco Wholesale employee agreement (the employee agreement) that prohibit the unauthorized posting, distribution, or alteration of any material on Company property.

We will not maintain provisions in our employee agreement that prohibit you from leaving Company premises during your work shift without permission of management.

We will not maintain provisions in our employee agreement that may reasonably be interpreted as prohibiting you from discussing your wages and other terms and conditions of employment with other employees and third parties, including union representatives.

We will not maintain provisions in our employee agreement that may reasonably be interpreted as prohibiting you from starting or storing wage information or information relating to other terms and conditions of employment of employees without permission of management.

We will not maintain provisions in our employee agreement that prohibit the removal of confidential material from Company premises, which we have defined as conduct that may reasonably be interpreted as including your wages or other terms and conditions of employment.

We will not, in any like or related manner, interfere with, restrain, or coerce you in the exercise of your rights guaranteed you by Section 7 of the Act.

We will rescind or modify the language in the following provisions of our "Employee Agreement."

1. Sections 11.3 and 4(a), 11.3.22 and 11.3.24,

2. Section 11.7 to the extent that it defines the name, address, phone number and e-mail address of employees as confidential and prohibits disclosure of such information to any third parties,

3. The portions of Section 11.7 that provides that "All Costco employees shall refrain from discussing private matters of other employees. This includes topics such as, but not limited to sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers comp, injuries . . . , etc."
4. Section 11.9 to the extent that it provides that all information relating to our employees must not be disseminated, that payroll information may not be shared or transmitted and unauthorized removal of confidential material (as defined overbroadly by Respondent in the Agreement) from Company premises is prohibited.

We WILL furnish all current employees with inserts for the current "Employee Agreement" that advise that the unlawful rules have been rescinded or modified or provide the language of lawful provisions, or

We WILL publish and distribute to all you a revised "Employee Agreement" that (1) does not contain the unlawful provisions, or (2) provides the language of lawful provisions.

COSTCO WHOLESALE CORPORATION
Attachment F
Minimum Wage
Generally, you must be paid at least the federal minimum wage for all the time that you work, whether you are paid by the hour, the day, or at a piece rate.

Overtime & Regular Rate
If you are not an exempt employee, you must receive time and one-half your regular rate of pay after 40 hours of work in a 7-day workweek. Regular rate includes most compensation, including non-discretionary bonuses and shift differentials.

Misclassification
Some employers misclassify workers who are employees under the law as something other than employees, sometimes calling them "independent contractors." When this happens, the workers do not receive certain workplace rights and benefits, such as the minimum wage and overtime pay, to which they are legally entitled.

Recordkeeping
Generally, you should know that your employer must keep records of all wages paid to you and of all hours you worked, no matter where the work is done. Similarly, it is recommended
that you keep your own records of all the hours you work and of your pay. It is recommended that you keep all your pay stubs, information your employer gives you or tells you about your pay rate, how many hours you worked, including overtime, and other information on your employer's pay practices. This work hours calendar should help you keep as much information as possible.

Employers must pay employees for all the time worked in a workday. "Workday," in general, means all of the hours between the time an employee begins work and ends work on a particular day. Sometimes the workday extends beyond a worker's scheduled shift or normal hours, and when this happens the employer is responsible for paying for the extra time.

Usually, workers have to be paid for all the time that they work, including:

- Waiting for repairs to equipment necessary for work
- Time spent travelling between worksites during the workday
- Time spent waiting for materials during the workday
- Breaks less than 20 minutes long
- Time spent completing unfinished work after a shift

**NOTE!** While most workers in the United States have these rights, some workers are not covered by federal labor laws. If the federal law does not apply, check with your State Labor Department.

---

The U.S. Department of Labor's Wage and Hour Division (WHD) is responsible for administering and enforcing some of the nation's most important worker protection laws. WHD is committed to ensuring that workers in this country are paid properly and for all the hours they work, regardless of immigration status. There are over 200 WHD offices throughout the country with trained professionals to help you. The information below is useful to file a complaint with WHD:

- Your name
- Your address and phone number (how you can be contacted)
- The name of the company where you work(ed)
- Location of the company (this may be different from where you worked)
- Phone number of the company
- Manager's, supervisor's, or owner's name (who should we ask to speak to?)
- Type of work you did
- How and when you were paid (i.e. cash or check, every Friday).
Calendar Instructions
For each day you work, fill in the following information:
- **Month**: Next to the month, write the year in which you are working
- **Date**: Write the date in the green box
- **Arrive**: Write when you arrived at the worksite
- **Start**: Write what time you started working
- **Stop**: Write what time you stopped working
- **Leave**: Write what time you left the worksite
- **Meal & Other Breaks**: Write in minutes how long your meal breaks or other breaks were

### MONTH 2012

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(Continued...)
For More Information

You work hard, and you have the right to be paid fairly. It is a serious problem when workers in this country are not being paid every cent they earn. All services are free and confidential, whether you are documented or not. Please remember that your employer cannot terminate you or in any other manner discriminate against you for filing a complaint with WHD.

Call the U.S. Department of Labor's Wage and Hour Division at 1-866-487-9243 (toll free) or see our website at www.wagehour.dol.gov.

REV. JULY 2010
DOL–Timesheet
By U.S. Department of Labor
Open iTunes to buy and download apps.

Description
This is a timesheet to record the hours that you work and calculate the
It also includes overtime pay calculations at a rate of one and one-half
hours you work over 40 in a workweek.

This DOL–Timesheet does not handle items such as tips, commissions, weekends, shift differentials, or pay for regular days of rest.

Disclaimer: DOL is providing this App as a public service. The regulations are intended to enhance public access to information on DOL programs under development and it does not include every possible situation or be aware that, while we try to keep the information timely and accurate publication of the materials and their appearance in or modification of this App rely on the accuracy of the data provided by the user. Therefore guarantees. The Federal Register and the code of Federal Regulations information published by DOL. We will make every effort to correct err

Customer Ratings
Current Version: 3.0
33 Ratings

More iPhone Apps by U.S. Department of Labor

Labor Stats
View in iTunes

6/8/2012

Este es un horario para registrar las horas que usted trabaja y para calcularla. También incluye los cálculos del pago de sobretiempo a base regular de pago por todas las horas que usted trabajó en exceso de 40

Este Horario-de-DOL no calcula cuestiones de, por ejemplo, propinas, día feriado, pago por fin de semana, turnos diferenciales, o pago por d

Desautorización: DOL (siglas en inglés para el Departamento de Trabajo público, los reglamentos y los materiales relacionados que se reflejan acceso del público a información sobre los programas de DOL. Esta Ap continuo y no incluye toda situación posible que se pueda encontrar estar consciente de que, mientras intentamos mantener la información retraso entre la publicación oficial de los materiales y su aparición en, conclusiones a las que llegue esta App dependen de la exactitud de los tanto, nosotros no damos ninguna garantía explícita o implícita. El "Federal Regulations" siguen siendo las fuentes oficiales para la información reg

DOL-Timesheet Support

**IPhone Screenshots**

![Timesheet screenshot]

**Customer Reviews**

What Genius...!
by David Odom

...thought of this?!?!?

It is hard enough to get employees to clock in/out, of the actual system an app that purports to be "invaluable in wage and hour investigations"

I'm now waiting to hear from an employee who claims their pay is wor
this app.

Taxes? Deductions? Garnishments? Meal and rest break penalties?

Nice try, but this totally misses the mark and will only cause more wag.

Incomplete
by Adam Dabney

This app has good potential but lacks useful things like OT rates and D
taxa your tax bracket and deduction. This seems important if there go

time sheet.

Simple and Efficient
by Kravor

Does exactly what you'd expect for a simple time tracker. The small tin

Customers Also Bought

iTunes on Facebook
Like | 22,106,405

App Store on Facebook
Like | 5131,045

Become a fan of the iTunes and Air
Inside scoop on new apps and mo
Attachment G
Superior Court of New Jersey, Appellate Division.

Superior Court of New Jersey, Appellate Division.

LOVING CARE AGENCY, INC., Steve Vella, Robert Cremers, Lorenz Lokcoy, Robert Fuso, and LCA Holdings Inc., Defendants-Respondents.

Argued May 13, 2009.

Background: Former employee filed action against employer for alleged violations of Law Against Discrimination. The Superior Court, Law Division, Bergen County, denied employee's motion to require employer to return all copies of e-mails sent to employee to attorneys over work-issued laptop through employee's personal, web-based e-mail account. Employee appealed.

Holding: The Superior Court of New Jersey, Appellate Division Fabisch, J.A.D., held that:
(1) a breach of a company policy with regard to use of its computers does not justify company's claim of ownership to personal communications and information accessible therefrom or contained therein;
(2) e-mails exchanged by employee through her personal, password-protected web-based e-mail account were protected by the attorney-client privilege;
(3) actions of employer's counsel in proceeding to read communications in question without giving employee an opportunity to argue that they were privileged were inconsistent with professional conduct rules and
(4) action would be warranted for a hearing, before judge in related chancery action, as to whether employee's counsel should be disqualified.

Reversed and remanded.

West Headnotes

1 Procedural Procedure 397A C==19

397A Procedural Procedure

507A Dispositions and Discovery

507A(A) Discovery in General

507A(1) k. Discretion of Court. Most

Cited Cases

Judges have broad discretion in deciding discovery disputes, but that does not empower judges to adjudicate on the papers factual disputes critical to the existence of that discretion.

(1) Labor and Employment 2311 H Comp 93

2311H Labor and Employment
2311H1 Rights and Duties of Employers and Employees in General
2311H11 Rules, Regulations, Orders, and Standards
2311H12 k. In General, Most Cited Cases

An employer's rules and policies must be reasonable to be enforced by courts; there must be a nexus between the rule and what an employer may reasonably require of its employees.

(1) Labor and Employment 2311 H Comp 93

2311H Labor and Employment
2311H1 Rights and Duties of Employers and Employees in General
2311H11 Rules, Regulations, Orders, and Standards
2311H12 k. In General, Most Cited Cases

To gain enforcement in courts, the conduct regulated by an employer's rules and policies should concern the terms of employment and reasonably further the legitimate business interests of the employer.

(1) Labor and Employment 2311 H Comp 92

2311H Labor and Employment
2311H1 Rights and Duties of Employers and Employees in General
2311H11 Rules, Regulations, Orders, and Standards
2311H12 k. In General, Most Cited Cases

Telecommunications 372 Comp 1340

272 Telecommunications

Computer Communications

Civil Liabilities; Illegal or Improper Purposes

Company could be held liable for libel or other torts committed by employees in the course of their employment. Examples include employees who transmit false and defamatory information about the company's competitors or about other employees, or who send messages that are malicious or harmful to the company's reputation.

Labor and Employment

In General

Manuscripts, Handbooks, and Policy Statements

k. Particular Cases, Most Cited Cases

Labor and Employment

Rights and Duties of Employers and Employees in General

Rules, Regulations, Orders, and Standards

k. In General, Most Cited Cases

Company could be liable for damages caused by employees in the course of their employment, regardless of whether the employees act alone or in concert with others.

Labor and Employment

Rights and Duties of Employers and Employees in General

k. Privacy in General, Most Cited Cases

Telecommunications

Civil Liabilities; Illegal or Improper Purposes

A policy imposed by an employer, purporting to allow employees to use company equipment for personal purposes, may be invalid if the employer has not authorized the use of such equipment for such purposes.

Labor and Employment

Privacy

k. In General, Most Cited Cases

A policy prohibiting employees from using company equipment for personal purposes may be invalid if it is not an authorized use of such equipment.

Telecommunications

Civil Liabilities; Illegal or Improper Purposes

A policy prohibiting employees from using company equipment for personal purposes may be invalid if it is not an authorized use of such equipment.
231H Labor and Employment
231H. Rights and Duties of Employer and Employee in General
231 HK 72. Privacy in General. Most Cited Cases

Labor and Employment 231H C24763

231H Labor and Employment
231H VIII. Adverse Employment Action
231H V III A In General
231H B C D Reasons or Grounds for Adverse Action
231H C 758. B. Conduct or Misconduct In General. Most Cited Cases
An employer may monitor whether an employee is distracted from the employer's business and may take disciplinary action if an employee engages in personal matters during work hours, but that right to discipline or terminate does not extend to the confidentiality of the employee's personal communications.

118 Privileged Communications and Confidentiality 311H C247112

311H Privileged Communications and Confidentiality
311H.II. Attorney-Client Privilege
311H.II.1. Construction of Attorney-Client Privilege

111 Privileged Communications and Confidentiality 311H C247126

311H Privileged Communications and Confidentiality
311H.II. Attorney-Client Privilege
311H.II.1. Construction of Attorney-Client Privilege

112 Privileged Communications and Confidentiality 311H C247141

player's policy that the e-mails were not protected by any privilege. RPC 4.4(A).

32 Appeal and Error 33XVII Determination and Disposition of Cause 2004MJR Reversal

Employment discrimination action, in which trial court improperly denied employer's motion to require employee to return all copies of e-mails that were sent by employees through her personal, web-based e-mail account to her attorney by way of a work-issued laptop, would be remedied for a hearing, before the judge in a related chancery action by employer against that employee and other defendant, to determine whether employer's counsel should be disqualified for failing to alert employee that it was in possession of the e-mails before proceeding to read them.

160 Pretrial Procedure 307A 44.1


307B Add.1 k. In General. Most Cited Cases
Courts possess the inherent authority to impose sanctions for violations of the spirit of the discovery rules.

171 Attorney and Client 43 45 19

43 Attorney and Client 43 statute: Disqualification
45.18 Privileges, Disabilities, and Liabilities 45.18 k. Disqualification in General. Most Cited Cases
Disqualification of counsel is a discretionary remedy that may be imposed for violation of discovery rules, although it is a remedy that should be used sparingly. *939 Donald P. Jacobs, Short Hills, argued the case for appellant (Budd Larner, P.C. attorney; Mr. Jacobs and Allen L. Harris, on the brief).

Lynne Anne Anderson, Newark, argued the case for respondents (Sills Cummis & Gross, P.C., attorneys; Mr. Anderson, of counsel; Arnold L. Webber, on the brief).

Before Judges FISHER, A.L.J. MINNITI and BALLESTRIS.

The opinion of the court was delivered by

FISHER, J.A.D.

*939 In this appeal, we address whether workplace regulations converted an employee's e-mails with her attorney—sent through the employer's personal, password-protected, web-based e-mail account, sent via her employer's computer to the employer's property. Finding that the policies undergirding the attorney-client privilege substantially outweigh the employer's interest in enforcement of its unilaterally imposed regulation, we reject the employer's claimed right to rummage through and retain the employee's e-mails to her attorney.

I

Plaintiff Martha Strenger was Executive Director of Nursing at Loving Care, Inc. (the company) until her resignation on or about January 2, 2008. The following month, she filed this action against the company alleging, among other things, violations of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49.

As part of the employment relationship, the company provided plaintiff with a laptop computer and a work e-mail address. Prior to her resignation, plaintiff communicated with her attorney, Budd Larner, P.C., by e-mail. These communications contained to plaintiff's anticipated suit against the company, and were sent from plaintiff's work-issued laptop but through her personal, web-based, password-protected Yahoo e-mail account.

After plaintiff filed suit, the company extracted and created a forensic image of the hard drive from plaintiff's computer. In reviewing plaintiff's Internet browsing history, an attorney at Sills Cummis discovered and, as he later certified, "read numerous communications between [plaintiff] and her attorney from the three period prior to her resignation from employment with the company." Sills Cummis did not advise Budd Larner that the image extracted from

the hard drive included these communications.

Many months later, in answering plaintiff's interrogatories, the company referenced and included some of plaintiff's emails with her attorneys. Frank Lerner requested the immediate identification of all other similar communications, the return of the original and all copies, and the identification of the individuals responsible for collecting them. When Sally Cimini refused, plaintiff applied *60 for an order to show cause with temporary restraints. The Judge denied temporary restraints but scheduled the application as a motion.

On the return date, the trial judge denied plaintiff's motion in all respects, finding that the emails were not protected by the attorney-client privilege because the company's electronic communications policy did not allow plaintiff to view them as company property. We granted leave to appeal.

II

In support of its claimed right to pry into and review plaintiff's communications *394 with her attorney, the company relies upon the following electronic communications policy allegedly contained in the company handbook:

[1] The company reserves and will exercise the right to review, audit, intercept, access, and disclose all matters on the company's media systems and services [395] at any time, with or without notice.

[2] It is not clear whether the use of the word "services" is a typographical error; the context could suggest that the company meant "servers."

[3] E-mail and voice mail messages, internet use and communication and computer files are considered part of the company's business and are records. Such communications are not to be consid-
company had not previously enforced it. In response, the company asserted that it had disseminated a handbook containing the policy quoted above, that the policy was finalised approximately one year before plaintiff sent the email in question, and that the policy’s provisions applied to all employees, including executives, without exception.

In considering these factual disputes, we are immediately struck by the fact that the record on appeal contains multiple versions of an electronic communications policy, thus creating a genuine factual dispute on this particular point. The judge, rather than conduct a hearing to resolve this and the other material disputes we have mentioned, concluded that the policy applied to executives because “[i]n the handbook exempt Directors or those similarly situated.” In short, the judge identified the particular version of the policy the plaintiff believed applied and rejected plaintiff’s sworn factual contentions that the company had not yet finalized an applicable policy by the time the email was transmitted by reference to the language of the disputed policy itself.

These factual disputes surrounding the identification of the policy that applied to plaintiff’s email are applied to the judge in a substantially similar manner in a determination of the disputes about the emails exchanged by plaintiff and her attorney. These threshold questions could not be resolved by recast only to the parties’ competing contentions.

B

Assuming the policy we quoted earlier was in effect and applied to plaintiff at the time she sent the email in question, further questions about the meaning and scope of the policy and, specifically, whether the policy covers emails sent to an attorney by way of an employee’s personal, password-protected internet email account, when a company-owned computer is the vehicle used to send and receive those emails.

The trial judge found that the company’s policy put employees on notice that electronic communications, whether made from her company email address or an internet-based email address would be subject to review as company property. In reaching this conclusion, the judge stated that the company policy “specifically state[d] plaintiff on notice that all of her internet-based communications ‘are to be considered private or personal and that the policy “put employees on notice that the technology resources made available to employees were to be used for specific work-related purposes, particularly during business hours.” According to the judge, the policy adequately warned there was no reasonable expectation of privacy “with respect to
any communication made on company issued laptop computers and server, regardless of whether the E-mail was sent from plaintiff's work E-mail account or personal web-based E-mail account.

We are not so confident that this is the result an objective reader would derive from the policy's various forms. For example, while paragraph 1 may provide support for the company's broad interpretation by indicating that the company "reserves and will exercise the right to ... intercept ... matters on the company's media systems and services," the policy neither defines nor suggests what is meant by "the company's media systems and services," nor do those words about coverage a clear and unambiguous understanding about their scope. But, even if we *64 were to conclude those words would denote to an objective reader the broad scope urged by the company, there remains a conflict between the declarations in paragraph 2 which "all small and voice mail messages, Internet use and communication and computer files" are considered "part of the company's business and client records" and not "private or personal to any individual employee" with the recognition in paragraph 3 that "[o]ccasional personal use is permitted." An objective reader could reasonably conclude from a comparison of paragraphs 2 and 3 that not all personal e-mails are necessarily company property because the policy expressly recognizes that occasional personal use is permitted. Moreover, the policy makes no attempt to suggest when personal use is permitted; here, rather than explain when personal use is and are not permitted, the company simply scales to segregate unto itself the power to keep all personal e-mails. In addition, the record reveals that the company had its own "e-mail system" for communications within and without the company. The references to the use or misuse of this "e-mail system" in paragraph 4 could reasonably be interpreted to refer only to the company's work-based system and not to an employee's personal private e-mail account accessed via the company's computer.

FN 5. Certainly, it would be an unreasonable interpretation to assume that even though the policy permits "occasional personal use," personal e-mails would nevertheless become company property.

These ambiguities cast doubt on the legitimacy of the company's attempt to seize and retain personal e-mails sent through the company's computer via the employee's personal e-mail account. Paragraph 4 and its subparagraphs suggest the legitimate company interest in protecting the company from the employee's using the company's "e-mail system" to send e-mails in violation of "government laws," for political activism, in search of a new job, or to engage in offensive or harassing conduct, among other things. But it does *65 not necessarily or logically follow from these examples that an employee would objectively understand that vindicating those legitimate business interests, the company intended to retain private e-mails as its property rather than the employee's. Moreover, the listing of specific prohibitions set forth in paragraph 4 could very well convey to an objective reader that personal e-mails, which do not fit those descriptions, are of the type that are "[o]ccasional[ly] .. permitted."

**997 In short, although the matter is not free from doubt, there is much about the language of the policy that would convey to an objective reader that personal e-mails, such as those in question, do become company property and little to suggest that an employee would not retain an expectation of privacy in such e-mails.

C

[1] The trial judge resolved these disputed threshold contentions and interpreted the policy against plaintiff without conducting an evidentiary hearing, to either illustrate the policy's meaning or resolve the parties' factual disputes about the policy's adoption, dissemination and application. In defending the process adopted by the judge, the company relies upon the discretion possessed by judges in ruling on discovery matters. That argument is misguided, judges do have broad discretion in deciding discovery disputes, see Ogden v. N.J. Milk, Inc. Co., 169 N.J. 480, 492, 784 A.2d 1147 (2001); that does not empower judges to adjudicate on the parties' factual disputes critical to the exercise of that discretion, see Kirm v. Bardant, 201 N.J. 337, 99 S. Ct. 74 (2000); but that does not empower judges to adjudicate on the parties' factual disputes critical to the exercise of that discretion, see Kirm v. Bardant, 201 N.J. 337, 99 S. Ct. 74 (2000);
(App. Dec. 1992), modified in part, 129 N.J. 319, 272 A.2d 623, 630. The court held that the adoption of the new procedure would not relieve the employer of its obligations under the contract. The court stated that the procedure was designed to ensure that employees were aware of the changes made to the handbook and that they understood the new policies. The court also noted that the new procedure was consistent with the employer's practices and that it was not necessary to adopt a more formal procedure.

As a result of the court's ruling, the new handbook was distributed to employees, and the employer was required to take steps to ensure that employees understood the new policies. The employer also took steps to ensure that employees were aware of the changes made to the handbook and that they understood the new policies. The court held that the employer had met its obligations under the contract. The court concluded that the employer had not violated the contract by adopting the new procedure.

In summary, the court held that the employer had met its obligations under the contract by adopting a new handbook that included changes to the policies and procedures. The court also held that the employer had not violated the contract by adopting a new procedure to ensure that employees understood the changes made to the handbook.

As a result of the court's ruling, the employer was able to adopt the new handbook and procedures without violating the contract. The employer was also able to ensure that employees understood the changes made to the handbook and that they understood the new policies. The court's ruling provided a clear framework for employers to adopt new policies and procedures without violating the contract.
However, this view of the salutary nature of employee handbooks has never been limitless. Contrary to the thrust of the company's argument here, an employer's rules and policies must be reasonable to be enforced. See Jackson v. Int'l Paper Co., 161 Mont. 300, 519 P.2d 879, 881 (1974); Boes v. Int'l Paper Co., 157 Mont. 251, 489 P.2d 599 (1972) (citing several cases).

There must be a nexus between the rule and what an employer may reasonably require of its employees. Stated another way, to gain enforcement in our courts, the regulated conduct should concern the terms of employment and "reasonably further the legitimate business interests of the employer." Western Dairy Producers, Case v. Bd. of Review, 484 A.2d 687, 690 (Del. 1984); see also 29 Amer. Jur. 2d Employment Relations § 167 (2004) (stating that "[i]n most instances, the right to operate policies and rules is an incident of the employer's business judgment") (citing sources).

We have no doubt that many aspects of the policy in question are reasonable and represent "ypically directed to the business relationship. Holley v. Superc. 526 N.W.2d at 392-93, 932 A.2d 1273. Certainly, the subparts of paragraph 4 provide clear rules for the use of company computers that the company may legally enforce by means of terminating the employee's use of the computer and the employee's computer's use by company policy. See Thruart v. National Indus. Corp., 659 F. Supp. 283, 372 N.Y.S.2d 1172, 842 N.Y.S.2d 277 (2007).

In addition, paragraphs 1 and 2 reflect the employer's interest in protecting the confidentiality of its business and personal communications made by the employee in the furtherance of the company's business. As interpreted by the company, however, those provisions purport to reach into the employee's personal life without a sufficient nexus to the employer's legitimate interests. This claimed right seems to be based principally on the fact that the computer used to make personal communications is owned by the company, although the company provides no plausible explanation for the policy's expressed acknowledgment that "[o]ccasional personal use is permitted." No rationale is offered to explain how non-use of the policy prevents the company's absolute right to retain, as its own property, all emails, whether business-related or personal, with the provision that "[o]ccasional personal use is permitted."

Ignoring the significance of its express permission for "[o]ccasional personal use," the company's argument appears to rely solely on the fact that the employee utilized the company's computer and that anything flowing from that use becomes subject to the company's claimed ownership right. We reject the company's ownership of the computer as the sole determinative factor in determining whether an employee's personal emails may become the company's property.

In this regard, we agree with the tenor of a recent decision of the New York Court of Appeals, which discounted the significance of the fact that a company's computer was the means by which an employee sent and received personal communications through a separate email account. See Thruart v. National Indus. Corp., 659 F. Supp. 283, 372 N.Y.S.2d 1172, 842 N.Y.S.2d 277 (2007). Thruart recognized that a computer in the setting constitutes little more than a file cabinet for personal communications. Id. at 1278.

Property rights are no less offended when an employer examines documents stored on a computer as when an employer searches through a folder containing an employee's private papers or reaches into and examins the contents of an employee's pockets. Indeed, even when a legitimate business purpose could support such a search, we can envision no valid reason for saying that an employee's use of his/her own property in determining what is in those locations with a right to own the contents of the employee's own computer or the contents of his/her own pockets. As a result, we conclude that the breach of company policy with regard to the use of its computers does not justify the company's claim of ownership of personal communications and information accessible therefrom or contained therein.

Although there may be gray areas where an employer possesses a legitimate interest in accessing personal communications from a computer belonging to its employees that impact on its business or reputation, see, e.g., State v. Badger, 409 N.E.2d 353, 544 A.2d 833 (Ind. 1988); Doe v. X2C Corp., 382 N.J. Super. 132, 136, 887 A.2d 1155 (App. Div. 2005), the matter at hand does not present the same or similar circumstances considered in Badger upon which the company's *400 claims great emphasis, or Doe, nor does it present a difficult question in resolving the conflict between an employer's personal interests and the employee's business interests. Although plaintiff's
emails to her attorney related to her anticipated lawsuit with the company, the company had no greater interest in these communications than it would if it had engaged in the highly impermissible conduct of electronically eavesdropping on a conversation between plaintiff and her attorney while she was on a lunch break.

FIN7. In *Doe*, when hired as a bookkeeper, the defendant was advised that the "computers or anything in the office is company property." *Id.* at 539, 984 A.2d 503. Later, after gaining the employer's trust, the defendant installed a secret password and stored personal information in the employer's computer system. The defendant thereafter made a purchase using the employer's credit card and called the employer's payroll company to increase his salary. The defense was discharged when the employer discovered these thefts. In the context of the criminal proceedings and a police search of the contents of the computer system that followed, the defendant argued he had a reasonable expectation of privacy in the computers. In that context, we held that this expectation was unreasonable. *Id.* at 539, 984 A.2d 503, noting that the defendant's "personal information was not the focus of the search; it did not concern his theft; and the record is silent as to whether it played a role in the indictment." *Id.* at 539, 984 A.2d 502.

FIN9. In *Doe*, we held that an employee did not have a reasonable expectation of privacy when the employer exceeded the policy-based right to examine the company computer to determine whether the employee had accessed child pornography. Paragraph 4(a) in the policy at issue specifically prohibited the conduct dealt with in *Doe* and, in light of that subpart's specificity, negates any expectation the employee may have had in engaging in those types of communications. Those legitimate company interests were not implicated here.

Finally, many highly personal and confidential transactions are commonly conducted via the Internet, and may be performed in a moment's time. With the touch of a keyboard or click of a mouse, individuals may access their medical records, file examine activities in their bank accounts and phone records, file income tax returns, and engage in a host of other private activities, including, as here, enlisting an attorney regarding confidential matters. Regardless of where or how those communications occur, individuals possess a reasonable expectation that those communications will remain private. See *Griner v. Arch Wireless Operating Co., Inc.*, 529 N.J. Super. 669, 504 (9th Dist. 2008) (finding a reasonable expectation of privacy in text messages stored by a service provider), note dated, 529 N.J. Super. 669, 504 (9th Dist. 2008) (finding a reasonable expectation of privacy in text messages stored by a service provider), note dated, 529 N.J. Super. 669, 504 (9th Dist. 2008) (finding a reasonable expectation of privacy in text messages stored by a service provider)


FIN11. In *Doe*, the plaintiff alleged that the defendant's publication of the plaintiff's name in the newspaper article was an invasion of privacy. The defendant argued that the plaintiff's right to privacy was not implicated because the plaintiff had voluntarily exposed his name and photograph to the public.


FIN11. In addition, in keeping pace with the rapid advances of technology, our Supreme Court has found an expectation of privacy in the information stored in a personal pager, *State v. Delorenzo*, 168 N.J. 591, 531 A.2d 772 (1987), and in the subscriber information as an individual provides to an Internet service provider, *State v. Reid*, 194 N.J. 383, 399, 945 A.2d 34 (2007).
**493. [493]** A policy imposed by an employer, purporting to transform all private communications into company property—namely because the company owned the computer used to make private communications or used to access such private information during work hours—furthers no legitimate business interest. See Western Digital Corp., supra, 884 P.2d at 649. When an employee, at work, engages in personal communications via a company computer, the company's interest—absent circumstances the same or similar to those that occurred in *M.R.* or *Dege*-like not. In the context of those communications the company's legitimate interest is in the fact that the employee is engaging in business other than the company's business. Certainly, an employer may monitor whether an employee is distracted from the employer's business and may take disciplinary action if an employee engages in personal matters during work hours, that right to discipline or terminate, however, does not extend to the confidentiality of the employee's personal communications.*FN12*

**FN12.** Indeed, this conclusion more closely comports with the policy's multiple declarations about its purpose, i.e., "[the company] retains the authority to take corrective notice for conduct which the company considers unacceptable..."; "[a]lthough the company's communications system may result in disciplinary action up to and including separation of employment."

Here we make no attempt to define the extent to which an employee may reach into an employee's private life or confidential records through an employment rule or regulation. Ultimately, these matters may be a subject best left for the Legislature. But, it suffices for present purposes to say that the past willingness of our courts to enforce regulations unilaterally imposed upon employees is not limitless; the moral force of a company regulation loses impetus when based on no good reason other than the employer's desire to rummage among information having no bearing upon its legitimate business interests.

*73* We thus reject the philosophy buttressing the trial judge's ruling that, because the employer buys the employee's energies and talents during a certain portion of each workday, anything that the employee does during those hours becomes company property. Although we recognize the considerable scope of an employer's right to govern conduct and communications in the workplace, the employer's interest in enforcing unilateral regulations wanes when the employer attempts to reach into purely private matters that have no bearing on the employer's legitimate interests.

Moreover, in this case, the company's obliquely interest in enforcing its regulations, as the means of proving into an employee's private affairs, must be weighed against the employee's considerable interest in maintaining the confidentiality of her communications with her attorney—subject to which we now turn.

**IV.**

Communications between a lawyer and client in the course of their relationship and in professional confidence are privileged. N.J.S.A. 2A:42A-19. The scope of this privilege is defined by N.J.S.A. 2A:38, which grants clients the following rights:

(a) to refuse to disclose any such communications, and
(b) to prevent his lawyer from disclosing it, and
(c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (b) in the course of its transmission between the client and the lawyer, or (c) in a manner not reasonably to be anticipated, or (d) as a result of a breach of the lawyer-client **493** relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness.


**[101]** Over the years, "the primary justification and dominant rationale for the privilege has come to be the encouragement of free and full disclosure of information from the client to the attorney."

There is no question-absent the impact of the company's policy-that the attorney-client privilege applies to the emails and would protect them from the view of others. In weighing the attorney-client privilege, which attaches to the emails exchanged by plaintiff and her attorney, against the company's claimed interest in ownership or access to these communications based on its electronic communications policy, we conclude that the latter must give way. Even when we assume an employer may trespass to some degree into an employee's privacy when buttressed by a legitimate business interest, we find little force in such a company policy when offered as the basis for an intrusion into communications otherwise shielded by the attorney-client privilege.

Giving the company the benefit of all doubts about the threshold disputes mentioned in earlier sections of this opinion, as well as the broadest interpretation of its electronic communications policy permitted, despite the obvious ambiguities in the policy's text, we nevertheless are compelled to conclude that the company's policy is of insufficient weight when compared to the important societal interest in protecting the attorney-client privilege. As a result, we conclude that the judge exhibited inappropriate respect for the attorney-client privilege when she found that plaintiff "took a risk of disclosure of her communications and a risk of 'writhe the privilege she expected" when she communicated with her attorney through her work-issued computer, and that plaintiff's action in the face of the policy "constitute[d] a waiver of the attorney client privilege." Accordingly, we reverse the order under review and conclude that the emails exchanged by plaintiff and her attorney through her personal Yahoo email account remain protected by the attorney-client privilege. There being no other issues for finding a waiver of the privilege, the Judge erred in denying plaintiff's motion for the return of all copies of the emails in question.

As we have already mentioned, the company's attorney examined the privileged emails in question, referencing them in the little discovery that has taken place to date in this matter. We conclude that counsel's actions were inconsistent with the obligations imposed by RPC 4.4(b), which provides that when representing a client, "[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender."

In considering these obligations, we are not unmindful that circumstances may arise when the attorney who has received such a document, either through paper discovery or by forensically examining a computer's hard drive, may arguably believe the document is not protected by the attorney-client privilege. For example, the attorney here assumed that the company's policy regarding the use of its computers turned plaintiffs privileged emails into the company's property. Notwithstanding such an assumption, attorneys are obligated, as suggested by RPC 4.4(b), to cease reading or examining the document, protect it from further revelations, and notify the adverse party of its possession so that the attorney's right to retain or make use of the document may thereafter be adjudicated by the court.

Here, rather than follow such an approach, Sills Cummis appointed itself the sole judge of the issue and made use of the attorney-client privilege, without giving plaintiff an opportunity to advocate a contrary position. That being the case, we reject the trial judge's finding that Sills Cummis had no affirmative duty "to alert plaintiff that it was in possession of the subject E-mail before reading it because Sills Cummis believed in good faith, based on the company's policy, that the E-mail was not protected by any privilege." Sills Cummis may have reached that determination in good faith, but counsel thereafter acted in studied indifference to the right of plaintiff to ac-
Plaintiff argues that, as a consequence of Sills Cummins’s failure to place the matter in litigation prior to reading and utilizing the disputed emails, the firm should be disqualified from further participation in this case. Courts possess the inherent authority to impose sanctions for violations of the spirit of the discovery rules. See Summit Trust Co. v. Rand, 373 N.J.Super. 452, 864 A.2d 1214 (App.Div. 2004), certif. denied, 171 N.J. 597, 766 A.2d 658 (2000). Disqualification of counsel is a discretionary remedy that may be imposed, although it is a remedy that should be used sparingly. See N.J.Super. 571, 776 A.2d 249 (2000). Although we need not attempt to define all the circumstances that may be relevant to this determination, the remedy of disqualification in this instance should at least consider the content of the emails, whether the information contained in the emails would have inevitably been divulged in discovery that would have occurred absent Sills Cummins’s knowledge of the emails’ content, and the nature of the issues that have been or may in the future be pled in either this or the related Channery action. These are matters **464 better assessed in the first instance, in the trial court. Accordingly, we remand for a hearing to determine whether Sills Cummins should be disqualified or, if not, whether any other appropriate sanction should be imposed as a result of the circumstances to which we have alluded. We deem it advisable that the hearing be conducted by the Channery judge, who not only has the benefit of being familiar with the issues in the related case now before her, but also because the Channery judge is not in the same position as the Law Division judge, who may yet retain a commitment to the determination she previously made on the issues we have now decided differently. See N.J.Super. 111, 506 A.2d 404 (1986).

END OF DOCUMENT

Attachment H
DATE: February 28, 2013

TO: Ronald Hooks, Regional Director
    Region 19

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

SUBJECT: The Boeing Company
         Case 19-CA-088157
         512-5012-0125-0000
         512-5012-0133-0000
         512-5012-2200-0000

The Region submitted this case for advice regarding whether a “Code of Conduct” maintained as part of the Employer’s business ethics policy unlawfully interferes with employees’ Section 7 rights. We agree with the Region that the Code of Conduct does not violate Section 8(a)(1) because employees would not reasonably construe its potentially overbroad language to restrict protected concerted activities, in the context of the almost forty pages of explanations and examples immediately following the Code.

FACTS

The Boeing Company (“Employer”) manufactures commercial and military aircraft throughout the world. The Society of Professional Engineering Employees in Aerospace, Local 2001 (“SPEEA” or “Union”) represents roughly 14,000 employees at the Employer’s facilities in Washington and California. In 2004, the Employer drafted and implemented its “Ethical Business Conduct Guidelines” (“Ethical Guidelines”) in response to what the Employer felt was a high profile procurement scandal by former employees that threatened its standing as a contractor with the United States government. The Ethical Guidelines is a forty-three page manual that contains a one-page preamble—the “Code of Conduct”—followed by a table of contents and almost forty pages explaining the Employer’s business ethics policies and additional business compliance issues, with examples.

The “Code of Conduct” provides:

The [Employer] Code of Conduct outlines expected behaviors for all [] employees. [The Employer] will conduct its business fairly, impartially, in an ethical and proper manner, in full compliance with all applicable laws and regulations, and consistent with the [Employer’s] values. In conducting its business, integrity must
underlie all company relationships, including those with customers, suppliers, and communities and among employees. The highest standards of ethical business conduct are required of [the Employer's] employees in the performance of their company responsibilities. Employees will not engage in conduct or activity that may raise questions as to the company's honesty, impartiality, reputation or otherwise cause embarrassment to the company.

As an employee of the [Employer], I will ensure that:

- I will not engage in any activity that might create a conflict of interest for me or the company.

- I will not take advantage of my [company] position to seek personal gain through the inappropriate use of [Employer] or non-public information or abuse my position. This includes not engaging in insider trading.

- I will follow all restrictions on use and disclosure of information. This includes following all requirements for protecting [Employer] information and ensuring that non-Boeing proprietary information is used and disclosed only as authorized by the owner of the information or as otherwise permitted by law.

- I will observe fair dealing in all of my transactions and interactions.

- I will protect all company, customer and supplier assets and use them only for appropriate company-approved activities.

- Without exception, I will comply with all applicable laws, rules and regulations.

- I will promptly report any illegal or unethical conduct to management or other appropriate authorities (i.e., Ethics, Law, Security, EEO).

Every employee has the responsibility to ask questions, seek guidance, and report suspected violations of this Code of Conduct.
Retaliation against employees who come forward to raise genuine concerns will not be tolerated.¹


The Employer presents, distributes, and discusses its Ethics Guidelines at a mandatory day-long training and orientation program for new employees. During the program, both Employer and Union representatives are present and available to employees. Employees are also expected to reaffirm their adherence to the Code of Conduct on a yearly basis as a condition of employment.

Employees are directed by both the Ethical Guidelines and the Employer to refer to online resources for clarification on any Employer policy. One of the online "Frequently Asked Questions" on the Ethical Guidelines website states:

[The Employer] expects employees/non-employees to follow the Code of Conduct while at work, on company business, on company premises and while representing [the Employer]. This includes company travel and temporary assignments outside an employee/non-employee's home location. The Code of Conduct does not affect an individual's ability to exercise his/her constitutional, statutory or other protected rights.

ACTION

We conclude that the Employer's Code of Conduct does not violate Section 8(a)(1) because employees would not reasonably construe the Code of Conduct to restrict their Section 7 rights, given the context of the policy within the Employer's detailed

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¹ Emphasis added.

² A list of those eleven policies, with brief one-line explanations, is also included in the table of contents.
Ethical Guidelines. Accordingly, the Region should dismiss the charge, absent withdrawal.

An employer violates Section 8(a)(1) of the Act through the maintenance of a workrule or policy if the rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." The Board has developed a two-step inquiry to determine if a workrule would have such an effect. First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act 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.

The Board has cautioned against "reading particular phrases in isolation,"7 and will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.8 Instead, the potentially violative phrases must be considered in the proper context.9 Rules that are ambiguous as to their application to Section 7

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3 It is clear that the Code of Conduct does not explicitly restrict Section 7 activity, and there is no evidence that it was promulgated in retaliation for Section 7 activity or applied to suppress Section 7 activity.


6 Id. at 647.

7 Id. at 646.

8 Id. at 647 ("[W]e will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way."). See also Palms Hotel and Casino, 344 NLRB 1363, 1368 (2005) ("We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it.").

9 Compare Flex Frac Logistics, LLC, 358 NLRB No. 127, slip op. at 3 (Sept. 11, 2012) (finding context of confidentiality rule did not remove employees' reasonable impression that they would face termination if they discussed their wages with anyone outside the company), and The Roomstore, 357 NLRB No. 143, slip op. at 1 n.3, 16–17 (Dec. 20, 2011) (finding employees would reasonably interpret the
activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.

The Code of Conduct's restriction on “conduct or activity that may raise questions as to the [Employer's] honesty, impartiality, reputation or otherwise cause embarrassment” to the Employer is not facially unlawful. Furthermore, employees would not reasonably construe that language as restricting Section 7 activity when viewed within the broader framework of the Ethical Guidelines. The Ethical Guidelines describes numerous activities that could undermine the Employer's “honesty, impartiality, reputation,” or otherwise “cause embarrassment,” including bribery, antitrust violations, insider trading, and offering and accepting certain “business courtesies” regarding commercial customers and government employees—activities which clearly do not implicate activities protected by Section 7.

employer's “negativity” rule as applying to Section 7 activity in context of prior employer warnings linking “negativity” to the employees' protected discussions concerning terms and conditions of employment), with Wilshire at Lakewood, 343 NLRB 141, 144 (2004) (finding lawful handbook provisions prohibiting employees from “abandoning [their] job by walking off the shift without permission of [their] supervisor or administrator,” because employees would necessarily read the rule as intended to “ensure that nursing home patients are not left without adequate care during an ordinary workday”), vacated in part on other grounds, 345 NLRB 1050 (2005), rev'd on other grounds sub nom. Jochims v. NLRB, 480 F.3d 1161 (D.C. Cir. 2007).

10 See, e.g., Claremont Resort and Spa, 344 NLRB 832, 836 (2005) (rule proscribing “negative conversations” about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity).

11 See, e.g., Tradesmen International, 338 NLRB 460, 462 (2002) (employees would not reasonably read prohibition against “statements which are slanderous or detrimental to the company or any of the company's employees” as applying to protected activity where rule was found in a list of egregious activities such as sabotage and racial or sexual harassment and where employer had not led employees to believe it applied to Section 7 activity).

12 See id. at 460–61 (finding that employees would recognize that rule prohibiting “any conduct which is disloyal, disruptive, competitive or damaging to the company,” such as “illegal acts in restraint of trade” and employment with another employer
Accordingly, a reasonable employee would understand that the above Code of Conduct language references legitimate business concerns regarding potential ethical lapses rather than Section 7 activity.\textsuperscript{13}

Similarly, the Code of Conduct’s prohibition on “activit[ies] that might create a conflict of interest” between employees and the Employer also would not reasonably be interpreted to restrict Section 7 activity. The Ethical Guidelines devotes two pages to the types of conflicts of interest the Employer requires employees to avoid—such as “outside employment with a[n Employer] customer, supplier, or competitor, or having a significant financial interest with one of these entities.” Thus, when viewed in the context of the Ethical Guidelines, the Code’s prohibition on conflicts of interest is neither overbroad nor ambiguous.\textsuperscript{14}

Moreover, the Code of Conduct’s requirements that employees “protect all company, customer and supplier assets and use them only for appropriate company-approved activities” and comply with “all restrictions on use and disclosure of information . . . includ[ing] . . . all requirements for protecting [Employer]

while employed by the employer, was intended to reach conduct similar to those examples rather than Section 7 activity).

\textsuperscript{13} See id. Cf. Costco Wholesale Corp., 358 NLRB No. 106, slip op. at 1–2 (Sept. 7, 2012) (finding employer’s policy prohibiting employees from making statements “that damage the Company, defame any individual or damage a person’s reputation” to be unlawful because the rule had no “accompanying language that would tend to restrict its application” to legitimate business concerns); Knauz BMW, 358 NLRB No. 164, slip op. at 1 (Sept. 28, 2012) (finding employer’s “courtesy rule,” which prohibited “disrespectful” conduct and “language which injures the image or reputation” of the employer, to be unlawful, because nothing in the rule or elsewhere in the employee handbook “would reasonably suggest . . . that employee communications protected by Section 7 . . . are excluded from the rule’s broad reach”).

\textsuperscript{14} Compare Tradesmen International, 338 NLRB at 461–62 (“Employees would not reasonably believe that an expectation that they represent the Employer in a ‘positive and ethical manner,’ in the context of a prohibition on conflicts of interest, would prohibit Section 7 activity.”), with HTH Corp., 356 NLRB No. 182, slip op. at 1, 25 (June 14, 2011) (affirming ALJ finding that an employer’s conflict of interest policy which prohibited employees from giving advice either “solicited or unsolicited, for the intended purpose of discouraging any potential or actual customer from utilizing services of [the employer] to aid another organization,” violated Section 8(a)(1) because “[i]nformation sharing such as this is specifically protected by Section 7 of the Act.”), enf’d on other grounds, 693 F.3d 1051 (9th Cir. 2012).
information” are lawful restrictions on employees’ use of certain proprietary information. Employees would not reasonably construe this language, in context, as restricting Section 7 activity such as discussing wages and other terms of employment with other employees or union representatives. Thus, the confidentiality language does not specifically reference and restrict information concerning employees and their jobs.\textsuperscript{15} Therefore, when read in context with the policy concerning “Proper Use of Company, Customer, and Supplier Resources” in the Ethical Guidelines, employees reasonably would understand that the Code of Conduct reflects the Employer’s legitimate concerns over employees using Employer property for impermissible business or political objects while on working time, rather than for Section 7 communications.\textsuperscript{16} Additionally, the fact that the Union is present at new employee orientations where the policy is presented would also lead employees to believe that restrictions on use of Employer assets and information would not extend to employee communications with their Union representatives.\textsuperscript{17}

\textsuperscript{15} Compare Super K-Mart, 330 NLRB 263, 263–64 (1999) (prohibition against disclosing “company business and documents” found lawful, as it did not by its terms include employee wages or working conditions and made no reference to employee information) with Flex Frac Logistics, LLC, 358 NLRB No. 127, slip op. at 1–2 (Sept. 11, 2012) (finding that employees would reasonably construe prohibition on disclosing “personnel information and documents” as prohibiting Section 7 communications, even though provision also listed “computer and software systems and process” and other examples of confidential information that the employer could legitimately restrict from disclosure, because the context failed to adequately limit the provision’s “unlawfully broad sweep”) and DirecTV U.S. DirecTV Holdings, LLC, 359 NLRB No. 54, slip op. at 3 (Jan. 25, 2013) (confidentiality provision prohibiting employees from disclosing employee records or other information about their coworkers’ jobs would reasonably be construed as restricting Section 7 communications, even though the provision also covered “information about customers,” “company business,” and other listed items).

\textsuperscript{16} Cf. Mediaone of Greater Florida, Inc., 340 NLRB 277, 277–78, n.4 (2003) (finding overbroad and ambiguous summary of the employer’s no-solicitation policy contained in front of an employee handbook to be lawful in light of the full, facially lawful solicitation provision contained later in the same handbook, as employees would reasonably disregard the shorter summary provision in favor of the longer and more detailed description of the policy).

\textsuperscript{17} We note that the Union’s presence, on its own, would not necessarily save an overbroad or ambiguous policy from being found unlawful as Section 7 also protects employee conduct that is at odds with a particular union’s interests.
Finally, although the Employer has not explicitly informed employees that their Section 7 activities are not covered by its Code of Conduct, the Employer has provided guidance as to the Code of Conduct's targeted scope. Thus, the statement in the Ethical Guidelines website's "Frequently Asked Questions" section indicating that the Code of Conduct does not apply to employees' "constitutional, statutory, or other protected rights," further supports finding that employees would not reasonably believe that the Code of Conduct restricts their Section 7 or union activities.

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

/s/
B.J.K.