In The Supreme Court of New Jersey

Docket No.: 75,171

SALVATORE PUGLIA,

Plaintiff-Petitioner,

v.

ELK PIPELINE, INC., ELK PIPELINE, INC., t/a and/or d/b/a CROWN PIPELINE CONSTRUCTION COMPANY, CROWN PIPELINE CONSTRUCTION COMPANY, THOMAS MECOUCH, individually and as the corporate alter ego,

Defendants—Respondents.

ON PETITION FOR CERTIFICATION

DOCKET NO.: A-886-13-T1

Civil Action

Sat Below:

Hon. Marie E. Lihotz, P.J.A.D.
Hon. Carmen Messano, J.A.D.
Hon. Michael A. Guadagno, J.A.D.
Hon. Jean B. McMaster, J.S.C.

AMICUS CURIAE BRIEF AND APPENDIX OF EMPLOYERS ASSOCIATION OF NEW JERSEY

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PRELIMINARY STATEMENT

Amicus Curiae Employers Association of New Jersey ("EANJ")[1] urges this Court to unequivocally prevent an intolerable conflict between federal and state law and provide unambiguous jurisdictional guidance to employers and employees when workplace disputes arise out of terms and conditions of employment common to employees. Specifically, the Court should hold that the claims of plaintiff Salvatore Puglia ("plaintiff") asserted under state law are based upon concerted activity governed by the National Labor Relations Act, 29 U.S.C. §§ 151-166 ("NLRA").

Congress enacted the NLRA in 1935 to protect the rights of employees and employers, encourage collective bargaining, and curtail certain private sector labor and management practices which harm the general welfare of workers, businesses, and the U.S. economy. The National Labor Relations Board ("NLRB" or "Board"), an independent federal agency, is vested with the power to safeguard employees' rights to engage in legally-protected "concerted" activity, whether or not they are members

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[1] As a non-profit organization comprised of 1,400 employers within New Jersey and dedicated to helping employers make responsible employment decisions through education, informed discussion, and training, EANJ is uniquely situated to submit this *amicus curiae* brief.

of a labor union. The NLRB also acts to prevent and remedy unfair labor practices committed by private employers.

It is well-settled that federal labor law precludes state courts from hearing civil actions for activities arguably subject to the protections the NLRA. This especially includes actions artfully (or improperly) framed as arising under state law, such as the New Jersey Conscientious Employee Protection Act ("CEPA").

In the case at bar, plaintiff, with another employee, allegedly objected to improper overtime payments and rate of pay discrepancies and claimed he was allegedly laid off because of his objection. He filed a civil action in state court under CEPA but the case was dismissed by the trial court after it correctly reasoned that the CEPA claim arose out of a collective bargaining agreement and therefore was preempted by federal labor law. The Appellate Division affirmed.

But the appellate panel, respectfully, also should have found that the CEPA claim was preempted because plaintiff performed no "whistleblowing" activity. For equally compelling reasons, the Appellate Division's decision should be affirmed because plaintiff alleged that he was the subject of retaliation because he engaged in "concerted" activity exclusively protected by the NLRA. To hold otherwise creates an intolerable conflict

between federal and state law, causing undue confusion and costs for litigants and vexatious litigation for the courts.

LEGAL ARGUMENT[2]

State Court Actions Arising Out Of Terms And Conditions Of Employment Common To Other Employees, Even If Made By A Single Employee, Are Preempted By Federal Labor Law.

The Appellate Division affirmed summary judgment in favor of the employer because, by maintaining he was wrongfully laid off, plaintiff "inherently invoke[d]" his collective bargaining agreement ("CBA"). Puglia v. Elk Pipeline, Inc., 437 N.J. Super. 466, 479 (App. Div. 2014). Because plaintiff's claim did not "stand alone" and was "grounded on a violation of [his] seniority status, as defined in the CBA, a negotiated provision governing his employment," the appellate panel correctly held that his CEPA claim was preempted by the NLRA. Id. at 480. Indeed, it is well-established that a state court action—asserting state law claims founded on rights created by a CBA and substantially dependent on interpreting that agreement—is preempted by federal labor law. See, *e.g.*, Avco v. Machinists Union, 390 U.S. 557 (1968).

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[2] EANJ relies upon the Procedural History and Counter-Statement of Facts set forth in Defendants-Respondents' original brief in support of its opposition to plaintiff's petition for certification.

Yet preemption of state law actions by federal labor law applies to more than claims arising out of a CBA. Employees enjoy extensive rights under the NLRA whether they belong to a labor union or not, including the right to engage in all sorts of self-help, also known as "concerted activity." Significantly, even a single employee may engage in legally-protected concerted activity when seeking to vindicate a claim arising out of the terms and conditions of employment common to other employees. Indeed, the Board's website defines "protected concerted activit[y]" to include "[a]n employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions." NLRB Website, "Employee Rights," www.nlrb.gov/rights-we-protect/employee-rights. (EANJ001a to 002a).[3]

The Supreme Court has held that Congress implicitly mandated two types of preemption necessary to implement federal labor policy. Relevant to EANJ's position is the doctrine known as Garmon pre-emption, see San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), which "is intended to preclude state interference with the [NLRB's] interpretation and active enforcement of the `integrated scheme of regulation' established

[3] Pursuant to N.J. Court Rule 1:36-3 (and for the Court's convenience), unreported cases and publicly-available internet based-documents are attached to EANJ's Appendix as ("EANJ___a"), submitted herewith and incorporated herein by reference.

by the NLRA." Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 613 (1986). To this end, Garmon preemption holds that States cannot "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 286 (1986). Garmon preemption exists to uphold national labor policy and to vindicate Congress's decision to "entrust[] administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." Garmon, 359 U.S. at 242, 246, 79 S.Ct. 773.

In preempting state law, the U.S. Supreme Court emphasized the importance of "delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered." Id., 359 U.S. at 246. Garmon preemption focuses on avoiding "the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes." Id. at 242. As this Court has confirmed, Garmon precludes "state courts from entertaining tort actions for activities arguably subject to the protections of [Section] 7 or the prohibitions of [Section] 8 of

the National Labor Relations Act." Blum v. Int. Assoc. of Machinists, AFL-CIO, 42 N.J. 389, 398 (1964).

Here, however, the Appellate Division did not determine whether plaintiff—who, with another employee, allegedly objected to improper overtime payments and rate of pay discrepancies—had engaged in legally-protected concerted activity. See Puglia, 437 N.J. Super. at 480, n. 4. Yet that precise issue provides an entirely proper analytical framework for preemption in this case.

Under CEPA, a plaintiff must, among other things, perform a "whistle-blowing activity as described in N.J.S.A. 34:19-3a, c(1) or c(2)." Id. at 473 (citing Mosley v. Femina Fashions, Inc. 356 N.J. Super. 118, 127 (App. Div. 2002), certif. denied, 176 N.J. 279 (2003)). Here, plaintiff's claim was preempted by the NLRA because it arose out of the CBA *and* because he performed no "whistleblowing" activity; rather, he engaged in quintessential "concerted activity" because his complaint—improper overtime payments and rate of pay discrepancies—arose out of terms and conditions of employment common to other employees.

This activity falls directly within Section 7 of the NLRA, which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to

> bargain collectively through representatives of their own choosing, and to engage in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C.A. 157 (emphasis added). The phrase "to engage in other concerted activities" in Section 7 is not confined to situations in which two or more employees are working together at the same time and the same place toward a common goal, or any other similarly narrow meaning. Indeed, a lone employee can engage in legally-protected concerted activity, particularly when that employee overtly or implicitly acts as a representative of at least one other employee concerning terms and conditions of employment. See NLRB v. City Disposal Sys, 465 U.S. 822, 830 (1984).

In Fresh & Easy Neighborhood Market, Inc., Case 28-CA-64411 (Aug. 11, 2014) (EANJ003a to EANJJ038a), for example, the Board held that an employee engaged in protected concerted activity *simply by asking* co-workers for help in making a sexual harassment complaint to her employer. During the employer's investigation, the employee admitted that she was only filing the complaint on her own behalf, and her co-workers were not involved other than as potential witnesses. According to the Board even if the employee was pursuing her own individual claim, her "selfish motivation" for speaking to her co-workers was irrelevant because "concertedness is not dependent on a

shared objective or on the agreement of one's coworkers with what is proposed." Id. at 4 (EANJ006a). See also 200 East 81st Restaurant Corp., Case 02-CA-115871 (Apr. 29, 2014) (EANJ039a to EANJ0047a) (sole employee suing under Fair Labor Standards Act for unpaid overtime was engaging in legally protected concerted activity).

Further, Section 8 of the NLRA prohibits employers from "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in section 7," including discharging or otherwise discriminating against an employee. 28 U.S.C. 158; see also DR Horton, Inc., Case 12-CA-25764 (Jan. 3, 2012) (EANJ048a to EANJ065a) (mandatory arbitration agreement interfered with employees' Section 7 rights to engage in concerted activity relating to their wages, hours, or other terms and conditions of employment); American Red Cross Arizona Blood Services Region, Case 28-CA-23443 (Feb. 2, 2012)(EANJ066a to EANJ092a)(employer committed an unfair labor practice by requiring employees to sign an "agreement and acknowledgement of receipt of employee handbook."); Banner Health System, Case 28-CA-23438 (July 30, 2012) (EANJ093a to EANJ100a)(work rule asking employees subject to an internal investigation to not discuss the matter while the employer investigated interfered with Section 7 rights).

In fact, on March 18, 2015, NLRB General Counsel Richard F. Griffin, Jr., issued a report explaining several years of Board decisions and positions taken by his office on what constitutes terms and conditions of employment under the NLRA. Among terms and conditions reviewed by the General Counsel are employer policies and practices relating to confidentiality; conduct toward the employer and management; conduct toward co-workers; communications and interaction with outside parties and the media; use of logos, copyrights or trademarks; photography and recording in the workplace; leaving work or premises, or walking off the job; and conflicts of interest. See Memorandum GC-15-04, www.nlrb.gov/reports/general-counsel-memos/GC-15-04-Report of the General-Counsel-Concerning-Employer-Rules.pdf (Mar. 18, 2015)(EANJ101a to EANJ130a).

Significantly, the General Counsel expansively interprets what constitutes unlawful "interference" with Section 7's right to engage in protected concerted activity. He views employer rules as unlawful when an employee "would reasonably" construe a rule as prohibiting any forms of protected concerted activity. According to the Board, the absence of evidence that the policy language actually restricted any employee's actions is irrelevant. Id.

In sum, the NLRA provides the exclusive remedy for violations of an employee's Section 7 right to object to employer rules, practices, and policies that chill employee concerted activity, which is broadly defined as one employee acting alone on issues relating to terms and conditions of employment common to other employees. Aggrieved employees may file an unfair labor charge to the NLRB, which has broad investigatory and adjudicative authority and can fashion equitable and compensatory remedies for unfair labor practices. 29. U.S.C. §161. Indeed, the U.S. Supreme Court has likened the Board's expansive powers to that of a grand jury, which "may investigate merely on suspicion that the law is being violated, or even just because its wants assurance that it is not." U.S. v. Morton Salt Co., 338 U.S. 632,642-43 (1950).

Rather than pursue his alleged grievance before the Board, plaintiff here subverted the Board's authority and federal labor law by re-characterizing his activity as falling within CEPA. "The purpose of CEPA is 'to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employees from engaging in such conduct.'" Mehlman v. Mobile Oil Corp., 153 N.J. 163, 179 (1998) (quoting Abbamont v. Piscataway Bd. of Educ., 138 N.J. 405, 531 (1994)). Plaintiff's complaint to his employer about

purportedly improper overtime payments and rate of pay discrepancies was not an objection to an activity, policy, or practice that violated a law, rule, or regulation promulgated under law so as to trigger the protections of CEPA.[4] Rather, it was a complaint by an employee arising out of terms and conditions of employment common to other employees. Plaintiff did not perform a "whistleblowing" activity, but engaged in "concerted" activity such that his state lawsuit also should be preempted by the NLRA.

There are three forms of Garmon preemption, depending upon the conduct attempted to be regulated: (1) where the conduct is actually protected or prohibited by the NLRA; (2) where the conduct is arguably prohibited by the NLRA; and (3) where the conduct is arguably protected by the NLRA. See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S.

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[4] CEPA prohibits, in relevant part, an employer from taking retaliatory action against an employee because she makes "disclosures" or "objects to" "any activity, policy or practice" which the employee reasonably believes is:

a) in violation of a law, or a rule or regulation promulgated pursuant to law;
b) fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation; or
c) incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J.S.A. 34:19-3, *et seq.*

180 (1978). Here, all three forms of the Garmon preemption apply: plaintiff's objections were clearly protected by Section 7 of the NLRA; his layoff was arguably prohibited by Section 8 of the NLRA; and his wage claim could have been adjudicated by the Board. Under Garmon, therefore, plaintiff's CEPA lawsuit, to the extent that the allegations arise out of terms and conditions of employment common to other employees, is entirely preempted by the NLRA.

CONCLUSION

The U.S. Supreme Court's preemption doctrines relating to the NLRA center on reinforcing the "purpose of the Act [, which] was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971) (quoting Garner v. Teamsters Union, 346 U.S. 485, 490, (1953)). As noted by this Court, Garmon preemption precludes "state courts from entertaining tort actions for activities arguably subject to the protections of [Section] 7 or the prohibitions of [Section] 8 of the National Labor Relations Act." Blum, 42 N.J. at 398. Thus, this Court must be vigilant against allowing CEPA to subvert the NLRA or the exclusive authority of the Board to remedy unfair labor practices.

For the foregoing reasons, EANJ respectfully urges this Court to affirm the Appellate Division's decision.

Respectfully submitted,

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Employee Rights

Employees covered by the National Labor Relations Act are afforded certain rights to join together to improve their wages and working conditions, with or without a union.

Union Activity

Employees have the right to attempt to form a union where none currently exists, or to decertify a union that has lost the support of employees.

Examples of employee rights include:

- Forming, or attempting to form, a union in your workplace;
- Joining a union whether the union is recognized by your employer or not;
- Assisting a union in organizing your fellow employees;
- Refusing to do any or all of these things.
- To be fairly represented by a union

Activity Outside a Union

Employees who are not represented by a union also have rights under the NLRA. Specifically, the National Labor Relations Board protects the rights of employees to engage in "concerted activity", which is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action.

A few examples of protected concerted activities are:

- Two or more employees addressing their employer about improving their pay.
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other.
- An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.

More information, including descriptions of actual concerted activity cases, is available on the protected concerted activity page.

Who is covered?

Most employees in the private sector are covered by the NLRA. However, the Act specifically excludes individuals who are:

- employed by Federal, state, or local government
- employed as agricultural laborers
- employed in the domestic service of any person or family in a home
- employed by a parent or spouse
- employed as an independent contractor
- employed as a supervisor (supervisors who have been discriminated against for refusing to violate the NLRA may be covered)
- employed by an employer subject to the Railway Labor Act, such as railroads and airlines

Resources

Download the Mobile App
The NLRB Process
E-File Documents
Fact Sheets
Graphs & Data
FAQs
Site Feedback
Forms
National Labor Relations Act (NLRA)
Related Agencies

SHARE

- employed by any other person who is not an employer as defined in the NLRA

More information is available on the jurisdictional standards page.

Fresh & Easy Neighborhood Market, Inc. *and* Margaret Elias. Case 28–CA–064411

August 11 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

This case raises the issue of whether an employee was engaged in "concerted activity" for the purpose of "mutual aid or protection" within the meaning of Section 7 of the National Labor Relations Act when she sought assistance from her coworkers in raising a sexual harassment complaint to her employer. The judge found that she was not, and the Acting General Counsel excepts.[1] We find that the employee was indeed engaged in concerted activity for the purpose of mutual aid or protection. We also agree with the Acting General Counsel that, to the extent the Board's divided decision in *Holling Press, Inc.*, 343 NLRB 301 (2004), would require a finding that the employee's activity was *not* for mutual aid or protection, that case—which lies far outside the mainstream of Board precedent—should be overruled. Nevertheless, in the particular circumstances of this case, we agree with the judge that the employer did not violate Section 8(a)(1) when it questioned the employee about why she obtained witness statements from her coworkers and instructed her not to obtain additional statements.

I. FACTS

On August 24, 2011,[2] employee Margaret Elias, a cashier at the Respondent's grocery store, asked supervisor Bruce Churley if she could participate in training related to the sale of alcohol, known as "TIPS." Churley told her to write a note to him on a whiteboard in the breakroom, which Elias did on August 25. Her message read, in relevant part: "Bruce . . . Could you please sign me up for TIPS training on 9/10/11?"

On August 26, Elias saw that the word "TIPS" had been changed to "TITS" and that a picture of a worm or peanut urinating on her name had been added to her original whiteboard message. Elias asked Michael Anderson, her team leader, about filing a sexual harassment complaint and showed him the whiteboard. When Anderson asked why she would want to do so, Elias left the breakroom, angry at his reaction. Afterward, Anderson telephoned Churley and, when informed of Elias' plan to file a sexual harassment complaint, Churley told Anderson to take a photograph of the altered whiteboard message and erase it.

That same day, Elias hand copied the whiteboard picture and the altered message to a piece of paper.[3] She asked Anderson and two coworkers, Krista Yates and Victoria Giro, to sign the document. All three did so. Regarding the substance of Elias' conversations with those employees, the credited evidence establishes the following:[4] Before Anderson signed, Elias told him that she wanted to depict what was on the whiteboard and to file a sexual harassment complaint in connection with that content. Likewise, before Yates signed, Elias indicated to her that she wanted to file a complaint.[5] When Giro signed the document, she knew Elias was upset by the whiteboard alteration and, at some point during their conversation about the document, Elias mentioned wanting to file a complaint.[6] Giro, who testified that she personally found the whiteboard alteration inappropriate,

[1] On April 23, 2012, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

The National Labor Relations 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, and conclusions only to the extent consistent with this Decision and Order. We shall modify the judge's recommended Order to reflect the violations found and in accordance with the Board's standard remedial language, and consistent with our decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010). We shall also substitute new notices to conform to the Order as modified and with *Durham School Services*, 360 NLRB No. 85 (2014).

The judge found that the Respondent violated Sec. 8(a)(1) of the Act by maintaining an overbroad and discriminatory confidentiality rule in its employee handbook, on its company-wide intranet portal, and on its New Hire CDs, and by failing to notify its employees at the Phoenix, Arizona facility of changes to its solicitation and distribution rule. In the absence of exceptions, we adopt the judge's findings in this regard. As discussed in the Amended Remedy section of this decision, we shall amend the remedy and modify the recommended Order to require notice posting by the Respondent at all of its facilities nationwide with respect to its maintenance of the unlawful confidentiality policy. In addition, in the absence of exceptions, we adopt the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by maintaining an overly broad and discriminatory solicitation policy, by creating an impression of surveillance, and by threatening employees with unspecified reprisals.

[2] All dates are 2011 unless otherwise stated.

[3] Employees at Elias' level were not permitted to carry or use cameras at the facility.

[4] The judge generally credited the testimony of Anderson, Yates, and Giro.

[5] Yates testified that when Elias raised the whiteboard alteration to her, Elias indicated that she wanted to file a complaint, but Yates could not recall if Elias specifically stated that she wanted to file a sexual harassment complaint.

[6] As the hearing transcript reflects, Giro testified that Elias *did* inform Giro of her desire to file a complaint about the whiteboard incident, and the judge credited Giro's testimony generally. The judge's finding that Elias never told Giro that she wanted to file a complaint is clearly erroneous.

suggested that Elias report the matter to Churley so he could review the breakroom cameras, find out who altered Elias' message, and take appropriate corrective action. As found by the judge, during these conversations Elias was loud and angry.

At the time that Anderson, Yates, and Giro signed Elias' document, only the hand- drawn picture and the altered whiteboard message appeared on the paper. At some later point, Elias added the following statement: "Someone changed the board to 'TITS' instead of TIPS and [sic] and put a worm pissing on my name. I take this as sexual harassement [sic]. This has been on the [b]oard since I got here at 2PM." Elias testified that although she did not intend that statement to be a joint complaint, "I was offended and I believe that the other girls were offended too. And it just seemed that if we were to file a harassment charge that it wouldn't happen again." Elias also testified that she felt the altered message was "sexual-based harassment" for her and the two other women who were working that night.[7]

Later on August 26, Churley returned to the store and saw the photograph of the altered whiteboard that Anderson had taken. Churley then reviewed the breakroom's video footage and identified Gary Hamner as the employee who altered Elias' whiteboard message. Churley emailed Employee Relations Manager Monyia Jackson to report the incident. He also spoke to Anderson, Giro, and Yates about Elias' request that they sign her handwritten reproduction of the altered whiteboard message. The three stated that they believed they were only witnessing that Elias' reproduction was correct, that they did not want to help her bring a sexual harassment complaint, and that they felt forced to sign the document. Nonetheless, Giro testified that she would not have liked the whiteboard alteration if it had happened to her and thought that management should have been notified in some way so that disciplinary action could be taken. In fact, Giro testified that, the day after she signed Elias' document, she went to Churley and told him that she thought the whiteboard alteration was inappropriate and that she hoped he would "take care of it."

In the following days, Yates made a formal complaint against Elias for "bullying" her into signing the statement showing the reproduced whiteboard message and accused Elias of altering the statement after Yates signed it. In addition, Hamner complained that Elias cursed at him upon his arrival to work on August 26.

Employee Relations Manager Jackson then began an investigation into the whiteboard incident and the complaints against Elias. After interviewing Anderson, Yates, and Hamner, Jackson telephoned Elias on August 31.[8] Jackson spoke to Elias about her sexual harassment complaint, as well as her coworkers' complaints against her. When Jackson questioned Elias about why she felt that she had to obtain her coworkers' signatures on the statement, Elias responded that it was for her own protection. Jackson also instructed Elias not to obtain any further statements so that Jackson could conduct her investigation into the incident. She told Elias, however, that Elias could talk to other employees and ask them to be witnesses for her. Elias was never threatened with and did not receive discipline for her actions. Upon completing the investigation, Jackson concluded that the whiteboard alterations were inappropriate, disciplined Hamner for making the alterations, informed Elias of her decision in writing, and assured Elias that she would be protected against retaliation. Jackson found no merit to Yates' and Hamner's complaints against Elias.

II. THE JUDGE'S DECISION

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by questioning Elias about why she felt she had to obtain her coworkers' signatures on the hand-drawn reproduction of the altered whiteboard, or by instructing Elias not to solicit additional written statements from her coworkers. Relying largely on *Holling Press*, 343 NLRB 301, the judge reasoned that Elias had not been engaged in concerted activity for the purpose of mutual aid or protection at the time she sought her coworkers' assistance in raising a sexual harassment complaint to management. Instead, he found that Elias' complaint was personal and not shared by other employees, and that her goal in raising the issue to management was a purely individual one. In addition, the judge, observing that the Respondent did not bar Elias from speaking with her coworkers, found that Jackson's request that Elias take no further statements was not meant to deprive her of the right to engage in concerted activities, but rather to prevent disruption at the store. He thus concluded that the Respondent's questions and instructions to Elias were not unlawful.

[7] Although the judge discredited Elias' testimony regarding her demeanor while soliciting her coworkers to sign the reproduced whiteboard message, he did not discredit her testimony as to her reasons for seeking to raise the sexual harassment complaint to the Respondent. We may thus properly rely on Elias' testimony on this point. See *River Ranch Fresh Foods, LLC*, 351 NLRB 115, 117, 117 fn. 15 (2007).

[8] The judge credited Jackson's version of the telephone call.

III. DISCUSSION

A. Elias Engaged in Concerted Activity for the Purpose of Mutual Aid and Protection

To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." Although these elements are closely related, our precedent makes clear that they are analytically distinct. See *Summit Regional Medical Center*, 357 NLRB No. 134, slip op. at 3 (2011). As described more fully below, whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems,* 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The Supreme Court has observed, however, that "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems,* 465 U.S. at 835. The concept of "mutual aid or protection" focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

Under Section 7, both the concertedness element and the "mutual aid or protection" element are analyzed under an objective standard. An employee's subjective motive for taking action is not relevant to whether that action was concerted. "Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one." *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). Nor is motive relevant to whether activity is for "mutual aid or protection." Rather, the analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees. As one court has explained:

> The motive of the actor in a labor dispute must be distinguished from the purpose for his activity. The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of "mutual aid or protection" of employees.

Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320, 328 fn. 10 (7th Cir. 1976).

Applying those principles, we disagree with the judge's findings that Elias' solicitation of her coworkers' assistance was neither concerted nor for the purpose of mutual aid or protection.

1. Elias was engaged in concerted activity

In *Meyers I*, the Board defined concerted activity as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497. In *Meyers II*, the Board clarified that the *Meyers I* definition of concerted activity includes cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887. The requirement that, to be concerted, activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7. In this regard, "inasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). In addition, it is well established that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Whittaker Corp.*, 289 NLRB 933, 933 (1988), quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

Here, Elias sought her coworkers' assistance in raising a sexual harassment complaint to management, by soliciting three of them to sign the piece of paper on which she had copied the altered whiteboard message in order to "prove" the harassment to which she had been subjected. Although she did not intend to pursue a joint complaint, her testimony establishes that she wanted her coworkers to be witnesses to the incident, which she would then report to the Respondent. Two of those coworkers testified that they were aware of her intent to memorialize the incident for the purpose of reporting it to management. Even without more, under *Meyers II*

and its progeny, Elias' conduct in approaching her coworkers to seek their support of her efforts regarding this workplace concern would constitute concerted activity. Elias did not have to engage in *further* concerted activity to ensure that her initial call for group action retained its concerted character. See *Circle K Corp.*, 305 NLRB at 933; and *Whittaker Corp.*, 289 NLRB at 934. The Board has previously found similar action to support a finding of concerted activity. See *Holling Press*, 343 NLRB at 302 (employee appealing to her coworkers to support her sexual harassment claim was engaged in concerted activity), citing *Mushroom Transportation v. NLRB*, above, 330 F.2d 683.[9]

In concluding that Elias was not engaged in concerted activity, Member Miscimarra and the judge maintain that Elias was raising a personal complaint not shared by others and that her coworkers signed the statement only to stop her "annoying" conduct.[10] But under Board precedent, concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed. See, e.g., *El Gran Combo*, 284 NLRB 1115, 1117 (1987), enfd. 853 F.2d 996 (1st Cir. 1988); and *Meyers II*, 281 NLRB at 887. The concerted nature of Elias' request would not be diminished even if Elias' coworkers did not agree with her sexual harassment complaint, or, as Member Miscimarra argues, did not want to sign the document. The Board has also recognized that activity such as Elias' solicitation in this case may be protected even if the solicited employee is uncomfortable with the request. See *Frazier Industrial Co.*, 328 NLRB 717, 719 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000). It is also well established that an employee may act partly from selfish motivations and still be engaged in concerted activity, even if she is the only immediate beneficiary of the solicitation.[11] Thus, Elias' initial request, on its own, establishes concerted activity, regardless of whether her coworkers signed or refused to sign the document and notwithstanding their irritation with the manner of her request for their assistance.[12]

Member Miscimarra further contends that our decision today will result in unprecedented Section 7 protection for an employee soliciting assistance from his or her coworkers in raising a complaint to management even if the solicited employees are unwilling to help or file their own complaint against the employee seeking assistance, they do not have a shared interest in the matter raised by the employee, and the complaint raised by the soliciting employee lacks merit. However, what our colleague deems unprecedented protection is, in fact, consistent with decades of Board precedent. As noted, solicited employees do not have to agree with the soliciting employee or join that employee's cause in order for the activity to be concerted. See *Mushroom Transportation*, 330 F.2d at 685; *Circle K Corp.*, 305 NLRB at 933; *Whitaker Corp.*, 289 NLRB at 934; and *El Gran Combo*, 284 NLRB at 1117. Nor do the solicited employees have to share an interest in the matter raised by the soliciting employee for the activity to be concerted. See *El Gran Combo*, 284 NLRB at 1117; and *Hintze Contracting Co.*, 236 NLRB 45, 48 (1978), enfd. mem. 1979 WL 32447 (9th Cir. 1979). Further, the protected, concerted nature of an employee's complaint to management is not dependent on the merit of such a complaint. See *Spinoza, Inc.*, 199 NLRB 525, 525 (1972), enfd. 478 F.2d 1401 (5th Cir. 1973). It is thus clear that, in finding Elias' conduct to be concerted, we are applying established precedent. Our colleague's criticisms, therefore, represent a dispute with existing Board jurisprudence.

2. Elias' concerted activity was for the purpose of mutual aid and protection

We turn now to the question whether Elias' concerted activity was for the purpose of mutual aid or protection. Our finding that it was flows from the Supreme Court's endorsement, in *Eastex*, of the view that Congress designed Section 7 "to protect concerted activities for the *somewhat broader* purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-

[9] To this extent, we agree with *Holling Press*, despite our rejection below of other aspects of that decision. *Abramson, LLC*, 345 NLRB 171 (2005), meanwhile, is distinguishable. In that case, the Board addressed whether an employee pursuing a Title VII claim was engaged in concerted activity. In concluding that he was not, the Board found that there was no evidence that the employee discussed his wage concerns underlying the Title VII claim with other employees or that he sought his coworkers' support in remedying the alleged discrimination. Id. at 173–174. By contrast, Elias discussed the whiteboard alteration with three coworkers, informed them of her intention to raise a complaint to management, and solicited their assistance in doing so.

[10] Nor does the record establish that Elias was raising a wholly personal complaint. Employee Victoria Giro credibly testified that she would have been concerned had she been the victim of Hamner's misconduct, that she agreed that management should have been notified in some way so that disciplinary action could be taken, and that she herself raised the whiteboard alteration to Churley and asked him to "take care of it."

[11] See *Circle K Corp.*, 305 NLRB at 933; *El Gran Combo*, 284 NLRB at 1117; and *Dreis & Krump Mfg. Co.*, 221 NLRB 309, 314 (1975), enfd. 544 F.2d 320, 328 (7th Cir. 1976). Further, the Board has held that "[w]here an employee's objectives in taking certain action may be mixed, and one supports a finding of concertedness, [the Board] may not ignore it in favor of one that does not." *Circle K Corp.*, 305 NLRB at 934 fn. 9.

[12] In finding that Elias did not act concertedly, the judge also found that Elias' conduct was disruptive to the store's operations. In our view, such evidence is more relevant to the question, not presented here, whether an employee engaged in protected concerted activity loses such protection by her conduct. See *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

organization' and 'collective bargaining.'" 437 U.S. at 565 (emphasis added). Thus, the "mutual aid or protection" clause encompasses "much legitimate activity [by employees] that could improve their lot as employees." Id. at 567. The Court concluded that it was appropriate for the Board to draw the precise boundaries of that clause "as it considers the wide variety of cases that come before it." Id. at 568.

In *Meyers II*, the Board "acknowledged that efforts to invoke the protection of statutes benefitting employees are efforts engaged in for the purpose of 'mutual aid or protection'" and reiterated the Supreme Court's view that "proof that an employee action inures to the benefit of all" is "proof that the action comes within the 'mutual aid or protection' clause of Section 7. 281 NLRB at 887. In exercising the authority affirmed by the *Eastex* Court, the Board has found that a broad range of employee activities regarding the terms and conditions of their employment falls within the scope of the "mutual aid or protection" clause. See, e.g., *Dreis & Krump Mfg.*, 221 NLRB at 314 (employees' complaints over supervisory handling of safety issues); and *Tanner Motor Livery,* 148 NLRB 1402, 1404 (1964), enfd. in relevant part 349 F.2d 1 (9th Cir. 1965) (employees' protest of racially discriminatory hiring practices). See also *Ellison Media Co.*, 344 NLRB 1112, 1113–1114, 1119 (2005) (conversation between two employees was for mutual aid or protection where one employee, who had previously complained about offensive comments from a supervisor, urged a second employee to report sexually suggestive comments from same supervisor); and *Owens Illinois*, 290 NLRB 1193, 1204-1205 (1988), enfd. 872 F.2d 413 (3d Cir. 1989) (employee's action in contacting OSHA was protected).

As those cases indicate, Elias' activity unquestionably would be deemed for "mutual aid or protection" had she attempted to join forces with another employee who likewise had been the victim of alleged sexual harassment by Hamner (or anyone else in the Respondent's workplace for that matter). Thus, the question presented here is whether Elias' solicitation of support from her coworkers should be treated any differently simply because, on this occasion, Elias was confronting misconduct that Hamner seemingly directed at her alone.[13] After a review of well-established precedent, we answer that question in the negative.

In other contexts, the Board has found that an employee who asks for help from coworkers in addressing an issue with management does, indeed, act for the purpose of mutual aid or protection, even where the issue appears to concern only the soliciting employee, the soliciting employee would receive the most immediate benefit from a favorable resolution of the issue, and the soliciting employee does not make explicit the employees' mutuality of interests. In *IBM Corp.*, 341 NLRB 1288, 1294, 1307 fn.13 (2004), for example, the Board reaffirmed that the "mutual aid or protection" element is satisfied where a single employee, facing a disciplinary interview, requests assistance from a coworker.[14] The Supreme Court has held the same. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (single employee's appeal for help from other employees implicates "mutual aid or protection" even though only that employee may have had an immediate stake in the outcome). Discipline, of course, is often highly individualized—and the *IBM* Board certainly did not suggest that concerted activity exists only where the employee asked for help has engaged in the same or similar alleged conduct for which his coworker is being investigated. Likewise, in *El Gran Combo*, 284 NLRB at 1116–1117, the Board found that an employee who, unlike his band mates, did not receive a share of the band's album sales nonetheless acted for the purpose of mutual aid or protection by soliciting fellow band members to support his individual demand for a share of the group's earnings. Similarly, in *Circle K Corp.*, 305 NLRB at 932–934, the Board found that even where an employee may have been motivated by personal concerns in soliciting a coworker to sign a letter to management regarding terms and conditions of employment of concern to all employees, the employee was nonetheless engaged in concerted activity that satisfied the "mutual aid or protection" requirement. In *Rock Valley Trucking Co.*, 350 NLRB 69, 69, 83–84 (2007), the Board found that a truckdriver who was assigned lower mileage than his coworkers was engaged in protected conduct when he raised the disparities with his coworkers and his manager and asked a coworker to bring the issue to management. Although the driver was the one who directly suffered from the unequal assignment, the Board agreed that his actions were aimed not merely to secure a personal benefit, but also sought a change from a flawed assignment process that could affect all employees.

[13] Although it was directed at Elias, Hamner's misconduct *affected* other employees, too, as indicated by Giro's testimony that she would not have liked the altered wording if it had been aimed at her, that she thought management should have been notified in some way so that disciplinary action could be taken, and that she did ask Supervisor Churley to take action. Moreover, the inappropriate and offensive message was publicly posted on a whiteboard in the employee breakroom and not delivered privately to Elias.

[14] A Board majority held that in a nonunion setting, the employer lawfully may refuse the request. Id. at 1294.

Although arising in widely varying circumstances, all of those cases are grounded in the "solidarity" principle. In enacting Section 7, Congress created a framework for employees to "band together" in solidarity to address their terms and conditions of employment with their employer. *City Disposal Systems*, 465 U.S. at 835. "[M]ak[ing] common cause with a fellow workman over his separate grievance" is a hallmark of such solidarity, even if "only one of them . . . has any immediate stake in the outcome." *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505 (2d Cir. 1942). By soliciting assistance from coworkers to raise his issues to management, an employee is requesting that his coworkers exercise vigilance against the employer's perceived unjust practices. See *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1005 fn. 4 (1st Cir. 1988), quoting *J. Weingarten*, 420 U.S. at 260–261. The solicited employees have an interest in helping the aggrieved individual—even if the individual alone has an immediate stake in the outcome—because "next time it could be one of them that is the victim." Id.[15] "An injury to one is an injury to all" is one of the oldest maxims in the American labor lexicon.[16]

Applying that bedrock principle here would lead to the conclusion that Elias, too, was acting for the purpose of mutual aid or protection in soliciting her coworkers' assistance in complaining to management about an incident of alleged sexual harassment.[17] Nevertheless, we recognize, as did the judge, that such a finding appears to be foreclosed by the Board's decision in *Holling Press*. In that case, over a dissent by then-Member Liebman, the Board found that an employee, although acting concertedly, did *not* act for the purpose of mutual aid or protection when she sought a colleague's assistance in connection with her sexual harassment complaint. In doing so, the Board concluded:

> [W]here one employee is the alleged victim, that lone employee's protest is not concerted. And, even if the victim seeks support from another employee, and that seeking of support is concerted activity, the "mutual aid or protection" element may be missing. The bare possibility that the second employee may one day suffer similar treatment, and may herself seek help, is far too speculative a basis on which to rest a finding of mutual aid or protection. [343 NLRB at 303–304.]

Thus, *Holling Press* effectively nullifies the solidarity principle when it comes to claims of sexual harassment involving conduct directed at only one employee. In doing so, *Holling Press* seemed to create a special exception for sexual harassment claims.

The General Counsel asks us to reverse *Holling Press* in that respect. Drawing on the Board's decision in *Meyers II*, above, he argues that when an individual employee effectively invokes statutory protections benefitting employees—here, protections against sexual harassment in the workplace—that employee's efforts are for the purpose of "mutual aid or protection" under established Board and Supreme Court precedent, discussed above.[18] We agree that *Holling Press* cannot be reconciled with that precedent.

The fundamental flaws of *Holling Press* were persuasively articulated by the dissent in that case. First, the Board erroneously discounted the solidarity principle as it applies to sexual harassment in the workplace. Faced with the *IBM* case described above, the Board accepted that the solidarity principle may apply when a single employee is threatened with discipline because "discipline and the threat thereof are commonplace occurrences," *Holling Press*, 343 NLRB at 304, and so other employees are likely to seek similar assistance in return in the future. By contrast, the Board posited, claims of sexual harassment "are not a common everyday occurrence," and so there is merely a "theoretical possibility" of future

[15] As Judge Learned Hand observed more fully in *Peter Cailler Kohler Swiss Chocolates*:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. 130 F.2d at 505–506.

[16] The phrase is traced at least as far back as the motto of the nineteenth-century Knights of Labor. See, e.g., Atleson, *Values and Assumptions in American Labor Law* 206 fn. 13 (1983).

[17] As described, after seeing the altered whiteboard message, Elias engaged her fellow employees in conversations about the message, expressed her position that it constituted sexual harassment, stated that she planned to file a complaint with management, and asked her coworkers to sign the document she had prepared showing the altered message. And, although Elias did not intend her subsequently added statement alleging sexual harassment to be a joint statement, she testified that she proceeded with her complaint to management not only because she was offended, but because she believed other female employees were offended as well and that filing a complaint might prevent similar conduct in the future. Accordingly, it is clear that Elias' activity had a purpose relating to working conditions at the Respondent's facility. See *Dreis & Krump*, 544 F.2d at 328 fn. 10. That being true, it does not matter that Elias alone apparently was the intended target of the whiteboard incident. Nor does it matter that she did not articulate any mutuality of interest at the time. See *Timekeeping Systems, Inc.*, 323 NLRB 244, 248 (1997); and *Whittaker Corp.*, 289 NLRB at 933.

[18] In *Meyers II*, the Board accepted the principle "that efforts to invoke the protection of statutes benefitting employees are efforts engaged in for the purpose of 'mutual aid or protection,'" although such efforts may not necessarily be concerted. 281 NLRB at 887.

reciprocation. Id. As pointed out by the dissent, the premise that claims of sexual harassment are rare is simply indefensible.[19] More broadly, as the dissent explained, neither the Act nor Board precedent distinguishes between different types of workplace grievances for purposes of determining whether the "mutual aid or protection" requirement is met. Thus, an employee who receives assistance with a workplace sexual harassment-related complaint today may assist a coworker with a disciplinary matter tomorrow, or any other matter involving other terms and conditions of employment.

Second, the *Holling Press* Board failed to deal adequately with applicable Board precedent. It is settled that the "Board is not at liberty to ignore its own prior decisions, but must instead provide a reasoned justification for departing from precedent." *Goya Foods of Florida*, 356 NLRB No. 184, slip op. at 3 (2011), quoting *W & M Properties of Connecticut, Inc. v. NLRB,* 514 F.3d 1341, 1346 (D.C. Cir. 2008). The *Holling Press* decision does not meet that standard. As described, the Board's rationale for distinguishing *IBM* was baseless. But more generally, *Holling Press* failed to come to grips with the lesson of the cases embracing the solidarity principle: that the "mutual aid or protection" element is satisfied by the implicit promise of future reciprocation, when one employee answers another's call for assistance, even if that promise is rarely (or never) called upon.

The result is that *Holling Press* is an outlier, having departed from established Board and court precedent without providing a coherent reason for doing so. Indeed, *Holling Press* effectively created an exception from Section 7 for claims of sexual harassment in circumstances where those claims, had they instead concerned discipline, safety, or many other matters similarly affecting working conditions, would have enjoyed the protection of the Act.[20] We thus find that fidelity to precedent and adherence to the principles of the Act will be best served by overruling *Holling Press* to the extent it is inconsistent with our decision today.[21] We hold that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection. This decision applies equally to cases where, as here, an employee seeks to raise that complaint directly to the employer, or, as in *Holling Press*, to an outside entity.

Member Miscimarra charges that in so holding, we are "eliminating the statute's 'mutual aid or protection' language" and broadening its reach to create Section 7 coverage for "every individual employee—regarding every individual complaint implicating any individual non-NLRA right—as soon as the individual seeks the involvement of anyone else who is a statutory employee." But the Board's case law, as we have shown, has long held that an employee who invokes the protection of a *statute benefitting employees* is engaged in an activity for mutual aid or protection (which may, or may not, be concerted, depending on the circumstances). Of course, we do not find Elias' activity protected simply because her complaint implicated *some* statutory right. What matters, rather, is that she approached her coworkers with a concern *implicating the terms and conditions of their employment*, and sought their help in pursuing it.

Contrary to Member Miscimarra's claims, our holding today is squarely in line with established Board precedent. Employees have protections both under the Act and under other federal and state statutes governing the workplace, which address terms and conditions of employment. That an employee's activity in the workplace may also implicate other statutes does not mean that it has somehow lost the protection of the Act. Consistent

[19] In recent years, the EEOC, and state and local agencies in a work sharing agreement with it, have received over 11,000 sexual harassment allegations yearly. U.S. Equal Employment Opportunity Commission, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997–FY 2011*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Aug. 23, 2013). Many others likely go unreported. See, e.g., Westfall, *The Forgotten Provision: How the Courts Have Misapplied Title VII in Cases of Express Rejection of Sexual Advances*, 81 U. Cin. L. Rev. 269, 280 (2012).

[20] See Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 Berkeley J. Empl. & Lab. L. 23, 39–40 (2006) (observing that "[t]he *Holling Press* majority struggled to distinguish *IBM Corp.* on the ground that sexual harassment allegations lacked a mutual interest for all employees"); Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Lab. L. & Pol'y J 221, 226 (2005) (citing *Holling Press* as reflecting a "shriveled understanding of when employees are engaged in 'protected activity'" under Sec. 7 of the Act).

[21] In addition to bringing greater consistency to our precedent regarding the mutual aid or protection clause, overruling *Holling Press* furthers the important federal policy of preventing sexual harassment in the workplace. The Supreme Court has recognized that such harassment is "every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Thus, federal law recognizes that prevention is the best way to eliminate sexual harassment and encourages employers to do so by providing employees with, among other things, effective means to report sexual harassment. See 29 CFR § 1604.11(f) (EEOC regulation); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). We do not agree with our dissenting colleague that our decision will "predictably undermine" employee rights. Rather, we believe that fostering a supportive work culture with high coworker solidarity where employees feel free to address sexual harassment with their coworkers, results in an increased likelihood of reporting and has been linked to lower incidences of harassment in the workplace overall. See Blackstone et al., *Legal Consciousness and Responses to Sexual Harassment*, 43 Law & Society Rev. 631, 635, 646, 654 (2009).

with Supreme Court and Board precedent, as discussed above, employees are not required to choose between engaging in Section 7 activity and pursuing their other legal or administrative remedies.[22] When Congress enacted workplace legislation in the decades after the Act was passed, it clearly intended to give employees more rights and more remedies, not to eliminate existing ones.

Accordingly, we find that Elias's solicitation of her colleagues' assistance in complaining to the Respondent about the whiteboard incident was for the purpose of mutual aid or protection.

B. The Respondent did not Violate Section 8(a)(1) by Instructing Elias not to Obtain Additional Statements from her Coworkers

Having found that Elias acted both concertedly and for the purpose of mutual aid and protection, we turn to the allegations that the Respondent violated Section 8(a)(1) by its actions in connection with its investigation into Elias' conduct. The Acting General Counsel has excepted to the judge's finding that the Respondent did not violate Section 8(a)(1) when manager Jackson instructed Elias not to obtain additional statements from her coworkers related to the sexual harassment complaint. Under the particular facts of this case, we agree with the judge that Jackson's instruction to Elias did not violate the Act.

There is no question that, as a general matter, employees have a Section 7 right to discuss with one another ongoing employer investigations into alleged employee misconduct, including allegations of sexual harassment.[23] Indeed, to prohibit such discussions, an employer bears the burden of showing that it has a legitimate business justification that outweighs employees' Section 7 rights. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011). In the particular circumstances of this case, we find that the Respondent made that showing.

It is settled that "an employer is responsible for acts of sexual harassment in the workplace where the employer .... knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR § 1604.11(d) (EEOC regulation). Consistent with this principle, the Board has recognized that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct, including complaints of harassment. See *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001). The interest in a full, fair, and accurate resolution of sexual harassment complaints, along with prompt corrective action, is not exclusively the employer's. Employees also have an interest in raising sexual harassment complaints to management and having an effective system in place for addressing such complaints.

Here, as part of her investigation into Elias' sexual harassment complaint, Jackson instructed Elias not to obtain additional statements from her coworkers in connection with that complaint. Jackson's instruction to Elias was narrowly tailored to address the Respondent's need to conduct an impartial and thorough investigation. Elias was specifically told that, in relation to the investigation, she should let Jackson obtain any additional statements. Jackson did not prohibit Elias from discussing the pending investigation with her coworkers, asking them to be witnesses for her, bringing subsequent complaints, or obtaining statements from coworkers in future complaints.[24] Further, as Elias had made additions to the statement after her coworkers had signed it and her coworkers had expressed concern to Jackson over these alterations, Jackson's instruction would reasonably be viewed as seeking to safeguard the integrity of the investigation, not restrict Elias in the exercise of her Section 7 rights. Thus, although instructions limiting employees from discussing or seeking assistance with sexual harassment complaints and investigations may in other contexts violate the Act, we find on these facts that Jackson's narrowly tailored instruction to Elias did not do so. We therefore agree with the judge that the Respondent did not violate Section 8(a)(1) by instructing Elias to

[22] Member Miscimarra's concern that our holding creates "process restrictions" that will detract from the legal protection afforded to employees under other statutes is unfounded. First, the purported problems identified by our colleague are no more than functions of the rights employees already have under the Act. Further, as demonstrated by our decision below on the specific violations alleged, our holding will not restrict employers' ability to carry out their business operations, to handle complaints, or to conduct investigations as necessary. For similar reasons, we reject Member Johnson's criticism, in his partial dissent, that we somehow regard the Board as an "üheragency" or that we apply Sec. 7 to override all other statutory frameworks created by Congress.

[23] See, e.g., *Ellison Media*, 344 NLRB 1112, 1113–1114 (2005); *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (Sec. 7 protects employees' right to discuss sexual harassment complaints), enfd. mem. 63 Fed.Appx. 524 (D.C. Cir. 2003); *All American Gourmet*, 292 NLRB 1111, 1130 (1989) (rule precluding employee from discussing sexual harassment complaint with coworkers violated Sec. 8(a)(1)).

[24] We thus view Jackson's instruction as distinguishable from cases involving an employer's blanket prohibition on discussing ongoing investigations of employee misconduct. See, e.g., *SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003); *Phoenix Transit System*, 337 NLRB at 510; *Keller Ford*, 336 NLRB 722, 722 (2001), enfd. mem. 69 Fed.Appx. 672 (6th Cir. 2003); and *K Mart Corp.*, 297 NLRB 80, 80 fn. 2 (1989).

refrain from obtaining additional witness statements in connection with the sexual harassment complaint.

C. The Respondent did not Violate Section 8(a)(1) by Questioning Elias about the Whiteboard Incident and her Request to Her Coworkers

The General Counsel also excepts to the judge's finding, made without explanation, that the Respondent did not violate Section 8(a)(1) by virtue of Jackson's questioning of Elias during their August 31 telephone call as to why Elias felt the need to obtain her coworkers' signatures on the document showing the reproduced whiteboard message. The Act generally prohibits employers from questioning employees about their protected concerted activity, including *why* they chose to engage in that activity.[25] At the same time, the Board has recognized that, as part of a full and fair investigation, it may be appropriate for the employer to question employees about facially valid claims of harassment and threats, even if that conduct took place during the employees' exercise of Section 7 rights.[26] As with the instruction preventing Elias from obtaining additional statements, we find on the particular facts of this case that the Respondent's questioning of Elias was not unlawful.

The record establishes that the Respondent's questioning of Elias was focused on and narrowly tailored to enabling the Respondent to conduct a legitimate investigation into Elias' complaint, as well as her coworkers' complaints against her. As described, Elias' coworkers complained to management about Elias' own conduct in seeking her coworkers' assistance in raising a sexual harassment complaint to management. These matters involved the same operative facts, timeline, actions, and participants. It was therefore reasonable for Jackson to investigate them together and to ask the questions she legitimately believed important before reaching a conclusion. Moreover, although Jackson's question concerned why Elias felt she had to obtain her coworkers' signatures, there is no evidence that Jackson was attempting to delve into Elias' motives or sentiments beyond the narrow facts surrounding the complaints at issue.[27] Instead, a reasonable employee viewing Jackson's actions in context would recognize that she was legitimately trying to gain a full picture of the events as part of her investigation. Finally, in closing the investigation, Jackson assured Elias that the Respondent was committed to protecting her against retaliation of any kind and told her to report any future incidents of harassment or retaliation. Such assurances are relevant to a determination of whether an employer's questioning of an employee about her collective actions is lawful. See generally *Bourne Co. v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (setting forth relevant factors for determining if questioning is coercive).

Based on the foregoing, we find that the Respondent's questioning of Elias did not, under the circumstances presented here, violate Section 8(a)(1). We therefore adopt the judge's recommendation to dismiss the complaint allegation.

AMENDED REMEDY

The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining in its employee handbook, New Hire CD, and on its intranet portal confidentiality provisions prohibiting the discussion of wages, hours, compensation, or working conditions of other employees. No party has excepted to this finding. The standard affirmative remedy for maintenance of unlawful work rules is immediate rescission of the offending rules; this remedy ensures that employees may engage in protected activity without fear of being subjected to the un-

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[25] See, e.g., *Belle of Sioux City, L.P.*, 333 NLRB 98, 105 (2001) (emphasizing that, just as an employer may not question employees about union activity, it may not question unrepresented employees about their concerted efforts to change or mitigate terms and conditions of employment).

[26] For example, in *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528–529 (2007), the Board found that the employer lawfully questioned a union supporter about alleged vulgar language and threatening behavior when making of prounion remarks. Specifically, the Board found:

> The Respondent had a legitimate basis for investigating [the employee's] misconduct, and its investigation was entirely consistent with its policy. . .. Furthermore, the Respondent made reasonable efforts to circumscribe its questioning to avoid unnecessarily prying into [the employee's] union views, and the limitations on its inquiry were clearly communicated to [him].

To be sure, the Board has found that legitimate managerial concerns regarding the prevention of harassment do not justify policies discouraging Sec. 7 activity "by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity." *Consolidated Diesel Co.*, 332 NLRB at 1020. However, this does not preclude a legitimate investigation simply because some aspect of the conduct of one of the parties is protected under Sec. 7.

[27] In *Bridgestone Firestone South Carolina*, 350 NLRB at 528–529, an employee became loud, angry, and used obscenities during a conversation with his coworkers about the union. In response to a complaint from one of the coworkers about the employee's conduct and consistent with its policy against "profane, threatening or indecent language[,]" the employer conducted an investigation into the employee's alleged misconduct, including questioning the employee about his comments. The Board found that the employer's questioning did not violate Sec. 8(a)(1) because it narrowly asked whether the employee made the profane statements attributed to him by his coworkers and expressly emphasized that the substance of the potentially protected discussion in which the profanity was used was not at issue. The Board also found that the employer appropriately circumscribed its questioning to avoid prying into the employee's union views and clearly communicated the limitations on its inquiries.

lawful rule. *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). Pursuant to *Guardsmark*, the Respondent may comply with the Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could be costly. 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 that will cover the unlawfully broad rules, until it republishes the handbook either without the unlawful provisions or with lawfully-worded rules in their stead. Any copies of the handbook that are printed with the unlawful rules must include the inserts before being distributed to employees. See *Guardsmark, LLC,* 344 NLRB at 812 fn. 8.

Further, the unlawful provisions have been or are in effect at the Respondent's facilities companywide. "[W]e have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 7 (2011) (quoting *Guardsmark, LLC*, 344 NLRB at 812). As the D.C. Circuit observed, "only a company-wide remedy extending as far as the company-wide violation can remedy the damage." *Guardsmark, LLC. v. NLRB*, 475 F.3d 369, 381 (D.C. Cir. 2007).

The judge further found that the Respondent violated Section 8(a)(1) of the Act by failing to notify employees of changes in its solicitation and distribution policy (also in place nationwide) made in September 2009 and January 2011. The record reflects, however, that the Respondent's failure has been proven only with respect to the Phoenix, Arizona facility involved in this proceeding.[28] Therefore, our remedy with respect to that violation is limited to the Phoenix facility.

[28] The judge appears to have implicitly made this finding, stating that "although Jackson testified that this new rule was to be read to the employees at team huddles, this, apparently, was not done, at least at the facility involved herein." To the extent that the finding was not made explicit, we do so here.

We therefore amend the judge's recommended remedy and modify his recommended Order accordingly, and shall substitute a new notice to conform to the Order as modified.

ORDER

The Respondent, Fresh & Easy Neighborhood Market, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining provisions in the summary and complete versions of "Confidential Information Version 1-11," provided to employees in the employee handbook, New Hire CD, and on the intranet portal, prohibiting the discussion of wages, hours, compensation, or working conditions of other employees.

(b) Failing to notify employees at its Phoenix, Arizona facility about the September 2009 and January 2011 changes to its solicitation and distribution policy.

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

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

(a) Rescind, nationwide, the portion of the confidentiality rules described in paragraph 1(a) above.

(b) Furnish all current employees nationwide with inserts for their current employee handbooks that (1) advise that the unlawful confidentiality rules listed in paragraph 1(a) above have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to all current employees nationwide revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules. To the extent that these rules, and any characterizations or summaries of the same, are also found on the Respondent's intranet portal or on its New Hire CDs, revise that content so that it (1) does not contain the unlawful rules, or (2) provide lawfully-worded rules.

(c) Notify all employees at its Phoenix, Arizona facility that the solicitation and distribution policy described in 1(b) above was changed in September 2009 and January 2011.

(d) Within 14 days after service by the Region, post at its Phoenix, Arizona facility copies of the attached notice marked "Appendix A" and within that same time period post at all its other facilities, nationwide, copies of the attached notice marked "Appendix B."[29] Copies of the notices, on forms provided by the Regional Director for Region 28, 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 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. 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 Appendix A to all current employees and former employees employed by the Respondent at that facility any time since March 13, 2011. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of Appendix B to all current employees and former employees employed by the Respondent at such facilities any time since March 13, 2011.

(e) 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 take to comply.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

3. IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 11, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, the Board unanimously finds that the Respondent acted lawfully when dealing with three employee complaints. The first employee, Margaret Elias, complained about an offensive defaced whiteboard message that she regarded (with ample justification) as potential sex harassment. The second employee, Krista Yates, complained that she was "bullied" by the first employee, Elias, who insisted repeatedly that Yates sign a piece of paper that reproduced what appeared on the whiteboard.[1] A third employee, Gary Hamner, complained that Elias had said "fuck you" to him. The Respondent conducted an investigation; it concluded that Hamner defaced the whiteboard message, which caused him to be disciplined; Hamner's complaint against Elias was found to be without merit; Elias was advised that the whiteboard message had been inappropriate; and no adverse action was taken against her.

[1] Elias also had the written statement signed by a supervisor, Michael Anderson, and a co-employee, Victoria Giro.

The General Counsel pursued a two-part claim against the Respondent, alleging (1) that Elias engaged in "protected" Section 7 activity[2] by insisting that others sign the piece of paper, and (2) that the Respondent's investigation violated Section 8(a)(1),[3] which makes it unlawful to "interfere with, restrain, or coerce" employees in the exercise of protected activity. Specifically, the General Counsel alleged, first, that an investigating supervisor unlawfully asked Elias "why she felt" she needed the paper signed by others, and second, the supervisor unlawfully asked Elias "not to obtain any further statements" so that the supervisor "could conduct the investigation . . . [and] complete it."[4]

I respectfully dissent from the majority's conclusion that this case involves "protected concerted activity" by Elias. In my view, as noted more fully below, (a) the judge properly concluded that Elias failed to engage in "concerted activity" when she insisted that co-employees sign a statement that merely documented what appeared on a whiteboard; and this conclusion is consistent with the Board decisions in *Meyers Industries*[5] and Section 7 of the Act; (b) the majority decision in *Holling Press*[6]—which my colleagues overrule—correctly interpreted Section 7's additional threshold requirement that protected conduct be undertaken for the "purpose" of "mutual aid or protection"; the judge correctly found that the conduct of Elias was not undertaken for such a purpose; and *Holling Press* utilized an analysis that was more refined than my colleagues describe; and (c) my colleagues' expansive reading of the Act's protection, even though well-intended, will produce adverse consequences in circumstances like those presented here, thereby undermining the interests of employees in regard to sex harassment complaints and other non-NLRA protection that is available to employees.

My colleagues accurately describe most of the relevant facts. As noted above, employee Elias wrote a message on a whiteboard that was defaced in an offensive manner (the word "TIPS" was changed to "TITS," and "a peanut or a worm was drawn" that appeared to be urinating). In response, Elias reproduced the "words from the whiteboard" on a sheet of paper, and Elias repeatedly insisted that three individuals—a supervisor (Anderson)[7] and two co-employees (Yates and Giro)—sign the paper. Other important facts were credited by the judge and are undisturbed by the Board:

- The paper was prepared by Elias because she "could not take a picture of the defaced whiteboard." Thus, the paper—when signed by others—merely contained the "words from the whiteboard."[8]
- The paper "was neither a petition nor a joint complaint of everybody signing." Elias testified that she prepared the paper because she intended to "report" the incident, but she "didn't really have any expectations beyond reporting it."
- Elias was hostile and confrontational when she insisted that her paper be signed by supervisor Anderson and co-employees Yates and Giro. The judge credited their testimony that Elias was "very loud and angry" and "aggravated," and that Elias' requests to Giro were "very heated and uncomfortable." Indeed, as noted previously, co-employee Yates submitted her own complaint against Elias the next day "for 'bullying' [Yates] into signing the statement."
- Nobody signed the paper based on planned future action. Supervisor Anderson signed the statement "only to calm . . . down" Elias and avoid "escalating" the situation. Giro reported that she "felt intimidated into signing" and signed only because the "very heated" discussion "was taking place in front of customers and she wanted to end it." Yates saw Elias "yelling and backing Anderson in to a

[2] National Labor Relations Act ("NLRA" or "Act") Sec. 7, 29 U.S.C. § 157.

[3] NLRA Sec. 8(a)(1), 29 U.S.C. § 158(a)(1).

[4] There were no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by maintaining an overbroad and discriminatory confidentiality rule in its employee handbook, on its companywide intranet portal, and on its New Hire CDs, and by failing to notify employees at its Phoenix, Arizona facility of changes to its solicitation and distribution rule. Accordingly, those findings are not before the Board for review.

[5] *Meyers Industries*, 268 NLRB 493 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[6] 343 NLRB 301 (2004).

[7] Anderson was a statutory supervisor and agent of the Respondent. Elias' insistence that Anderson sign the paper does not necessarily defeat the possibility that Elias engaged in protected concerted activity when demanding that co-employees Yates and Giro sign the document. However, the record reveals that she treated Anderson, Yates and Giro in virtually the same manner, which reinforces the judge's conclusion that Elias' conduct—her insistence that Anderson, Yates and Giro sign the paper—was not undertaken for the "purpose" of "mutual aid or protection" within the meaning of Sec. 7.

[8] The judge concluded, based on uniform testimony by multiple witnesses, that *after* the paper was signed, Elias added a statement reading, "Someone changed the Board to 'TITS' instead of TIPS and put a worm pissing on my name. I take this as sexual harassment. This has been on the Board since I got here at 2PM."

corner" about signing the statement, and Yates was "freaked out" but signed "because she felt that was the fastest way to end 'the escalating situation.'"

- As the judge found, "Respondent did not take any action against Elias as a result of her actions," and "at the conclusion of [Respondent's] investigation," the co-employee (Hamner) who defaced the whiteboard message "was disciplined for his alteration of the whiteboard, and was warned about any future retaliation" against Elias.

I. SECTION 7'S REQUIREMENTS—GENERALLY

The threshold issue in this case—whether Elias engaged in "protected concerted activity"—is a shorthand reference to conduct protected under Section 7 of the Act, but the Board's analysis must be based on the language enacted by Congress.[9] In relevant part, Section 7 of the Act states:

> Employees shall have the right to *self-organization, to form, join, or assist labor organizations,* to *bargain collectively* through representatives of their own choosing, and to engage in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*[10]

Section 7 is the cornerstone of the Act, and it unquestionably confers protection regarding a range of activities.[11] However, the statutory language incorporates "words of limitation." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 220 (1964) (Stewart, J., concurring). Section 7 enumerates three specific types of protection for employees: to engage in "self-organization," to "form, join, or assist labor organizations," and to "bargain collectively through representatives."

Section 7 then enumerates a fourth category, encompassing "other *concerted* activities for the *purpose* of collective bargaining or *other mutual aid or protection.*" Statutory language must be construed as a whole, and particular words or phrases are to be understood in relation to associated words and phrases.[12] The language in Section 7 plainly reflects the Act's focus on "collective" actions, "self-organization" and representation, and these terms shed some light on the meaning of "mutual aid or protection."[13] As the Supreme Court observed in *Eastex, Inc. v. NLRB*,[14] Section 7 was designed "to protect concerted activities for the *somewhat* broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'"

The Act's provisions should be liberally construed, but we must still interpret the Act in a manner consistent with its terms. Section 7 protects employee activities only if they are "concerted," and only if motivated by the "purpose" specified in the statutory language—i.e., the purpose of "collective bargaining or *other mutual aid or protection.*" This follows from the statute's plain language[15] in addition to its legislative history.[16]

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[9] As the Supreme Court stated in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982): "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes" (citations omitted).

[10] 29 U.S.C. § 157 (emphasis added).

[11] See, e.g., Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at A General Theory of Section 7 Conduct*, 137 U. Penn. L. Rev. 1673, 1682 (1989) (hereinafter "Morris") (Sec. 7 embodies the "substantive content" of the Act's unfair labor practice provisions).

[12] 2A Norman J. Singer, *Statutes and Statutory Construction (Sutherland Statutory Construction)* Sec. 47.16 (5th ed. 1992).

[13] See, e.g., *Mohave Electric Cooperative, Inc. v. NLRB*, 206 F.3d 1183, 1191–1192 (D.C. Cir. 2000) ("[T]he canon of *ejusdem generis* . . . counsels against our reading [a] general phrase to include conduct wholly unlike that specified in the immediately preceding list . . .").

[14] 437 U.S. 556 (1978) (emphasis added).

[15] In reference to Sec. 7, Professor Charles Morris described the "commonly accepted meaning" of the words "concerted" and "mutual" as follows:

> *Concerted* derives its meaning from *concert* and is generally synonymous with the phrase *in concert.* Those three terms all convey a clear meaning. In reverse order, they mean "together; jointly;" "agreement of two or more individuals in a design or plan; combined action; accord or harmony;" and "contrived or arranged by agreement; planned or devised together; done or performed together or in cooperation." The meaning of *mutual* is equally explicit: "possessed, experienced, performed, etc., by each of two or more with respect to the other; . . . held in common, shared . . . Mutual indicates an exchange of a feeling, obligation, etc., between two or more people, or an interchange of some kind between persons. . . ."

Morris, supra fn. 11, at 1679–1680 (footnotes omitted; emphasis in original).

[16] Sec. 7 of the Act was modeled after Sec. 7(a) of the National Industrial Recovery Act (NIRA), described by the Board as having "the purpose" of giving employees "the opportunity to associate freely with [their] fellow workers for the betterment of working conditions" and creating "rights in organizations of workers." *Meyers I*, 268 NLRB at 493, quoting 79 Cong.Rec. H2332 (daily ed. Feb. 20, 1935) (statement of Rep. Boland), reprinted in 2 Leg. Hist. of the National Labor Relations Act of 1935, at 2431–2432 (1935). The statutory phrase "concerted activities" was previously used in Sec. 2 of the Norris-LaGuardia Act, which declares that "it is necessary that [the individual unorganized worker] shall be free from the interference, restraint or coercion of employers . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102. The primary purpose of the Norris-LaGuardia Act "was to curtail injunctions . . . against what everyone would recognize as organized activity, notably picketing in order to promote unionization or union demands." *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 843 (2d Cir. 1980). Based on this legislative history, the

II. APPLYING SECTION 7 IN THIS CASE

A. Elias did not Engage in "Concerted Activity" Under Section 7 and Relevant Board and Court Decisions

The Board has an eventful history regarding what constitutes "concerted" activity for purposes of Section 7. Early cases readily distinguished between protected conduct involving multiple employees acting in "concert"[17] and unprotected activities by an individual without coordination, planning or authorization involving others.[18] In *Alleluia Cushion Co.*,[19] however, the Board expanded Section 7 by finding that a solitary employee's actions regarding statutory Occupational Safety and Health Act (OSHA) protection could be "concerted" based on the Board's own determination that other employees had an interest in what the person was doing.[20] The *Alleluia Cushion* approach—criticized as a theory of "presumed" or "constructive concerted action"[21] and a "per se" standard of concerted activity[22]—was rejected by several courts of appeals.[23] In *Meyers I*, the Board overruled *Alleluia Cushion* based on the following analysis, which is instructive in the instant case:

> [T]he per se standard of concerted activity, by which the Board determines what *ought to be* of group concern and then artificially presumes that it *is* of group concern, is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." *A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7.*[24]

In *Meyers I*, the Board adopted a more restrictive interpretation of Section 7, and held that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in *with or on the authority of other employees*, and *not* solely by and on behalf of the employee himself."[25] Conversely, the Board held that "*individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove *concert of action*."[26]

In *Meyers II*,[27] the Board reaffirmed this standard and elaborated on the analysis that controlled whether a single employee's conduct constitutes "concerted" activities engaged in for the "purpose of . . . mutual aid or protection."[28] Three main points emerged from the *Meyers II* decision.

First, the Board held that a single employee, though not a "designated spokesman" by other employees, could engage in "concerted" activity if he or she "bring[s] *truly group complaints* to the attention of management."[29] However, such activity could be "concerted," according to the Board, only "[w]hen the record evidence *demonstrates group activities*, whether 'specifically authorized' in a formal agency sense, or otherwise."[30] The Board stated this question was a "factual one based on the totality of the record evidence,"[31] and relevant considerations included, for example: (a) whether other employees au-

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Board in *Meyers I* observed that Congress understood the concept of concerted activity "in terms of *individuals united* in pursuit of a *common goal*." 268 NLRB at 493 (emphasis added).

[17] See, e.g., *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951) (employees conversing about the need for a union were found to be engaged in concerted activity).

[18] See, e.g., *Traylor-Pamco*, 154 NLRB 380, 388 (1965) (two employees who ate lunch together, and apart from other employees, were not engaged in concerted activity absent evidence "that their association in refusing to eat in the tunnel [with others] was anything but accidental"); *Continental Mfg. Corp.*, 155 NLRB 255, 257–258, 261–262 (1965) (no protected concerted activity where a single employee, acting alone, prepared and signed a letter complaining about working conditions, even though the employee undisputedly worked with a co-employee to investigate issues referenced in the complaint, the issues involved other co-employees as well, and the letter stated that "the majority of the other employees" had the same "problem" but were "afraid to speak up").

[19] 221 NLRB 999 (1975).

[20] In *Alleluia Cushion*, the employee reported safety violations to a state OSHA office and accompanied an OSHA inspector on a plant tour, with no other involvement by other employees. Finding no group action, the administrative law judge dismissed the complaint, but the Board reversed, holding that a lone employee's invocation of a statutory right designed for the benefit of all employees will be "deemed" concerted "in the absence of any evidence that fellow employees disavow such representation." 221 NLRB at 1000.

[21] *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980).

[22] *Meyers I*, 268 NLRB at 495.

[23] *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d at 304; *Ontario Knife*, 637 F.2d at 840; *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23 (7th Cir. 1980); *NLRB v. Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079 (8th Cir. 1977).

[24] 268 NLRB at 496 (emphasis in original and added; footnote omitted).

[25] Id. (emphasis added).

[26] Id. at 498 (emphasis in original and added).

[27] 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[28] Id. at 885. The Board decision in *Meyers II* resulted from a remand by the Court of Appeals for the D.C. Circuit, although the court did not pass on the merits of the standard adopted by the Board. *Prill v. NLRB*, 755 F.2d 941, 957 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

[29] Id. at 886–887 (emphasis added).

[30] Id. (emphasis added).

[31] Id.

thorized or instructed the individual to speak for them;[32] (b) whether other employees "were aware of and supported" the individual's presentation to management;[33] and (c) whether the individual previously discussed a "common . . . complaint" with other employees who, in turn, "refrained from making [their] own . . . complaint."[34]

Second, the Board in *Meyers II* held that a single employee could engage in "concerted" activity by speaking with a co-employee for the purpose of "*seek[ing] to initiate or to induce or to prepare for group action.*"[35] Here, the Board quoted with approval the Third Circuit decision in *Mushroom Transportation Co. v. NLRB*,[36] where the court stated:

> It is not questioned that a conversation may constitute a concerted activity, although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in *with the object of initiating or inducing or preparing for group action* or that it *had some relation to group action* in the interest of the employees.[37]

The Third Circuit in *Mushroom Transportation* indicated that the Act's protection was unwarranted "when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to."[38] Thus, the court concluded:

> *Activity which consists of mere talk must, in order to be protected, be talk looking toward group action.* If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is *an individual, not a concerted, activity*, and, *if it looks forward to no action at all, it is more than likely to be mere "griping."*[39]

Third, the Board in *Meyers II* rejected the notion that Section 7 protection might be triggered by "a single employee's invocation of a statute enacted for the protection of employees generally."[40] The Board distinguished cases involving the Section 7 protection afforded an individual employee who seeks to enforce rights under a collective-bargaining agreement.[41] Employees can engage in concerted activity associated with "appeals to legislators" and "administrative and judicial forums,"[42] and the Board in *Meyers II* recognized that, like rights arising under a labor contract, statutory rights could be just as appropriate for "joint employee action."[43] However, the Board stated: "We merely find that invocation of employee contract rights is a continuation of an ongoing process of employee concerted activity, whereas employee *invocation of statutory rights is not.*"[44] Of particular import in the instant case is the Board's conclusion in *Meyers II* regarding this issue:

> [A]lthough it is our duty to construe the labor laws so as to accommodate the purposes of other Federal laws . . . , *this is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes.* The Board was not intended to be a forum in which to rectify all the injustices of the workplace. In *Meyers I*, the Board noted that although we may be outraged by a respondent who may have imperiled public safety, *we are not empowered to correct all immorality or illegality arising under all Federal and state laws. . . .*[45]

As a final matter, the Section 7 phrase, "concerted activities," contemplates *more* than the mere presence or involvement of two employees. Thus, as noted above (supra fn. 15), Professor Charles Morris has described the "commonly accepted meaning" of the word "concerted" as follows:

> *Concerted* derives its meaning from *concert* and is generally synonymous with the phrase *in concert.* Those three terms all convey a clear meaning. In reverse order, they mean "*together; jointly*;" "agreement of two or more individuals in *a design or plan; combined action; accord or harmony*;" and "contrived or arranged *by agreement; planned or devised together; done or performed together or in cooperation.*"[46]

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[32] Id. at 886, describing *Mannington Mills*, 272 NLRB 176 (1984).

[33] Id., describing *Mannington Mills*, supra fn. 32, and *Allied Erecting Co.*, 270 NLRB 277 (1984).

[34] Id., describing *Walter Brucker & Co.*, 273 NLRB 1306 (1984).

[35] Id. at 887 (emphasis added).

[36] 330 F.2d 683 (3d Cir 1964).

[37] Id. at 685 (emphasis added), quoted in *Meyers II*, 281 NLRB at 887, and in *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986).

[38] Id.

[39] Id. (emphasis added).

[40] 281 NLRB at 887.

[41] It is well established that Sec. 7 protects an individual's effort to enforce collective-bargaining agreement provisions, which, obviously, resulted from contract negotiations. The individual's activity is therefore considered an extension of the concerted action that produced the agreement. *NLRB v. City Disposal Systems*, 465 U.S. 822, 831–832 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[42] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 566 (1978).

[43] 281 NLRB at 888.

[44] Id. (emphasis added).

[45] Id. (emphasis added), citing *Meyers I*, 268 NLRB at 499.

[46] Morris, supra fn. 11, at 1679–1680 (footnotes omitted; emphasis in original).

If one person is a witness to somebody else's car crash, and if they both have a shared interest in avoiding such accidents, this does not mean they have engaged in "concerted" activity. Rather, our cases establish that "concerted" activity takes place, within the meaning of Section 7, *only* if the conduct involves or contemplates a joint endeavor to be "done or performed together or in cooperation."[47] A conversation between two employees, though it involves "a speaker and a listener," constitutes concerted activity only if "at the very least it was engaged in *with the object of initiating or inducing or preparing for group action or that it had some relation to group action* in the interest of the employees."[48] Thus, activity involving two or more employees consisting of "mere talk" must, in order to have Section 7 protection, "be talk *looking toward group action*."[49]

In the instant case, my colleagues—though acknowledging *Meyers II* and its progeny as controlling law[50]—reverse the judge's finding that Elias, the employee, failed to engage in "concerted" activity within the meaning of *Meyers II*.[51] Like the judge, however, I believe the above principles warrant a conclusion that Elias was *not* engaged in "concerted" activity when she engaged in an angry confrontation (with a supervisor and two other employees) about the paper she insisted that they sign.

As noted previously, the paper on which Elias sought signatures merely contained the "words from the whiteboard." The paper "was neither a petition nor a joint complaint of everybody signing," nor can Elias' actions be reasonably regarded as "bringing truly group complaints to the attention of management."[52] Rather than engaging in conduct "with the object of initiating or inducing or preparing for group action,"[53] Elias testified that—even in relation to her individual complaint—she "didn't really have any expectations beyond reporting it." The record is replete with indications that the two co-employees, Yates and Giro, did not regard the paper as having "some relation to group action."[54] Yates signed the paper only to end an "escalating situation" that caused her to be "freaked out," and which prompted Yates to submit her own complaint against Elias for "bullying" Yates into signing the document. Giro likewise stated she "felt intimidated into signing" the paper, and she did so only to end the "very heated" discussion that "was taking place in front of customers." These facts render implausible any suggestion that Elias was acting in "concert" with anyone else, and it is likewise clear that co-employees Yates and Giro were not acting in "concert" with Elias.[55]

Without question, neither Elias nor other employees should have been subjected to an offensive, defaced whiteboard message. But that begs the question of whether Elias engaged in "concerted" activity when insisting that her two co-employees sign a paper that had

[47] Id.

[48] *Mushroom Transportation*, supra fn. 36, 330 F.2d at 685 (emphasis added), quoted in *Meyers II*, 281 NLRB at 887, and in *Vought Corp.*, 273 NLRB at 1294.

[49] Id. (emphasis added).

[50] Although *Meyers II* remains the governing standard, some recent Board rulings seemingly revive the notion that an employee's mere discussion of certain subjects is protected on the basis that it is "inherently" concerted, *Hoodview Vending Co.*, 359 NLRB No. 36 (2012), or might "spawn collective action," *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied 81 F.3d 209 (D.C. Cir. 1996). The courts have not been receptive to the approach taken by the Board in these cases. See, e.g., *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 214 (D.C. Cir. 1996) ("We neither understand nor endorse the Board's 'spawning' theory, which, on its face, appears limitless and nonsensical."). See also *Trayco of South Carolina, Inc. v. NLRB*, 927 F.2d 597 (4th Cir. 1991), denying enf. 297 NLRB 630 (1990).

[51] The majority supports its finding that Elias engaged in "concerted" activity by citing *Holling Press*—which they overrule today—for the proposition that an employee's appeal to coworkers "to support her sexual harassment claim" constituted concerted activity. As noted in the text, numerous facts make it unreasonable to characterize Elias' actions as seeking group "support" for her "complaint" to management. Moreover, the instant case is materially different from *Holling Press*, where an employee had a pending state agency sex harassment claim; the employee joined by "union officials" met with the employer regarding the claim; and the employee attempted to arrange for other employees to testify as witnesses in an upcoming agency hearing. *Holling Press*, 343 NLRB at 301, 307–309. Thus, unlike the instant case, the employee's co-employee appeal in *Holling Press* clearly had the "object" of "initiating or inducing or preparing for [future] group action" (i.e., testimony by a co-employee in a future hearing). *Mushroom Transportation Co. v. NLRB*, 330 F.2d at 685. By comparison, neither Elias nor her co-employees in the instant case contemplated any future action of any kind, nor did anyone contemplate any type of group conduct or coordination.

[52] *Meyers II*, 281 NLRB at 886–887.

[53] *Mushroom Transportation*, supra fn. 36, 330 F.2d at 685.

[54] Id.

[55] I do not agree with the majority's suggestion that my criticisms of their analysis "represent a dispute with existing Board jurisprudence." Here, the majority cite a variety of cases that stand for a proposition that I do not dispute: a finding of concertedness is not defeated merely because solicited employees are uncomfortable with a solicitation, do not share the solicitor's cause, or choose not to join it. To be clear, where an individual employee speaks to a coworker, *and that speech looks toward group action*, the speaker's activity is concerted regardless of how the solicitation is received. My central point is that Elias' conduct—asking Yates and Giro to verify that she had correctly copied what was on the whiteboard—did not look toward group action and therefore was not concerted. My purpose in drawing attention to Yates's and Giro's opposition is to underline how very remote the conduct at issue here is from core Sec. 7 activity—i.e., action that is undisputedly concerted because undertaken "jointly" or in "accord or harmony" or "cooperation." Morris, supra fn. 11, at 1679–1680; see also *Meyers II*, 281 NLRB at 883 ("[I]t is protection for joint employee action that lies at the heart of the Act."). In analyzing an issue on the border of concertedness, it is useful to remind ourselves how far from the heartland we are.

an extremely limited purpose (i.e., to memorialize what had appeared on the whiteboard), and that pertained only to Elias' individual complaint. As the Board stated in *Meyers II*, our enforcement of the Act "is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices of the workplace."[56]

B. Holling Press Correctly Interprets Section 7's "Mutual Aid or Protection" Language, and Elias' Actions Failed to Satisfy this Additional Requirement

For employee actions to be protected under Section 7, they must not only be "concerted," they must also be undertaken for the "purpose" of "collective bargaining or *other mutual aid or protection*." I agree with my colleagues that employees can collectively pursue "mutual aid or protection" in numerous ways. However, the instant case does not involve such an endeavor. Moreover, my colleagues embrace the broader proposition that "when an individual employee effectively invokes statutory protections benefitting employees—here, protections against sexual harassment in the workplace—that employee's efforts are for the purpose of 'mutual aid or protection.'"[57]

There are two problems with my colleagues' suggestion that such activities are inherently protected under the Act. In *Meyers II*, the Board squarely held that invoking "statutory protections" did not even necessarily establish that the conduct involves "concerted" activity as defined in Section 7. More importantly, my colleagues embrace a standard that eliminates the statute's "mutual aid or protection" language.

By holding that any concerted activity regarding a single person's complaint inherently involves "mutual aid and protection" if it implicates a non-NLRA statutory right, my colleagues reinstate a "flip side" of *Alleluia Cushion* that the Board properly rejected in *Holling Press*.[58] In *Alleluia Cushion*, the Board embraced a now-discredited position that a single person's conduct could be regarded as inherently "concerted."[59] In *Holling Press*, the Board correctly concluded it was equally objectionable to "*presume*" that concerted conduct regarding a single person's complaint can inherently involve "mutual aid and protection."[60]

It bears emphasis that Section 7 states that concerted activities are protected only if undertaken for the "*purpose*" of "collective bargaining or other mutual aid or protection." The term "purpose" refers to intent. We have nearly 80 years of precedent establishing that, in cases that turn on a particular type of intent, motivation must be proven.[61] On its face, Section 7 contemplates a "purpose" that must be shared in some way by the employees involved in the "mutual" aid or protection.[62] The term "mutual" means "entertained, proffered, or exerted by *each* with respect to the other of two or to *each* of the others of a group."[63]

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[56] *Meyers II*, 281 NLRB at 888 (citations omitted).

[57] The *Meyers II* Board, in the context of explaining its rejection of the *Alleluia Cushion* doctrine, remarked that "efforts to invoke the protection of statutes benefiting employees are efforts engaged in for the purpose of 'mutual aid or protection.'" 281 NLRB at 887. However, this statement appears in a decision that was wholly devoted to articulating a proper understanding of "concerted activity." It cannot be fairly read as categorically holding that such efforts are *invariably* for mutual aid or protection, without regard to the facts of a particular case. Indeed, the *Meyers II* Board followed that statement with a brief discussion of *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), suggesting that, in context, the Board had in mind employees' "'appeals to legislators to protect their interests as employees,'" 281 NLRB at 887 (quoting *Eastex*, 437 U.S. at 566)—not an individual employee's pursuit of a sexual harassment complaint on behalf of her- or himself alone.

[58] *Holling Press*, 343 NLRB at 303, citing *Alleluia Cushion*, 221 NLRB at 1000–1001. I join Member Johnson in finding that the majority's application of its "solidarity principle" is based on an unwarranted extension of Judge Learned Hand's definition of a sympathy strike in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–506 (2d Cir. 1942), and in finding that it cannot survive scrutiny because, as explained below, it presumes what must be proven, i.e., that the conduct at issue was "for the purpose of . . . mutual aid or protection."

[59] For a discussion of *Alleluia Cushion*, which was overruled in *Meyers I*, see the text accompanying fns. 19-26, supra.

[60] 343 NLRB at 303 (emphasis in original).

[61] The most obvious examples are cases involving antiunion discrimination alleged to violate Sec. 8(a)(3). In this context, we have decades of case law indicating that alleged violations may not rest on the "arguable possibility" that unlawful intent existed, nor is it sufficient to rely on "mere suspicion and conjecture" or "suspicion, surmise, implications, or plainly incredible evidence." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 312–313 (1965); *NLRB v. Firestone Tire & Rubber Co. (Foam Div.)*, 539 F.2d 1335, 1339 (4th Cir. 1976); *Independent Gravel Co. v. NLRB*, 566 F.2d 1091, 1094 (8th Cir. 1977).

[62] See, e.g., *Continental Mfg. Corp.*, supra fn. 18, 155 NLRB at 257–258, 261–262, when a single employee gave the employer a letter complaining about working conditions and stating that "the majority of the other employees" had the same "problem" but were "afraid to speak up." Even though the employee undisputedly worked with a co-employee to investigate issues referenced in the letter, which involved other co-employees as well, the Board found there was "no protected concerted activity" because, among other things, the letter was prepared and signed by the employee "acting alone" without any evidence that "the letter was *intended* to enlist the support of other employees." Id. at 257–258 (emphasis added).

[63] *Webster's Third New International Dictionary of the English Language (1981)* 1493. See also Morris, supra fn. 11, at 1679–1680 (commonly accepted meaning of "mutual" is "possessed, experienced, performed, etc., by each of two or more with respect to the other; . . . held in common, shared . . . Mutual indicates an exchange of a feeling, obligation, etc., between two or more people, or an interchange of some kind between persons. . . .").

The facts of the instant case do not reflect any evidence that the interaction between Elias and other employees had the "purpose" (i.e., intent) of "mutual aid or protection." Although Elias insisted that co-employees Yates and Giro sign the paper that reproduced the words written in the defaced whiteboard message, the paper "was neither a petition nor a joint complaint of everybody signing." Although Elias sought the signatures of co-employees Yates and Giro, this pertained solely to Elias' individual pursuit of a complaint that she presented on behalf of herself. Regarding her individual complaint, Elias testified that she "didn't really have any expectations beyond reporting it." To say the least, nothing suggests that Elias took action for the "purpose" of aiding or protecting other employees. Nor is there any evidence that any co-employees acted for the "purpose" of giving mutual aid or support to Elias. Indeed, co-employee Yates submitted her own complaint *against* Elias for "bullying" Yates into signing the document. Co-employee Giro likewise signed only to end an angry, public confrontation that took place "in front of customers."

In short, we are left here with a case in which *nobody* acted for the "purpose" of extending "mutual aid or protection" to someone else. My colleagues find, nonetheless, that concerted activities took place for "mutual aid or protection" because Elias, on behalf of herself, wanted to complain about sex harassment. More generally, the Board majority announces a broad holding that "an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint *is acting for the purpose of mutual aid or protection*." They state this holding "applies equally to cases where . . . an employee seeks to raise that complaint directly to the employer, or . . . to an outside entity."

The broad holding announced by my colleagues dispenses with any inquiry about *whether* employee interaction involving a complaint about sex harassment (or, presumably, any other statutory employment right) involves the "purpose" set forth in Section 7 as a prerequisite to the Act's protection—i.e., whether the "purpose" relates to "*mutual* aid or protection." In my view, such a proposition was properly rejected by the Board majority in *Holling Press*, which my colleagues now overrule, and which utilized an analysis that was more refined than my colleagues describe.

In *Holling Press*, an employee, Catherine Fabozzi, asked a co-employee (Garcia) to testify in an outside proceeding in support of an individual sexual harassment claim. Contrary to my colleagues' description, nothing in *Holling Press* created a "special exception for sexual harassment claims" in Section 7. Rather, the Board held that "concerted" employee activities—whether they related to sex harassment or other matters – were all subject to *the same treatment* under Section 7: the Act's protection is available if the evidence establishes, in addition, that the activity occurred for the "purpose" of "collective bargaining or other mutual aid or protection."

The Board majority in *Holling Press* conducted a factual inquiry consistent with Section 7's structure and language. The majority determined that the interaction between Fabozzi and the co-employee was "concerted."[64] The majority then evaluated whether the record supported an additional finding that the interaction involved the "purpose" of "mutual aid or protection," and concluded it did not. This was a particularized finding based on the evidence, as described by the *Holling Press* majority:

> [W]ith respect to mutual aid or protection, the record reveals that from the outset, Fabozzi charted a course of action *with only one person in mind—Fabozzi herself.* To begin with, Fabozzi's complaint was individual in nature. . . . Thus, her apparent requests to coworkers to help her out . . . were not made to accomplish a collective goal. Rather, their purpose was to advance her own cause. . . . Further, there is *no evidence that Fabozzi offered or intended to help any employees as a quid pro quo for their support of her personal claim.* Her goal was a purely individual one. In addition, there is *no evidence that any other employee had similar problems—real or perceived—with a coworker or supervisor.* In particular, there is *no evidence Garcia took offense to [the alleged harasser's] comment* . . . or sought Fabozzi's help. *Nor did Garcia show any interest in assisting with Fabozzi's claim.* Indeed, Fabozzi's request that Garcia become a witness was accompanied by the threat that she could force Garcia to testify by "hitting" her with a subpoena. *Garcia's evident lack of concern regarding [the alleged harasser's] comment, her lack of interest in supporting Fabozzi, and Fabozzi's aggressive tactics with Garcia clearly establish the absence of any mutual purpose here.* Thus, even though Fabozzi's exhortation to Garcia to testify on her behalf constitutes concerted activity, *it was not made to benefit the group, but rather to advance Fabozzi's personal case.*[65]

Two other aspects of the Board majority ruling in *Holling Press* are contrary to my colleagues' discussion of that case.

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[64] Unlike the instant case, the interaction clearly contemplated future group activity (the co-employee's testimony in Fabozzi's upcoming proceeding), so the interaction was "concerted" within the meaning of Sec. 7. See fn. 51, supra.

[65] 343 NLRB at 302 (emphasis added).

First, the *Holling Press* majority—rather than asserting a philosophical preference—based its decision on the fact that Section 7 requires separate inquiries into whether activities were "concerted" (governed by *Meyers I* and *II*, described above), and whether the activities had the requisite "purpose" involving "mutual aid or protection." The majority noted that Section 7 requires "concert plus mutual aid or protection," and it rejected (as contrary to *Meyers I* and *II*) the notion that "where activity is found to be concerted, the purpose of that activity must, in effect, be *presumed* to be for mutual aid or protection."[66] The *Holling Press* majority properly rejected the notion that "when one employee asks for the assistance of another, there is *always* mutual aid or protection."[67] Referring to then-Member Liebman's dissenting views, the majority explained:

> In the instant case, *we have the element of concert, but not the element of mutual aid or protection*. In our view, our dissenting colleague is simply presuming from the concerted nature of Fabozzi's request to Garcia . . . that Fabozzi's complaint was for the purpose of mutual aid or protection. This is contrary to the teaching of *Meyers I* and *II*, discussed above, which explain that the *concepts of concertedness and mutual aid or protection are analytically distinct and must be analyzed separately*. . . . As explained above, Fabozzi's purpose in filing the charge was to benefit herself alone. The mere fact that Fabozzi subsequently enlisted Garcia to assist her with her complaint *does not somehow expand the scope of the original complaint beyond its intended purpose of benefiting Fabozzi alone*. . . .[68]

Second, the Board majority in *Holling Press* emphasized—as did the Board in *Meyers I* and *II*—that it was *not* finding that all employee conduct regarding sex harassment claims was unprotected under Section 7. Likewise, the majority clearly indicated that an individual's right to freedom from sex harassment and other workplace discrimination—even if outside the scope of Section 7—was clearly worthy of the protection afforded by other employment statutes. Thus, the *Holling Press* majority stated:

> In fact, *we do not "treat sexual harassment at work as merely an individual concern."* Such conduct can be, and often is, of concern to many persons in the workplace. *Where the victims and their supporters protest that conduct, the protest can fall within the ambit of Section 7.* However, where one employee is the alleged victim, that lone employee's protest is not concerted. And, even if the victim seeks support from another employee, and that seeking of support is concerted activity, the "mutual aid or protection" element may be missing. The bare possibility that the second employee may one day suffer similar treatment, and may herself seek help, is far too speculative a basis on which to rest a finding of mutual aid or protection.[69]

The above discussion reveals that, unlike the broad holding announced by my colleagues, the Board majority in *Holling Press* did not categorically exclude individual sex harassment complaints and other statutory employment claims from the scope of Section 7. Rather, the Board majority in *Holling Press* conducted an individualized review of the record, based on the language and structure of Section 7, which supported a finding that the employee's conduct was "concerted," but not for the "purpose" of mutual aid or protection.

For the reasons expressed previously, I believe the record here warrants a conclusion that Elias' conduct was not "concerted" nor did it occur for the "purpose" of mutual aid or protection. For these reasons alone, I would dismiss the complaint allegations that the Respondent violated Section 8(a)(1) in the course of investigating Elias' complaint.

C. Expanding Section 7 Will Undermine Employee Interests Regarding Sex Harassment Claims and Other Types of Statutory Protection

As a final matter, I respectfully disagree with my colleagues' statement that their holding "furthers the important federal policy of preventing sexual harassment in the workplace." I believe it is likely to have the opposite result, which is demonstrated by the allegations asserted against the Respondent, although they are properly being dismissed after years of Board litigation.[70] My col-

[66] Id. at 303.

[67] Id. (emphasis added).

[68] Id. (emphasis added; footnote omitted).

[69] Id. at 303–304 (emphasis added; footnote omitted).

[70] Contrary to the majority's suggestion, my concerns regarding "process restrictions" are not allayed by the Board's finding in this case that the Respondent lawfully conducted an investigation into Elias' conduct. My colleagues find Respondent's conduct lawful based on "the particular circumstances" and "particular facts" of this case. One cannot determine what other questions, during a different investigation, will constitute unlawful interference, restraint or coercion. Thus, in dismissing the allegations in *this* case, the majority leaves intact the chilling prospect of impending investigations, prolonged litigation, and potential liability in future similar cases. Such prospects necessarily restrict an employer's range of motion in responding to employee complaints and conducting investigations, regardless of whether the employer is subsequently found, on the particular facts and circumstances of its case, to have acted lawfully under the NLRA.

leagues' effort to expand the Act's protection is well-intentioned, but I respectfully submit there are two important shortcomings in their analysis.[71]

First, I believe the majority does not adequately examine the enormous array of federal, state and local statutory rights and obligations that confront employers, employees and unions in workplaces throughout the country. These non-NLRA statutes confer extremely important protection on employees in a work force that, increasingly, is becoming more diverse. My colleagues properly recognize that all women—indeed, all employees regardless of sex—have a right to work without being subjected to unlawful sex harassment or sex discrimination. However, there are other equally important types of statutory protection. Just to name a few, these include: (i) minimum wage and overtime requirements, which spawn additional issues about breaks and meal periods; (ii) occupational safety and health requirements, which address potentially life-threatening hazards and accidents in the workplace; (iii) workers' compensation issues and claims arising from work-related injuries; (iv) unemployment insurance issues and claims that can arise from layoffs, work force reductions and major business changes; (v) complex benefits and tax issues that arise from questions regarding how employees are compensated; and (vi) additional legal protection against discrimination or retaliation based on race, national origin, color, religion, age, disability, veteran status, family leave, citizenship, benefits eligibility, and (in certain jurisdictions) sexual orientation, height, weight, marital status, and a near-innumerable variety of other protected characteristics.

The broad holding announced by my colleagues—though couched in terms pertaining to a "sexual harassment complaint"—appears to have limitless application to every one of these other types of statutory claims. In fact, the General Counsel's more expansive argument, as my colleagues note, is that "when an individual employee effectively invokes *statutory protections* benefitting employees . . . that employee's efforts are for the purpose of 'mutual aid or protection.'" Even under preexisting law, which interpreted Section 7 consistent with its terms, there are many circumstances where the Act has conferred protection on two or more employees who, seeking to enforce statutory rights, engage in "concerted" activities with evidence of a shared "purpose" to afford "mutual aid or protection."[72] Now, my colleagues appear to create Section 7 coverage for every *individual* employee—regarding every *individual* complaint implicating any *individual* non-NLRA right—as soon as the individual seeks the involvement of anyone else who is a statutory employee. Such coverage appears to be unaffected by whether or not the object(s) of the appeal are willing or unwilling to help, whether or not they believe they have a shared interest in the matter, whether (as occurred in the instant case) they file their own complaint against the person who is seeking assistance, and whether or not the individual complaint has merit. I hope these assessments are incorrect. However, I am concerned that the majority's holding may be the source of an unprecedented expansion in Section 7 coverage that nobody can presently anticipate. I respectfully submit that such an expansion in Section 7's coverage would be dramatically at odds with *our* statute, its legislative history, and its underlying policies and purposes, which Congress intentionally limited to "concerted" activities by *multiple* employees who take "collective" action for the "purpose" of "mutual" aid or protection.

My second concern relates to the unintended consequence of my colleagues' holding: rather than advancing the policies associated with statutory requirements like the prohibition against sex harassment, expanding Section 7's coverage will predictably *undermine* the many important non-NLRA statutes and regulations that afford individual protection to employees. The NLRA focuses primarily on the *process* by which employees can decide whether to have union representation and engage in collective bargaining.[73] By comparison, other employment statutes primarily require a desired *outcome*: they man-

[71] For the reasons stated by Member Johnson and those set forth below, I agree with Member Johnson that where employee and employer are engaged in parallel investigations—i.e., simultaneously gathering evidence of potential violations of other employment statutes—the burden of proof should be on the General Counsel to show that an employee is *not* interfering with the employer's investigation.

[72] See, e.g., *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940); *Eastex v. NLRB*, 437 U.S. at 565; *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). The Board has also addressed the extent to which employees have a protected right under Sec. 7, and whether employers violate Sec. 8(a)(1) of the Act, regarding various types of "class action" waivers. See, e.g., *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied 737 F.3d 344 (5th Cir. 2013). Nothing in this opinion should be regarded as passing on the merits of such cases.

[73] The NLRA focuses on the process governing union representation elections, but employees are responsible for making their own decision regarding representation. See, e.g., NLRA Sec. 9(a), 29 U.S.C. § 159(a) (providing for representatives "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes"); Sec. 7, 29 U.S.C. § 157 (protecting the right of employees to "engage in" and "refrain from" activities protected under the Act). Likewise, employers and unions are responsible for whatever substantive terms result from negotiations, and the Act prohibits the Board from imposing substantive contract terms on any party. See, e.g., NLRA Sec. 8(d), 29 U.S.C. § 158(d) (providing that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession"); *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) (the Board lacks the authority to impose substantive contract terms on any party).

date safe workplaces with freedom from unlawful discrimination or harassment where employees are treated in compliance with other applicable laws. Every employee affected by my colleagues' holding *already* enjoys non-NLRA statutory protection with *existing* enforcement machinery under the substantive statute(s) implicated in an employee's individual complaint.

By making Section 7 applicable to every situation where one employee appeals to another regarding an individual complaint involving sex harassment or other statutory rights, numerous "process" restrictions under the NLRA become applicable:

- *Unlawful Interrogation*. The NLRA broadly prohibits the questioning of employees regarding "protected" activities.[74] Under my colleagues' holding, the employer, though obligated to conduct an investigation and take remedial action under substantive laws like Title VII of the Civil Rights Act of 1964,[75] is prohibited under the NLRA from questioning employees—including the person who presented the complaint—about the "protected" activity.
- *Unlawful Surveillance*. The NLRA prohibits employer surveillance of "protected" activities, as well as comments or actions that create the impression of surveillance.[76] Yet, employee complaints often involve disputes over what occurred or was communicated by or between employees. Under my colleagues' holding, fact-gathering regarding such disputes will become difficult or impossible, because the NLRA renders unlawful most video or audio surveillance, email system searches, and similar investigative efforts regarding "protected" conduct.
- *The Right to "Refrain From" Protected Activity*. If particular conduct is "protected," Section 7 affirmatively protects the right of employees to "engage in" the conduct *and* to "refrain from" engaging in the conduct. Thus, if an employee's individual complaint involves "protected" conduct, the complaining employee or co-employee witnesses may invoke an NLRA-protected "right" to "refrain from" answering questions and providing relevant information, even if the relevant claim involves a sexual assault associated with a sex harassment complaint, for example, or a work-related injury or fatality implicated in an OSHA complaint.
- *Difficulty Knowing Which Individual Complaints Are "Protected."* Under my colleagues' holding, Section 7 will cover all individual complaints that implicate statutory rights, but only if there is "concerted" activity by two or more employees. Yet, because the NLRA prohibits interrogation about "concerted" activity, employers cannot lawfully make inquiries sufficient to determine which individual complaints are covered by Section 7, and which are not.
- *Large Number of Individual Complaints Affected*. Co-employees predictably will be the most frequent source of information about employment-related complaints, and their involvement may occur in numerous ways and at different times. Therefore, under my colleagues' holding, nearly every investigation involving individual complaints will present difficult questions about whether or when the NLRA process-based restrictions are triggered.
- *Inability to Establish Standard Complaint-Handling Procedures*. Conventional cases involving "protected" activity often give rise to difficult questions about whether the employer has *knowledge* of the activity. Yet, as noted above, the Act prohibits employers from making inquires about "protected" activity, so employers cannot readily ascertain whether or when the NLRA applies to individual complaints, even if they exclusively invoke non-NLRA rights. Therefore, under my colleagues' holding, employers will be unable to adopt a standard process for handling and investigating individual complaints unless they treat *every* individual complaint as being "protected" under the NLRA.

These NLRA "process" restrictions play a vital role when employees engage in conventional types of "protected concerted activity" that have long been protected

[74] My colleagues note, correctly, that the Act "generally prohibits employers from questioning employees about their protected concerted activity, including why they chose to engage in that activity."

[75] As the majority acknowledges, under Title VII of the Civil Rights Act of 1964, "an employer is responsible for acts of sexual harassment in the workplace where the employer . . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR § 1604.11(d) (EEOC regulation).

[76] See, e.g., *Automotive Plastic Technologies, Inc.*, 313 NLRB 462, 466–467 (1993); *Avondale Industries*, 329 NLRB 1064, 1068 fn. 16 (1999).

under Section 7. However, the same "process" restrictions—if expansively applied to nearly every individual complaint implicating *non-NLRA* statutory rights—will clearly detract from the legal protection afforded to employees under such statutes.

This problem is illustrated by the instant case. Because Elias' conduct was alleged to be "protected" (an allegation that my colleagues now embrace), the Respondent has participated in years of litigation based on *two questions* that were asked during the investigation into Elias' individual sex harassment complaint. Moreover, my colleagues find Respondent's conduct lawful only based on "the particular circumstances" and "particular facts" of this case, so one cannot determine what other questions, during a different investigation, will constitute unlawful interference, restraint or coercion regarding "protected" rights in violation of Section 8(a)(1).

Although my colleagues' reasoning leads to the correct outcome, it bears emphasis that their extensive analysis arises from a single person's *individual* complaint, based on Elias' limited interaction with *two employees* (neither of whom wanted to help her), in relation to *two questions* asked during *one interview* conducted on a *single day* by a *single employer* regarding a *single statutory issue* (alleged sex harassment). My colleagues' holding appears to expand Section 7's coverage to *all* individual complaints whenever one employee attempts to involve another statutory employee regarding *all* types of potential employment rights, and *all* employers covered by the Act, affecting *innumerable* interviews and questions asked in workplaces every day throughout the country.

An employer is the only party on the scene, in real time, who can give employees what is required by the numerous employment statutes that focus on "outcome"—i.e., a legally compliant workplace. When an employer receives an "individual" complaint that implicates a non-NLRA statute, employers *already* have a legal obligation to protect employee interests by doing what the non-NLRA statute requires: to ascertain the applicable legal requirements, conduct an immediate investigation, reconcile conflicting evidence, and take strict, prompt remedial action if required. Regarding Elias' individual sex harassment complaint, the Respondent promptly accomplished all of the steps described above. However, based on an expansive interpretation of Section 7—which my colleagues now embrace—*two questions* asked during the Elias interview resulted in years of Board litigation.

I fully support the Act's aggressive enforcement where the evidence proves that two or more employees are engaged in "concerted" activities for "purpose of . . . mutual aid or protection." Absent such evidence, however, it undermines the policies and purposes of *other* important federal, state and local statutes to broadly apply the NLRA's "process" restrictions on top of the non-NLRA substantive and procedural requirements implicated in a single employee's individual complaint. Employers will need to focus on limiting and narrowly tailoring their investigations and discussions with employees, rather than focusing on the substantive legal issues relating to individual complaints. Employers will need to anticipate – consistent with the Respondent's experience – that one or two questions may result in years of Board litigation, separate from the complex non-NLRA laws and procedures that actually govern the employee complaint. Extensive research is not needed to conclude that these problems will delay or obstruct investigations and inhibit the vigor with which they can be carried out. Necessarily, these problems will operate to the detriment of employees.

In this respect, I believe the majority's holding is inconsistent with the Board's statutory duty to accommodate and avoid undermining federal statutes other than the NLRA. As the Supreme Court stated more than 70 years ago:

> *[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.* Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation *without excessive emphasis upon its immediate task.*[77]

[77] *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) (emphasis added). See also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("[W]here the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."); *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153 (D.C. Cir. 2003) ("[T]he Board . . . is obligated to defer to other tribunals where its jurisdiction under the Act collides with a statute over which it has no expertise."); *New York Shipping Assn. v. Federal Maritime Comm.*, 854 F.2d 1338, 1367 (D.C. Cir. 1988), cert. denied 488 U.S. 1041 (1989) ("[T]he agency must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute."); *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1501 (2000), supplemented 333 NLRB 963 (2001), enfd. 345 F.3d 1049 (9th Cir. 2003) (Board cannot adopt interpretation "announcing, in effect, that the NLRA trumps all other Federal statutes"). Cf. *Meyers II*, 281 NLRB at 888 ("Although it is our duty to construe the labor laws so as to accommodate the purposes of other Federal laws . . . this is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes" [citations omitted].).

All Board members agree there is no room in the modern workplace for unlawful sex harassment and other types of unlawful conduct. However, we enforce a single statute that, on its face, does not afford protection to "individual" action. Moreover, as noted above, the majority's expansion of Section 7—though well-intended—will impair employee rights and hinder the ability of employers to comply with statutes that require prompt, thorough investigations and meaningful corrective actions.

For these reasons, I concur in the majority's determination that the Respondent's actions during its interview with Elias were lawful and did not violate Section 8(a)(1). However, I dissent from the majority's decision to overrule *Holling Press*, and I dissent from their finding that the activities at issue here were "concerted" and took place for the "purpose" of "mutual aid or protection."

Dated, Washington, D.C. August 11, 2014

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, concurring in part and dissenting in part.

In this case, we are five Board Members divided by a common language.[1] All of us seemingly agree that the language of Section 7 of the Act states that, in order for us to find the unrepresented employee activity at issue here was protected by that provision, the General Counsel must prove that it was both "concerted" and for the purpose of "mutual aid and protection." All of us seemingly agree that these are discrete and independent elements of proof, and that the principles of *Meyers Industries I and II*[2] should still govern in determining whether the General Counsel has met his evidentiary burden. That, however, is where consensus ends and where significant differences begin as to the application of the common language in this *and* future cases.[3]

I write separately here to state certain points of agreement and disagreement with my colleagues as to whether Margaret Elias engaged in "concerted activity" for "mutual aid or protection" when she requested help from her coworkers to report to management a sexually offensive message visible to other employees in the breakroom. I concur with the majority that the General Counsel has proved both elements required for finding her conduct protected, but I do so based on affirmative proof of actual concert and mutual purpose. I concur in the majority's overruling of *Holling Press, Inc.*, 343 NLRB 301 (2004), but only to the limited extent that it held the "mutual aid or protection" element of protected concerted activity was not proved under the facts in that case and this, where other employees have been exposed to the same conduct that is the basis for an individual's sexual harassment complaint. I join Member Miscimarra in dissenting from the majority's overbroad holding that an

[1] Apologies to George Bernard Shaw.

[2] 268 NLRB 493 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand, *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[3] We are unanimous in finding that the Respondent did not violate Sec. 8(a)(1) of the Act when it questioned employee Margaret Elias about why she obtained witness statements from her coworkers and instructed her not to obtain additional statements from her coworkers. Inasmuch as I agree with the majority that Elias had engaged in protected concerted activity, I agree with finding that neither the questions asked nor the instructions not to obtain additional statements would reasonably tend to interfere with that activity. However, I do not join in the majority's analysis to the extent that it suggests employers are narrowly limited in their ability to conduct statutorily mandated investigations of facially valid sexual harassment complaints, or to determine what corrective or preventive actions must be taken to avoid derivative liability, see *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and I do not reach or pass on the merits of *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011). I also do not join the majority's allocation of the burden of proof in this case, although the majority reaches the right result. Here, where other statutes indisputably give the employer the primary responsibility to take action to prevent sexual harassment, see 42 U.S.C. § 2000e-2(a)(1); 29 CFR § 1604.11(f), the majority impermissibly interferes with Congressional will by requiring the employer to justify itself in any statement or comment that might interfere with an employee like Elias' "parallel investigation" of his or her claim. *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942).

More troubling still, even though the majority recognizes in other contexts that it is the employer who has the power to levy discipline or discharge, e.g., *Santa Fe Tortilla Co.*, 360 NLRB No. 130, slip op. at 1 fn. 7 (2014) ("Of course, it is the employer who wields the ax in the workplace."), the majority's unfortunate rationale hamstrings the employer in trying to effectively investigate and stop harassment by limiting individual employees' own potentially disruptive "parallel investigations," just as Elias embarked on in this case. The Board here also departs (without any rationale) from its earlier recognition that employers have a bonafide interest in controlling the investigation of an internal harassment complaint. See *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2002), enfd. 263 F.3d 345 (4th Cir. 2001). In my view, in the circumstances when both employee and employer are simultaneously gathering and assessing evidence of potential violations of other employment statutes, it should be the General Counsel who must show that the employee is *not* interfering with the employer's investigation, in order for the employee's Sec. 7 rights to prevail over the employer's rights and obligations under more directly controlling laws. The Board is interfering with Congressional intent under other statutes by imposing the burden on the employer. See dissent, post, at 12–13.

employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is always acting for the purpose of mutual aid or protection. As comprehensively and persuasively stated in that dissent, this holding cannot be reconciled with the principles of *Meyers Industries* that the majority claims to apply here. It also expands the protections of the Act to a point where it undercuts and hinders the ability of employers to fulfill their obligation to protect the rights of its employees under numerous other federal and state labor and employment statutes.

In my view, the fact that Elias solicited coworkers to corroborate evidence of an offensive whiteboard display was sufficient to establish under *Meyers* and *Mushroom Transportation*[4] both that her solicitation was "concerted" and for the purpose of "mutual aid and protection." It was concerted because she sought to induce group action.[5] Admittedly, she was ham-handed and overbearing in her efforts to induce group action, alienating those whom she solicited, but this does not disqualify her activity as a threshold concerted communication looking to group support. Further, her solicitation was for the purpose of "mutual aid and protection," because she intended to bring to management's attention conduct that was personally directed at her but visible and objectively offensive to other female employees. I find irrelevant the fact that Elias did not intend any action *other than* reporting her own hostile work environment claim to management.

The flaw in the majority opinion in *Holling Press*, and the reason that it should be overruled in part here, is that it too narrowly construed the circumstances in which an individual sexual harassment complaint, either to management or an outside authority, could be found to be for the purpose of "mutual aid and protection." That is, the majority too readily perceived such complaints to be purely personal, particularly if coworkers spurned the complainant's solicitation of their support.[6] Thus, contrary to the *Holling Press* majority and dissenting Member Miscimarra, I believe that in certain instances the purpose of aiding or protecting other employees may be proved by an individual's claim of sexual harassment conditions to which others are exposed, even if no other employee joins in pressing that claim.

In *Holling Press*, there was nothing speculative about the fact that solicited coworker Garcia was exposed to the same kind of offensive conduct as Fabozzi, even if Garcia was not bothered by Leon's comments. Fabozzi asked Garcia for help *after* Garcia told her about Leon's "tight white pants" comment. In asking Garcia to testify, it is clear that Fabozzi thought Leon's separate comments to Garcia would support her sexual harassment claim against Leon by showing a pattern of conduct. See, e.g., *Jackson v. Quanex Corp.*, 191 F.3d 647, 661 (6th Cir. 1999) (remarks that are generally demeaning to woman even when not demeaning any one woman in particular are considered probative in hostile working environment claim).

The mutual or common hostile working environment implications are even more apparent in this case. Because the Respondent did not permit employees to carry or use cameras at the facility, Elias hand copied an offensive message written by a coworker on the whiteboard in the employees' breakroom. There is disagreement as to what reasons Elias conveyed to her coworkers for asking them to sign her reproduction. At a minimum, however, no one disputes that Elias requested help from her coworkers to corroborate her reproduction of the offensive "TITS" message written on the whiteboard. See, e.g., *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 251–252 (6th Cir. 1998) (employee comments that land adjacent to a Hooters restaurant should be called "Hootersville," "Titsville," or "Twin Peaks" relevant to hostile working environment claim). In these situations, the legal history and framework of the statutory right to

[4] *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir 1964).

[5] In this respect, I agree with my colleagues in the majority that the concerted nature of Elias' conduct is not materially different from the solicitation conduct of employee Fabozzi which the *Holling Press* majority found was concerted. 343 NLRB at 302. Here, a request for a witness statement concerning potentially unlawful conduct that affected a group of employees is an attempt to initiate group action. Unlike Member Miscimarra, I find it irrelevant that the complainant did not at the time intend to file a lawsuit; I would not find the conduct less concerted because the employee chose to resort to the employer's internal processes, in obedience to the employer's guidance of how employees should pursue grievances. To hold otherwise would frustrate Congress' goal to surface and remedy sexual harassment issues as soon as possible.

[6] The Board has long recognized "it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act" if protection is denied because of "lack of fruition." *Salon/Spa At Boro, Inc.*, 356 NLRB No. 69, slip op. at 11 (2010) (quoting *Mushroom Transportation Co.*, above at 685. Thus, the Board in *Holling Press* should *not* have considered "[coworker] Garcia's evident lack of concern regarding Leon's comment, her lack of interest in supporting Fabozzi, and Fabozzi's aggressive tactics" in finding that Fabozzi's request to Garcia to testify before the state agency in support of her sexual harassment complaint against Leon was a "purely individual one" and was not for "mutual aid or purpose." *Holling Press*, 343 NLRB at 302. That is not to say that Fabozzi's aggressive tactics or Garcia's lack of interest and support are irrelevant. They are–but to the question of whether Fabozzi's conduct was removed from the protections of the Act, *not* whether Fabozzi's conduct was for "mutual aid or protection."

work in "an environment free from discriminatory intimidation, ridicule, and insult"[7] strongly support finding that Fabozzi and Elias' actions in pursuing individual sexual harassment claims that implicate a common hostile working environment are for the purpose of "mutual aid or protection" and are protected under the Act.

Essentially, *Holling Press* unfortunately overlooked the fact that some kinds of alleged violations of other statutes affect employees as a group. I will not comprehensively cover them here: but a uniform pay practice affecting a group of employees in the same way, a safety hazard affecting employees in the same way, or a discriminatory practice affecting employees in the same way are classic examples. Another classic example is the employee (or supervisor) who engages in potential harassment that affects a group of other employees, running afoul of Title VII. The quintessential example of that is posed by this case: an employee essentially created a derogatory, demeaning and gender-specific offensive display on a whiteboard. Even though the display directly targeted a single female employee, it existed for all female (and male) employees to see. Elias, who was the direct target, complained, and tried to enlist other employees to her cause by verifying what was written. One of the other female employees (Giro), in fact, testified that she agreed the display was "inappropriate" and that management should be notified about it so that it could be addressed. Those facts should be enough to determine that Elias' request—though it was to support her personal internal complaint—was also for the purpose of mutual aid and protection, i.e., of all female employees who were exposed to the conduct. The objective determination of whether a complaint is made for the purpose of mutual aid or protection thus derives from the objective facts of the underlying conduct at issue, not from the fortuity that only one person complained about it (the *Holling Press* analysis) or from a subjectively-based presumption that "every request for co-employee help is made in solidarity" (the majority's analysis).[8] In terms of Member Miscimarra's "car crash" analogy, therefore, I believe the other female employees were more than mere witnesses. The car also "crashed" directly into them, because they were also exposed to the offensive language. On the other hand, the flaw in my colleagues' opinion overruling *Holling Press* is that it so broadly construes the circumstances in which an individual sexual harassment complaint will be found to be for the purpose of "mutual aid and protection" as to vitiate the requirement of proof for this independent element of the statutory test. The majority's holding that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is always acting for the purpose of mutual aid or protection is, in effect, an irrebuttable presumption. If this is intended to be an irrebuttable presumption particular to claims of sexual harassment, then the majority here commits the same special exception error that it correctly contends was committed by the *Holling Press* majority. However, as Member Miscimarra also notes in his opinion, I do not think my colleagues' rationale can be so cabined, nor do I think they intend it to be, which makes their holding all the more concerning.

The problem with the majority's approach is that it both defies common sense and also lacks any limiting boundary. As to the first problem, the "solidarity principle" is a useful conceptual notion when two or more individuals actually act together to attempt to accomplish the same thing. However, the majority's belief here is that the mere request from one worker to another, to improve that first worker's individual terms of employment, in some manner *automatically* invokes an implicit offer of reciprocity. See majority opinion, supra (". . . [noting] the lesson of the cases embracing the solidarity principle: that the "mutual aid or protection" element is satisfied by *the implicit promise of future reciprocation, when one employee answers another's call for assistance, even if that promise is rarely (or never) called upon*") (emphasis added). The majority labels this the "solidarity principle," and relies on it to show that Elias' request was for "mutual aid or assistance" under Section 7.

That makes no sense, considering real life experience and human nature. For example, if one employee asks another for a soda, it is highly unlikely, assuming the second employee goes ahead and provides the soda, that the automatic motivation was an unspoken notion that there would be a soda or something else provided in return some day, in some other circumstances. There are half a dozen other reasons that might motivate such an act that have nothing to do with reciprocal expectations, including sheer altruism, convenience, and the excuse to get up and take a break from work. When a much more substantial kind of assistance is requested (such as the witness affirmation here), and granted, it is then even more tenuous to ascribe an unspoken motivation of in-

[7] *Meritor Savings Bank*, 477 U.S. 57, 65 (1986).

[8] In *Holling Press*, more than one employee had been affected by the supervisor's gender-specific potentially offensive conduct. This, indeed, surfaced during the first employee's (Fabozzi's) request for assistance, when the second employee (Garcia) brought up the supervisor's comments directed toward her—specifically, that he was was wearing his "tight white pants" for Garcia. Therefore, I would have found that Fabozzi's request for Garcia's testimony was protected in that case, rather than being solely for Fabozzi's individual benefit, as the *Holling Press* majority held. 343 NLRB at 302.

choate reciprocity to the employee(s) providing the assistance. This is especially so when considering the aggregate group of employees who aid other employees in some way with potential lawsuits. It is extremely statistically unlikely that each one of the assistors would have a lawsuit of his or her own in mind when providing the assistance.[9]

Indeed, that is why our main corpus of law governing significant joint endeavors—contract law—looks to objective evidence of actual motive in the first place. Simply stated, the law recognizes the superiority of objective manifestations of intent for determining what the joint endeavor actually was, rather than looking to some subjective, unspoken assumption of one of the parties. Worse here, the majority does not even look to a party's subjective assumption about the purpose of the request for assistance, but simply uses its own assumption about how employees should behave.

Even looking to the particular and serious issue of sexual harassment claims, the majority's factual presumption is empirically unsupportable. Here, an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is not *always* acting for the purpose of mutual aid or protection. Certainly, there are many instances, as demonstrated by the facts of this case and *Holling Press*, where an individual's sexual harassment claim involves conduct that affects the working conditions of more than the complainant. That is more likely to be the case with hostile work environment claims than with quid pro quo harassment claims, but it is possible in either situation. However, it is just as certain that interactions amounting to sexual harassment can be purely on a one-to-one basis and thus that neither the protest nor the outcome are of presumptive significance to the working conditions of any employee *other than* the claimant. A classic example of this is a harassment claim arising in the aftermath of a voluntary but failed office romance, where one former partner now harasses the other.[10] This is a particularly personal one-on-one conflict, and the claim of harassment, whether to management or to a third-party authority, cannot by itself justify a factual presumption that the claimant acts for a purpose that bears an identifiable relationship to "legitimate employee concerns about employment matters" in general[11] or that the "employee action inures to the benefit of all."[12]

As a policy-based presumption, the majority's holding fares even worse. First, it is founded on misapplication of the solidarity doctrine articulated in Judge Learned Hand's definition of a sympathy strike:

> *When all the other workmen in a shop make common cause* with a fellow workman over his separate grievance, *and go out on strike in his support*, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. *The rest know that by their action* each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts.[13]

As the italicized phrases clearly demonstrate, the requisite proof of a goal of mutual aid and protection under the *Peter Cailler* solidarity doctrine is demonstrated *by those who in fact join the individual grievant*, not by the mere grievance itself or the grievant's solicitation of support for it.[14] My colleagues stand the solidarity doc-

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[9] The majority here completely misses the point in dismissing *Holling Press* merely by citing statistics showing that many sexual harassment claims occur. The point made by the *Holling Press* opinion is that sexual harassment is a comparatively extremely rare slice of the millions of interactions that occur each day among people in the American workplace. Therefore, there is no empirical basis for the solidarity interest's fundamental assumption of "today I will help you with your sexual harassment complaint, because I know that some day I will have one of my own." The majority does not even attempt to prove the empirical basis behind such an assumption.

[10] See, e.g., *Gerald v. University of Puerto Rico*, 707 F.3d 7 (1st Cir. 2013), and *Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642 (5th Cir. 2002). Legal claims arising from or related to workplace romance occur frequently: two examples recently appeared in two separate Daily Labor Report articles on the same day. See "*Employer May Be Liable For Firing Orchestrated By Jilted Co-Worker*" and "*Coach Lacks Bias Claims For Reporting Director's Affair*" Daily Labor Report, No. 102, May 28, 2014.

[11] *Kysor/Cadillac*, 309 NLRB 237, 238 fn. 3 (1992); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–568 (1978).

[12] *Meyers II*, supra, 281 NLRB at 887.

[13] *NLRB v. Peter Cailler Kohler Swiss Chocolates*, 130 F.2d 503, 505–506 (2d Cir. 1942) (emphasis added).

[14] The Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), is similarly focused on the common role of a union representative, rather than on the individual requesting representation during an employer's investigation, as proof of the mutual aid and protection element. As the Court there stated:

> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of s 7 that '(e)mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.' *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (CA7 1973). This is true even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security. *The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other*

trine on its head by reasoning that, whenever an employee solicits coworker support in raising a claim of protection under an individual employment rights statute, they will presume a solidarity-based mutual purpose without requiring any affirmative showing of it. Of course, employees can act in solidarity, but this requires some kind of positive and affirmative action, not merely being the passive listener to a request for action.[15] The majority's presumption finds no support in the precedent they cite, and, as Member Miscimarra correctly states in dissent, is essentially the "flip-side" of the *Alleluia Cushion*[16] doctrine that courts of appeals sharply criticized and the Board correctly overruled in the *Meyers* cases.

The majority's "solidarity principle" ignores this time-honored *Meyers* framework and replaces it with a wholesale legal fiction. The legal fiction turns out to rest upon the majority's own subjective assumptions about worker "solidarity." Thus, this fiction even departs from the very precedent the majority cites, precedent which focuses on "mutual aid or assistance" from an *objective* perspective. The majority's approach impermissibly departs from the text and framework of the Act to engraft an automatic presumption of Section 7 protection for any employee request or demand for assistance with his or her own individual employment issue.

Of course, this brings us to the second problem with the "solidarity" as the majority defines it: it sweeps in way too much. No limiting principle can be discerned in the majority's approach. Any time an employee asks for assistance from another employee with any kind of employment-related problem, this is now Section 7 activity. Drawing from the above-discussed example, if we take the solidarity principle at face value, then one employee asking another to go get a soda is obviously concerted activity for the purpose of mutual aid or assistance, and thus protected Section 7 activity. Every request for assistance, no matter how trivial or how important—and no matter how individual-specific—will now receive statutory protection when the request relates in some way to a condition of work.[17] And, as Member Miscimarra describes in detail, once Section 7 protection has been extended to such employee overtures, an extensive regulatory framework will descend over an employer's ability to respond to them.

I fully concur in Member Miscimarra's policy-based criticism of the majority's presumption in Section II,C of his opinion. The presumption expands Section 7 coverage of individual employee actions far beyond what is permissible under the statutory language and manifest Congressional intent. Just as impermissibly, the majority's extension of Section 7 coverage conflicts with, if not overrides, *all the other statutory frameworks* that Congress consciously created to require employers to act where there might be violations of those statutes. In this particular case involving allegations of sexual harassment, Congress requires employers to conduct reasonably prompt and thorough investigations of sexual harassment, to take action to stop actual sexual harassment and even to prevent incipient sexual harassment.[18] Indeed, most employers, responding to this framework, act extremely aggressively to prevent anything that could come close to sexual harassment as defined under the law. This, of course, is one bonafide reason why employers try to regulate workplace civility. All of the foregoing is the framework that Congress intended to create to best protect employees under Title VII, and the majority's blunderbuss approach interferes with those goals. There is no sign, and certainly no justification provided by the majority, that Congress intended to impose the majority's new universe of restrictions on an employer trying to investigate and/or remedy violations under Title VII or any other statute. As I have recently stated in another context, Section 7 of the Act does not confer authority on the Board to act as an "überagency" without due regard for and proper accommodation of the enforcement processes established by these other laws and agencies.[19] Indeed, if searching for some logical policy presumption in this case, it would be best to begin and end with the presumption that Congress and the various states, having populated the field with these laws in spite of the Act's existence, perceived Section 7's sub-

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employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview. Concerted activity for mutual aid or protection is therefore as present here as it was held to be in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–506 (CA2 1942), cited with approval by this Court in *Houston Contractors Assn. v. NLRB*, 386 U.S. 664, 668–689, 87 S.Ct. 1278, 1280–1281, 18 L.Ed.2d 389 (1967). 420 U.S. 251, at 260–261.

[15] To draw a historical analogy, the transformative Solidarity Movement of the 1980s led by Lech Walesa would have foundered if its only result was a few hundred Gdansk shipyard workers listening to a speech. It was not the fact of listening that overthrew communism; it was the fact of action.

[16] *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

[17] The Supreme Court has affirmed that even such relatively trivial matters as sodas and soda prices can be terms and conditions of employment, so my "soda hypothetical" is not far-fetched. See *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488 (1979) ("in-plant-supplied food and beverages" and their prices are terms and conditions of employment).

[18] The majority's approach also undermines state law here. Some states seek to prevent harassment independently of the federal restrictions. See, e.g. Cal. Gov't Code sec 12940(h)– (k).

[19] *Plaza Auto Center, Inc.*, 360 NLRB No. 117 at slip op. 16 (2014) (Member Johnson dissenting).

stantive rights and the Board's processes as inapplicable to, or at least ill-suited to, effectuating the protections intended by their enactment. Thus, in yet another respect, the Board majority's new rule encroaches on Congressional prerogatives, and deserves no deference from the courts.

I concur in the result, and with a partial overruling of *Holling Press*. In other respects, I respectfully dissent, as described above.

Dated, Washington, D.C. August 11, 2014

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 the summary and complete versions of "Confidential Information Version 1-11," provided to employees in the employee handbook, New Hire CD, and on the intranet portal, prohibiting the discussion of wages, hours, compensation, or working conditions of other employees.

WE WILL NOT fail to notify you about the September 2009 and January 2011 changes to our solicitation and distribution policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed you by Section 7 of the Act.

WE WILL rescind the portions of the summary and complete versions of "Confidential Information Version 1-11," provided to employees in the employee handbook, New Hire CD, and on the intranet portal, prohibiting the discussion of wages, hours, compensation, or working conditions of other employees.

WE WILL furnish all of you with inserts for your employee handbook that (1) advise you that the unlawful rules listed above have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or WE WILL publish and distribute to all current employees nationwide revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules.

WE WILL revise the unlawful rules listed above and any characterizations or summaries of those rules found on our intranet portal and on our New Hire CDs so that they (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules.

WE WILL notify you that the solicitation and distribution policy described above was changed in September 2009 and January 2011.

FRESH & EASY NEIGHBORHOOD MARKET, INC.

The Board's decision can be found at http://www.nlrb.gov/case/28-CA-064411 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

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 the summary and complete versions of "Confidential Information Version 1-11," provided to employees in the employee handbook, New Hire CD, and on the intranet portal, prohibiting the discussion of wages, hours, compensation, or working conditions of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed you by Section 7 of the Act.

WE WILL rescind the portions of the summary and complete versions of "Confidential Information Version 1-11," provided to employees in the employee handbook, New Hire CD, and on the intranet portal, prohibiting the discussion of wages, hours, compensation, or working conditions of other employees.

WE WILL furnish all of you with inserts for your employee handbook that (1) advise you that the unlawful rules listed above have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or WE WILL publish and distribute to all current employees nationwide revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules.

WE WILL revise the unlawful rules listed above and any characterizations or summaries of those rules found on our intranet portal and on our New Hire CDs so that they (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules.

FRESH & EASY NEIGHBORHOOD MARKET, INC

The Board's decision can be found at http://www.nlrb.gov/case/28-CA-064411 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

William Mabry, Esq., for the General Counsel.
Joshua Ditelberg, Esq. (Seyfarth Shaw, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on February 23, 2012, in Phoenix, Arizona. The complaint, which issued on November 30, 2011,[1] and was based upon an unfair labor practice charge and an amended charge filed on September 13 and November 23 by Margaret Elias, an individual, alleges that since about March 13, the Respondent has maintained in its employee handbook, and on its intranet, overly broad and discriminatory rules regarding solicitation and confidential information. The complaint also alleges that on about August 31 the Respondent, by Monyia Jackson, its employee relations manager, and an admitted supervisor and agent of the Respondent, promulgated and maintained an overly broad and discriminatory rule prohibiting employees from obtaining statements from their coworkers regarding allegations of sexual harassment; created an impression among its employees that their concerted activities were under surveillance by the Respondent; threatened employees with unspecified reprisals because they engaged in concerted activities; and interrogated its employees about their concerted activities and the concerted activities of other employees, all in violation of Section 8(a)(1) of National Labor Relations Act (the Act).

I. JURISDICTION

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACTS

There are two distinct allegations here. It is initially alleged that the Respondent maintains overly broad and discriminatory rules regarding solicitations and confidentiality. The Respondent defends that the confidentiality and solicitation provisions have not been in effect since 2009 and 2011. The other allegation relates to alleged protected concerted activities by Elias and whether the Respondent attempted to unlawfully restrict these activities.

It is alleged that the following rules, maintained in its employee handbook,[2] are overly broad and discriminatory:

> (1) Knowing When Solicitation is OK [at p. 13]
>
> We like to avoid workplace disruptions and conflicts among team members. So we prohibit solicitation of team members during working time for any purpose.
>
> We also prohibit the distribution of literature during working time or on Company premises for any purpose[3] . . . . And keep in mind that violations of this policy could lead to disciplinary action.
>
> (2) Confidentiality at fresh & easy [at page 19]
>
> KEEP CONFIDENTIAL INFORMATION SECRET!
>
> OUR CUSTOMERS, CONTRACTORS, AND VENDORS PUT A LOT OF TRUST IN US. And we trust our team

[1] Unless indicated otherwise, all dates referred to here relate to the year 2011.

[2] The front page of the handbook states: "summary of policies."

[3] This rule was found to violate Sec. 8(a)(1) of the Act in *Fresh & Easy Neighborhood Market*, 356 NLRB No. 85 (2011). The confidentiality provision, also alleged here as unlawful, was not involved in that case.

> members to keep information they may learn private. When you work at fresh & easy, you may find out private information about our company, other people, or other companies. If you learn confidential information on the job, you can use it for fresh & easy business purposes—and for no other reason.
>
> WHAT IS CONFIDENTIAL INFORMATION?
>
> Basically, it's any information that isn't generally available to the public. Check our *Complete Confidentiality Policies and Procedures* for a full definition.

It is also alleged that since at least on or about March 13, 2011, the Respondent has maintained on its intranet at its facilities across the United States, the following overly broad and discriminatory rule regarding confidential information:

> What is it?
>
> Just so we're all on the same page, here's the Fresh & Easy definition of "confidential information." Confidential information is information generally not known outside of the company and is about Fresh & Easy, its business, or its business or technical information. Here are some examples:
>
> . . . .
>
> • Information about our team members;
>
> . . . .
>
> When in doubt, you should treat information that meets this general definition as confidential.

Bruce Churley, manager of the facility, and Michael Anderson, team leader at the facility, are admitted supervisors and agents of the Respondent. Each of the witnesses at the hearing testified about these provisions, as well as whether they were aware of any change. Churley, who has been employed by the Respondent since October 2009, testified that he has never been given a copy of the Respondent's employee handbook. If an employee wished to access the Respondent's rules, they can log on to one of the computers at work and access the rules on the intranet, on what is called the portal. When there is a change in the rules, employees are usually notified of the change via "team huddles," where a manager meets with his team to discuss the rule changes. He testified that he does not recall team huddles regarding the Respondent's confidentiality or no distribution rules. Anderson, who has been employed by the Respondent since October 2010, testified that the rules set forth in the employee handbook are really summaries of the Respondent's policies, whereas the full and complete policies are set forth on the portal through the Respondent's intranet. He has seen the rules in the employee handbook, but he doesn't know if the policies set forth there have changed: "I know you can go to the portal and get more information. . . ." When he is informed of policy changes, he usually notifies the employees of the changes in a huddle, but he has not been notified of any policy changes and does not recall any huddles regarding changes of policy in the employee handbook. When employees are hired, they are given new hire CDs, which provide the employees with summaries of its policies, and these new employees are told that they should consult the Respondent's portal for the complete policies.

Victoria Giro, who was employed by the Respondent from April 2010 to December, testified that she is not familiar with the employee handbook because she accessed the information from the portal. Employees can learn of policy changes through huddles, or through the portal or, if they have a question about policies, they can ask their manager. She has never had a huddle concerning the Respondent's no-distribution rule or its confidentiality rule. Krista Yates, who has been employed by the Respondent for 2-1/2 years, testified that the employees are notified of changes in policy through printouts, or more commonly, "updates are online." She does not remember receiving notification of changes in the Respondent's distribution rule, or confidentiality rule, or of having a huddle about a change in these rules. She also testified that the full and complete list of the Respondent's rules, and any changes in these rules, are on the portal, which can be accessed at any time at any of the Respondent's stores.

Elias testified that she was given a copy of the employee handbook in January containing the rules alleged above as unlawful. Since that time she has not been notified that there has been a change in the distribution/solicitation policy or in the confidentiality policy, nor has she participated in a huddle where she was informed of changes in its policies. She understood that a full listing of the Respondent's policies was available online, although, "I don't know how to get to them on the portal." As to whether she knew that if she had a question, or needed a clarification, about a policy, she could call the Respondent's HR hotline, she testified that she tried calling a few times, but could never get through to them. Jackson, a/k/a "MJ," testified that new employees are given the Respondent's New Employee CD, which contains the employee handbook summary of policies, and they are told by their manager that if they want to access the complete and current rules, they do that through the portal on the Respondent's intranet. In addition, employees with questions about the Respondent's policies can contact the Employee Relations Manager Jackson, directly, or call the HR service center; both telephone numbers should be listed in the breakroom. She testified further that the solicitation policy and the privacy policy were changed in 2009, and the confidentiality policy was changed in January 2011. She identified exhibits that effected the changes in these policies, including a memo, "District Message" from HR entitled: "Solicitation and Distribution—Policy Clarification," dated September 2, 2009, stating:

> We would like to inform our team members on the recent updates we have made to our Solicitation and Distribution Policy. Key changes that are important for you to know include
>
> We have changed the language to clarify our policy and how we apply it. It is important for you to note that distribution of any material is prohibited during working time.
>
> Fresh&easy also prohibits the distribution of literature at any time in any work area for any purpose.
>
> Working time includes that of the employee doing the soliciting and distributing and the employee to whom the soliciting and distributing is directed.

> Working time does not include meal periods, break periods, or any other unspecified periods during the workday when employees are properly not engaged in performing work tasks.
>
> To all Store Managers: Please ensure that the updated policies (attached) are posted on your notice board and the key messages covered in your Team Huddles. Additionally, please let your teams know that the Complete policy has been updated for their review online on the fresh&easy intranet.
>
> Once again, as with any policy or process, it is important that you consult with your area Employee Relations Manager and your District Manager. They are here to support you and provide you with builds to help manage issues and concerns fairly and consistently.
>
> Please ensure that your teams follow the process of signing the below acknowledgement that they re aware of the policy change and have been briefed.
>
> Thank you gain for providing your team the information they need to do their job!

Jackson testified that the store managers were to read this to employees during huddles. She also identified a memo dated January 2011 entitled "Solicitation and Distribution Policy" as the Respondent's policy currently in effect. It states, inter alia:

> We like to avoid workplace disruptions and conflicts among team members. So we prohibit solicitation (solicitation can be any written or verbal request asking for donations, help or support for any cause) for any purpose in any selling areas of the facility during business hours or in working areas when associates are on working time. "Working time" refers to the time of the workday when you are expected to be performing your job duties. If you're a fresh&easy team member, don't solicit when you are supposed to be working and don't solicit someone else who is supposed to be working.
>
> We also prohibit the distribution of literature during working time or at any time in a work area for any purpose.
>
> "Working time" refers to that portion of any work day during which the employee soliciting or distributing and/or the employee being solicited/receiving distributions is supposed to be performing any actual job duties. It does not include other, duty-free periods of time, such as lunch or break periods, or before or after both employees' work.
>
> "Working areas" refers to areas of fresh&easy property where employees normally perform work, or where work is in fact being performed. It does not include, *e.g.*,employee break rooms.
>
> We also do not allow anyone who is not a fresh&easy team member to solicit or distribute literature on any property that we own, lease or use. And keep in mind that violations of this policy could lead to discipline- they could even cost you your job.

She testified that this was to advise the managers of the policy change and was available on the Respondent's portal as of September 2009. Jackson also identified a "Summary Version Confidential Information" and a "Complete Version Confidential Information," which were sent to all of its managers. Each one states it is "Version 1-11" and refers to the Respondent's Confidential Information Policy stating, basically, that it is information not generally known or accessible to the public and includes all information obtained by employees while at work and that the Respondent "expects" this information to be kept confidential. It also states:

> **What is confidential information**
>
> Basically, it's any information that isn't generally available to the public. (It does not include sharing information about your own wages, hours, compensation, or working conditions with others if you decide to do so.) Check out the Complete Confidential Information Policies and Procedures for a full definition.

Jackson testified that these confidentiality rules have been in effect since January 2011. On cross-examination, she testified that although managers are supposed to post these changes on the bulletin board and to have team huddles and to distribute these new rules to all employees, the Respondent does not require its managers to record these team huddles and the distribution of these rules to all employees.

The other allegation here relates principally to Elias, who has been employed by the Respondent for over 1-1/2 years as a customer assistant; Churley is her supervisor. On about August 24, she asked Churley if she could participate in TIPS training, which is related to the sale of alcoholic beverages in the store, and he told her to write a note on the whiteboard in the employee breakroom to remind him of her request. As per his request, she wrote a note on the whiteboard referring to the TIPS training that they had discussed. When she went to the employee breakroom on the following day, she saw that her note on the whiteboard had been altered in that the word "TIPS" had been changed to "TITS," and a peanut or a worm was drawn on the board. She testified that she tried not to let it bother her, but soon changed her mind and told Anderson that she wanted to file a harassment claim, but "he didn't say anything." Because electronic equip-ment is not allowed, she could not take a picture of the altered whiteboard, so she copied on a piece of paper what was on the board and made a "statement." She testified that she added on this document; "Someone changed the Board to "TITS" instead of TIPS and put a worm pissing on my name. I take this as sexual harassment. This has been on the Board since I got here at 2PM."[4] She then asked Anderson to sign the statement: "He just signed it. He didn't even read it, He didn't even ask me. He just signed it." She testified that she did not threaten or attempt to intimidate him into signing the statement. Yates was standing next to Anderson and she asked Yates if she wanted to sign as a witness: "I said you don't have to . . . . if you want to, you could, just to what you observed on the board. And so, she signed it." She testified that she did not threaten or scream at Yates. Later that day she saw Giro and she explained

[4] Anderson, Yates, and Giro testified that when Elias asked them to sign her statement, only the words from the whiteboard were on the statement, not any comment of hers.

the situation to Giro in the same tone of voice and she signed it. Neither Anderson, Yates, nor Giro said that they did not want to sign the statement; "they just asked what it was." She also testified that the sole purpose of it was to be a witness statement; it was neither a petition nor a joint complaint of everybody signing, and she did not make any change to the statement after they signed it. On August 26, Churley told her that the situation had been reported to Jackson. On cross-examination, Elias was asked if she expected that Jackson would conduct an investigation:

> A. Well, at first, I understood that there was going to be an investigation. I honestly don't know the procedures . . .
>
> Q. What was your expectation?
>
> A. My expectation was to report it.
>
> Q. Did you expect that there would then be an investigation?
>
> A. I didn't really have any expectations beyond reporting it.
>
> Q. Did you want there to be an investigation?
>
> A. I didn't want people to write things like that on the board.
>
> Q. Did you want there to be an investigation?
>
> A. I don't know, I don't know. . . that wasn't my purpose, no. My purpose was to report it.
>
> Q. What did you expect would happen after it was reported.
>
> A. That management would do what they were supposed to do.
>
> Q. Which would be to conduct an investigation, correct?
>
> A. If that's what they do, I don't know. I'm not versed on it.

Churley testified that on August 26, he had a discussion with Elias about her request to participate in the options training program, where the company trains people who have shown the ability to lead and are motivated to become team leaders. Churley told her that he didn't feel that she was ready for the program, and that she had some skills that needed further development. Elias became "very angry, yelling," saying that she felt that she deserved to be in the program and that his predecessor had promised her the position; Giro testified that she overheard Elias yelling at Churley about the options program. Later that day, Churley received a call from Anderson saying that Elias wanted to file a sexual harassment complaint because of the alteration of her note on the whiteboard, and Churley told him to take a picture of the altered note. When he returned to the store he met with Elias and again told her that he was not ready to put her in the options program, and she started yelling again and said that she was too upset to work and wanted to go home, and he told her to go home. He saw the picture of the whiteboard, which stated: "Bruce, Could you please add 4 hours for city meeting. Could you please sign me up for TITS 9/10/11? Maggie Thank You." There was a picture drawn next to her name which resembles something urinating. As there is a video camera in the breakroom, Churley then viewed the video and saw that it was employee Gary Hamner who altered the message on the board, and he reported this to Jackson, and told her that Elias was upset about the situation. He then met with Anderson who told him that Elias obtained statements from him and others at the store, and that she was "very insistent that they sign." Anderson said that he signed her statement as well, but he felt forced to do so. Churley also spoke to Yates and Giro, who both said that they didn't want to sign Elias' statement, but they felt forced to do so, and signed so that the situation would calm down. About a week later, Jackson called the store and told Churley that she wanted to speak to Elias, and he gave Elias the phone and told her that Jackson wanted to speak to her. On August 27, Churley sent an email to Jeff Lang, the district manager, and Jackson, discussing the incident. He stated that Anderson, Yates, and Giro were "confronted" by Elias, who "demanded" that they sign the witness statement involving the whiteboard alteration, and that Yates and Giro felt intimidated into signing something that they did not wish to be a part of. The email continued that later that evening Elias approached him and wanted to continue discussing the options program, and he repeated that he was not ready to include her in the program. She began raising her voice until he was finally able to end the conversation by telling her that she could go home.

Anderson testified that on about August 26, Elias asked him to come into the breakroom to see what somebody had written over her message on the whiteboard and said that she wanted to file a sexual harassment charge and wanted the HR telephone number. Anderson replied, "What for? I don't know where this is coming from" and Elias asked, "What's wrong with you?" and "stormed out of the room angrily." Anderson then called Churley, told him of what occurred and that Elias wanted to file a sexual harassment complaint, and Churley told him to take a picture of the message on the whiteboard. Later that evening, Elias approached him with a drawing that she made of the whiteboard, and asked him to sign it. The document contained only the two sentences that Elias had initially written on the board, with the alteration and the picture next to it. There was nothing else on the paper when she showed it to him. He testified that he told her that he didn't need to sign the statement because he would not lie about what was on the board, but Elias was very angry and loud, and told him that he had to sign the document, and he signed it with the hope that if he did so she would calm down and not cause a scene in the store. On about August 30, Jackson called him and said that she wanted a statement from him, Yates, and Hamner.

Giro, who was employed by the Respondent from April 2010 to December, testified that Elias was upset about the alteration on the whiteboard, and Giro told her that although she hadn't noticed the wording, she agreed that it was inappropriate, but "I don't think it would have been a big deal if it happened to me, but no, I wouldn't have liked it. But I did feel like management should've been notified so that they could see who did that and take necessary . . . disciplinary action." Elias asked her to sign a paper that duplicated what was written on the whiteboard, but she never told Giro that she wanted to file a complaint about it. She testified that, although Elias did not "force" or "threaten" her to sign the statement, the discussion with Elias was "very heated" and "uncomfortable," and she signed because the discussion was taking place in front of the customers and "I want-

ed to get out of there." Her purpose in signing the statement was to be a witness as to what was on the whiteboard; she did not view it as a complaint or a petition to the Company. On the following day she told Churley that although the change on the whiteboard was inappropriate, she felt intimidated into signing the statement, and that Elias should have given him an opportunity to handle the situation, rather than making it into such a "big issue."

Yates testified that on about August 26, Elias asked her to sign a statement stating only what was on the whiteboard. Before Elias asked her to sign the statement, she saw Elias asking Anderson to sign: "He was backed into a corner and she was in his face." She was "kind of yelling" and "agitated." Shortly thereafter, Elias asked her to sign the statement, and she said that she was not comfortable being a witness to it, and did not want to sign it. Elias returned later and again asked her to sign, but, again, Yates said that she did not feel comfortable signing it. She eventually signed the statement because: "I was kind of freaked out. She'd been in my face, she was getting more aggravated, more hostile. I felt bullied . . . I figured the fastest way to diffuse the escalating situation was to sign and deal with it later." On the following day she called the Respondent's "hotline" to the HR department, filed a complaint against Elias for "bullying" her into signing the statement, and told Jackson about her confrontation with Elias the prior day and, at Jackson's request, she prepared an affidavit setting forth what occurred between she and Elias. A few days later, Churley asked her if there was anything that she wanted to talk to him about and she said that there was. He asked her about the document that she signed for Elias and whether there was space on that document for Elias to write something else, and Yates said that there was.

As stated above, on about August 31, Churley handed Elias a phone and said that Jackson wanted to speak to her; he told her to take the phone into the breakroom. She testified that Jackson began the conversation by asking if she knew Hamner, and she said she did, that she works with him. Jackson said that Hamner had filed a complaint against her alleging that on August 26, upon arriving at work, she said, "F—k you" to him. Elias said that it was a lie, that she would not use profanity to anyone, and Jackson said that his claim was under investigation. Elias then said that she should view the videotape and she could see that she never said it, and Jackson said, "Don't tell me how to do my job, and I would not be able to see what words were said." Elias told her that, at least, she could see that she did not say anything to Hamner. Jackson then told her that she was wrong in getting statements from employees, that it violated company policy, and Elias responded that she didn't get statements, that she just asked the employees to sign what was on the whiteboard. Jackson then asked Elias to prepare two statements for her: one in response to the complaint that she cursed at Hamner, and the other in regard to her complaint. She only submitted one affidavit, a statement that she submitted that is contained in a September 3 email to Jackson, relating solely to her complaint. On October 13, she received an email from Jackson on the subject of: "sexual based harassment 8/26/2011," stating:

> We are reporting on our investigation of the allegations you raised in your August 26 complaint regarding the white communications board. Our investigation has included reviewing the information provided by you, conducting employee interviews, and reviewing other available information.
>
> Based upon our investigation, we have concluded that inappropriate conduct did occur. As a result, we have taken corrective action that we expect will prevent any further inappropriate conduct. If our expectation proves wrong, it is especially important that you notify us of that immediately. As in this case, we will investigate any additional concerns in a prompt and thorough manner.
>
> The Company is committed to protecting you from retaliation as a result of your report and our investigation. We have informed the person in question and others that any retaliation is absolutely prohibited. Please call immediately if you feel that you are being subjected to retaliation in any form.

Jackson testified that she was copied on the August 27 email from Churley to Lang reciting the events of the prior day, including the incidents where Elias got Anderson, Yates, and Giro to sign her statement. She learned from Churley, that Yates, Anderson, and Hamner would all be working on August 30, which would be the first time that they would be available for interviews. On August 29, she received a complaint from Yates regarding Elias' actions toward her when she requested that Yates sign her statement. She initially interviewed Yates, who told her that Elias was yelling and screaming at her to sign the statement, even though she did not want to participate in it, and she said there was room on the paper for Elias to add something if she wished to do so. Jackson's investigation did not find that Elias threatened Yates. Jackson then interviewed Anderson who told her that Elias demanded that he sign the paper, and he did so only because she was getting louder in her demands and he was concerned that the situation would escalate further. She also spoke to Hamner, whose complaint was found to be without merit, and who was disciplined for altering the words on the board. Giro was on vacation and was unavailable. She next spoke to Elias, first about Hamner's complaint, and then about hers. She asked Elias why she felt that she had to obtain the signatures of the employees to her statement and she said that it was for her own protection. Jackson then testified:

> I asked her not to obtain any further statements so that I could conduct the investigation. And I told her that she could talk to the employees and ask them to be witnesses for her, but in relation to this investigation, to allow me to complete it.

As to the reason for this request, she testified: "Because she made the employees uncomfortable." She did not tell Elias that she had violated any company policy, she did not restrict her right to bring harassment complaints in the future, and Elias was not disciplined, or threatened with discipline, for any of her actions involving the altered whiteboard.

III. ANALYSIS

It is initially alleged that the Respondent's solicitation rule (also referred to as the distribution rule), as well as its confiden-

tiality rule, are overly broad, discriminatory, and violate Section 8(a)(1) of the Act. The Respondent defends that even if they did violate the Act (and the Board has found that the prior solicitation rule did violate Section 8(a)(1) of the Act, and that the revision of the rule was not adequately disseminated to the employees) these rules have been rescinded and new (and lawful) rules have been instituted in their place in September 2009 and January 2011. Jackson identified the memo to district managers dated September 2, 2009, that was to be read to employees in team huddles, as well as the Respondent's new Solicitation and Distribution Policy, as set forth in a memo dated January 2011 that was available to all employees on the Respondent's portal. I found Jackson to be a credible and believable witness, and credit her testimony that the September 2009 memo was to be read to the employees, and the new solicitation rule was posted on the Respondent's portal. I also find that by defining "working time" the Respondent corrected the problem with its prior rule, and that this new rule is a lawful one. However, although Jackson testified that this new rule was to be read to the employees at team huddles, this, apparently, was not done, at least at the facility involved here. There was no testimony that any of the employees, Churley or Anderson was specifically made aware of the changes in these rules in 2009 and 2011, and they all testified that they could not recall any team huddle where the employees were notified of the change in the solicitation rule. Although I have credited Jackson's testimony that the rule has been changed, and that the new rule does not violate the Act, I find that the Respondent's failure to notify its employees of the change violated Section 8(a)(1) of the Act.

I also credit Jackson's testimony that the Respondent changed its confidentiality rule in January 2011. Although the witnesses also testified that they do not recall any team huddles where they were told about this change, I need not decide that because I find that the Respondent's rule change did not fully correct the problem with the rule. While prohibiting sharing of information not generally available to the public, it excepts "sharing information about your own wages, hours, compensation, or working conditions with others if you decide to do so." While, initially, appearing to be a satisfactory change, and one that would allow employees to fully participate in protected concerted activities, a fuller review reveals a significant shortcoming. For employees to be able to truly discuss terms and conditions of employment, they must be able to fully discuss not only their terms and conditions of employment, but the terms of employment of their fellow employees, even those who don't wish to personally discuss it, and Respondent's revised rule appears to prohibit this full discussion, while allowing the employees to discuss their terms of employment. I therefore find that this rule could inhibit employees in the exercise of their Section 7 rights, and therefore violates Section 8(a)(1) of the Act. *Labinal, Inc.*, 340 NLRB 203, 210 (2003); *NLS Group*, 352 NLRB 744, 755 (2008).

The remaining allegations relate to the whiteboard alteration on August 26, and the resulting telephone conversation between Jackson and Elias on August 31. It is alleged that in that conversation, Jackson orally promulgated and maintained an overly broad and discriminatory rule prohibiting employees from obtaining statements from coworkers regarding sexual harassment allegations; created an impression among its employees that their concerted activities were under surveillance by the Respondent; threatened employees with unspecified reprisals because they engaged in concerted activities with other employees; and interrogated its employees about their concerted activities and those of their fellow employees. There is a major credibility conflict between Elias, and Anderson, Yates, and Giro. Elias testified that they did not need any encouragement to sign her statement; they signed it without complaint and, for Anderson, without even reading it. The testimony of Anderson, Yates, and Giro is substantially different. Anderson testified that Elias was very loud and angry when he initially refused to sign, and he signed the statement only to calm her down and prevent the situation in the store from escalating. Giro likewise testified that Elias' requests to her were very heated and uncomfortable, and she also signed because their discussion was taking place in front of customers and she wanted to end it. Yates testified that she saw Elias yelling and backing Anderson into a corner when she asked him to sign the statement, and that she was "in his face." She was getting aggravated and hostile when she asked Yates to sign, and was in her face as well. Yates was "freaked out" and signed because she felt that was the fastest way to end "the escalating situation." This is not a difficult determination. Anderson, Giro, and Yates all appeared to be testifying in a honest and truthful manner and had no reason to lie about the situation. In addition, their testimony is supported by the credible testimony of Churley and Giro that when he told Elias that he didn't feel that she was ready for the options training program, she became angry and yelled at him. Clearly, Elias was an easily excitable person when something unpleasant occurred, or when others did not accede to her requests, and her reaction to Anderson, Giro, and Yates was very similar to her earlier reaction that day to Churley. In addition, I found that, at times, Elias was evasive in her testimony in response to questions from counsel for the Respondent and, finally, I find it highly unlikely that Anderson, an admitted supervisor, would sign her statement without reading it. Further, based upon their testimony, I find that when they signed her statement, it set forth solely the wording on the whiteboard on August 26 and that after obtaining their signatures Elias added additional comments to the statement. I therefore discredit Elias in this regard, and credit the testimony of Anderson, Giro, and Yates rather than her testimony.

On August 31, Jackson called Elias while she was at the store. Prior to this call, she saw the email from Churley to Lang discussing what occurred when Elias asked Anderson, Giro, and Yates to sign her statement, she received a complaint from Yates about the incident with her, and she interviewed Anderson, Yates, and Hamner; Giro was on vacation. Jackson testified that she told Elias not to obtain any further statements so that she, Jackson, could conduct the investigation, although she could talk to the employees about the incident and ask them to be witnesses for her, but to allow her to complete the investigation. She said this because Elias made the employees uncomfortable. Elias testified that Jackson told her that she was wrong in obtaining statements from employees, that it violated company policy, and asked her to prepare two statements for her:

one regarding Hamner's complaint about her, and the other regarding her complaint. Without much difficulty, I credit Jackson's testimony as it comports with the evidence here and is more reasonable and believable than Elias' testimony. At the conclusion of her investigation Jackson determined that inappropriate action did occur (for which Hamner was disciplined) and if there was any further inappropriate conduct or retaliation, Elias was to report it immediately to the Company.

In my view, Jackson's request to Elias not to take any further statements from employees was a reasonable one, and not an unlawful one. Obviously, a bare statement to an employee not to take statements from fellow employees in support of her/his position on a work-related issue, could violate Section 8(a)(1) of the Act. However, I cannot look at the statement in isolation; I must look at the surrounding facts as well. "In determining whether an employer's statement violates Section 8(a)(1), the Board considers the totality of the relevant circumstances." *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003).[5] As obnoxious and puerile as the alteration on the whiteboard was, it appears that the other employees either didn't notice the change or didn't take offense at it. Elias' outrage at the alteration was personal and was not shared by the other employees. When she asked Anderson, Giro, and Yates to sign her statement, none of them wished to do so and each of them signed only because Elias was loud and angry, and to calm her down and prevent a further commotion in the store. Not only was Elias' attempt to get Anderson, Giro, and Yates to sign her statement annoying to them, it was disruptive to the store's operation. In *Five Star Transportation, Inc.*, 349 NLRB 42, 43 (2007), citing *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and *Salisbury Hotel*, 283 NLRB 685 (1987), the Board stated that concerted activities within the meaning of the Act encompasses conduct "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." In *Holling Press, Inc.*, 343 NLRB 301, 302 (2004), the Board stated: "In order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of 'mutual aid or protection.'" Further, in language that could apply to the facts here, the Board stated that the charging party's "goal was a purely individual one. In addition, there is no evidence that any other employee had similar problems—real or perceived—with a coworker or a supervisor." I find that Elias was not engaged in concerted activities for the purpose of the employees' mutual aid and protection at that time. The Respondent already had a copy of her statement and further statements would not add anything to the investigation. I therefore find that Jackson's request to Elias not to take any further statements from employees so that she (Jackson) could conduct the investigation was not meant to deprive her of her right to engage in concerted activities, as Jackson told her that she could speak to employees about the subject. Rather, it was an attempt to prevent further disruptions at the store. I note that the Respondent did not take any action against Elias as a result of her actions here. In fact, at the conclusion of Jackson's investigation, it was found that Hamner's complaint had no merit, and he was disciplined for his alteration of the whiteboard, and was warned about any future retaliation. I therefore recommend that this allegation paragraph 4(d)(1) be dismissed.

The remaining allegations also relate to Jackson's telephone conversation with Elias on August 31. Stated simply, I can find no merit to any of these allegations and recommend that they (pars. 4(d)(2), (3), and (4)) be dismissed as well.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(1)(1) of the Act by maintaining an overly broad and discriminatory confidentiality rule in its employee handbook, on its portal, and on its New Employee CDs.
3. The Respondent violated Section 8(a)(1) of the Act by failing to properly notify all of its employees of the change in its solicitation/distribution rule since about 2009.
4. The Respondent did not violate the Act as further alleged in the complaint.

THE REMEDY

Having found that the confidentiality provision contained in the employee handbook and the portal violates the Act, I recommend that the Respondent be ordered to rescind this provision and to notify all employees electronically that this provision has been rescinded and will no longer be a part of the employee handbook, the new employee CD, or the Respondent's portal. Although I have found that the Respondent changed its solicitation and distribution policy to a lawful policy, I have also found that the employees were not adequately informed of this change. I therefore recommend that the Respondent be ordered to notify all of its employees, electronically, of the change and to specifically note the change on its portal. I also recommend that Respondent be ordered to post the Board notice at each of its store locations.

Upon the foregoing findings of fact, conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Fresh & Easy Neighborhood Market, Inc., all of its stores, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, or enforcing the confidentiality provision contained in its employee handbook, its portal, and the New Employee CDs, given to new employees.

[5] See *Caesar's Palace*, 336 NLRB 271 (2001), and *Phoenix Transit System*, 337 NLRB 510 (2002), cited in the Respondent and the General Counsel's briefs.

[6] 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.

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

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

(a) Rescind the confidentiality provision contained in its employee handbook, its portal, and also contained on its New Employee CD, and notify all of its employees, electronically, that this has been done, and that this provision will no longer be enforced.

(b) Notify all employees electronically that its solicitation and distribution policy and rules was changed in 2009, and notify them of the changes.

(c) Within 14 days after service by the Region, post at all of its stores, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 28, 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 any of its stores, 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 13, 2011.[8]

(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 remaining allegations contained in the complaint be dismissed.

Dated, Washington, D.C. April 23, 2012

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 in our employee handbook, on our intranet site or on our New Employee CD, a confidentiality rule that prohibits you from discussing the terms and conditions of employment of other employees without their consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed you by Federal labor law.

WE WILL rescind our confidentiality rule and inform all of our employees, electronically, that this has been done, and WE WILL, notify all of our employees, electronically, that we changed our solicitation and distribution rule in 2009, and WE WILL tell them what the new rule is.

FRESH & EASY NEIGHBORHOOD MARKET, INC.

[7] 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."

[8] See *Fresh & Easy Neighborhood Market,* 356 NLRB No. 145 (2011).

JD(NY)–19–14
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

200 EAST 81ST RESTAURANT CORP.
d/b/a BEYOGLU

and **Case No. 02-CA-115871**

MARJAN ARSOVSKI, an Individual

Simon-Jon H. Koike, Esq., Counsel for the
General Counsel
Jessica N. Tischler, Esq. and *Mark D.*
Lebow, Esq., Counsel for the Charging Party
Gail Weiner, Esq., Counsel for the
Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York, New York on March 10, 2014. The charge in this case was filed on October 29, 2013. The Complaint which issued on December 18, 2013 and alleged that on or about June 25, 2013, the Respondent discharged Marjan Arsovski because he, in concert with other employees, filed a lawsuit alleging violations of the Fair Labor Standards Act and the New York Labor Law.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

I. Jurisdiction

The Respondent is a retail establishment which, during the calendar year ending November 13, 2013, derived gross revenue in excess of $500,000 and purchased and received at its New York place of business, goods and supplies valued in excess of $5000 directly from points located outside the State of New York. I therefore find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1959).

II. Alleged Unfair Labor Practices

The Respondent is a restaurant on the upper east side of Manhattan. The owner is Julian Betulovici, who in part for medical reasons, spends a large part of the year outside of

[1] The General Counsel's unopposed Motion to correct the record is granted.

New York. At the time of the events herein, the General Manager was Josip Raspudic, who in May 2013 had replaced Alexander Georghiou. It is admitted that Raspudic is a supervisor within the meaning of Section 2(11) of the Act. The evidence shows that Raspudic is the person who supervises the restaurant's non-cooking staff. The evidence further shows that because Betulovici is away for a good part of the year, Raspudic is the main person who runs the restaurant, albeit he and Betulovici are in daily contact with each other, either by phone or email when the latter is either in Poland or Florida.

Also at around the same time period, Anna Urgureanu was hired to be the new bookkeeper. In this regard, she replaced Marta Sikora, a long term employee, who had resigned in December 2012 or January 2013 and moved to California. It is conceded that Urgureanu was also a supervisor within the meaning of the Act. However, her main job was to account for and register the daily receipts and expenditures for the restaurant.

The Charging Party, Arsovski, was one of about 8 to 10 waiters who worked at the restaurant. As a waiter, a substantial proportion of his income was based on tips; mainly obtained from credit cards payments.

At the time of these events, Arsovski was having an affair with Urgureanu. Since she was the bookkeeper and therefore the person who was responsible for tallying up the income each day and figuring out what tips should go to what person, this could theoretically give rise to a problem because she would be in a position to juggle the records so that Arsovski would be able to obtain more in tips than he was entitled to. There is however, no evidence in this case that this occurred.

Some time between May 20 and May 23, Urgureanu gave notice of her intention to resign. This was communicated to Betulovici who was in Poland at the time and he asked Marta Sikora to return to the bookkeeping position until he could find a replacement. She agreed.

According to Betulovici, after Sikora returned in late May, she informed him that Arsovski was having an affair with Urgureanu and that Arsovski's personnel filed was missing. She also told him that a notebook containing a record of receipts and payments was missing. Betulovici testified that when he found out what was going on between Arsovski and Urgureanu, he phoned Raspudic on May 25 and told him to fire Arsovski.

Despite the claim by Betulovici that he decided to terminate Arsovski on May 25 because of his inappropriate relationship with Urgureanu and the missing records, this did not, in fact, occur. Raspudic did not tell Arsovski that he was being terminated and Arsovski continued to work without incident until June 25, 2013.

Arsovski testified that in May and June he spoke to a few of the other waiters about wages. He also testified that he told another employee named Burak Sunar that he was going to file a lawsuit. According to Arsovski, he asked Sunar to join in the lawsuit, but Sunar refused. [2]

On June 20, 2013, Arsovski, through legal counsel, filed a lawsuit in the U.S. District Court which alleged certain violations of the Fair Labor Standards Act. At paragraphs 10 of the

[2] This employee was not called as a witness.

Complaint, it states that it is brought by "Plaintiff on behalf of himself and similarly situated persons who are current and former tipped employees..., who elect to opt in to this action..." At paragraph 11, it states that the "FLSA Collective consists of approximately 40 similarly situated current and former employees of Beyoglu, who over the last three years, have been victims of Defendants' common policy and practices that have violated their rights under the FLSA, by, inter alia, willfully denying them overtime wages."

Notwithstanding the Complaint's assertion that Arsovski was acting on behalf of other similarly situated or affected employees, he did not obtain any kind of authorizations from any present or past employee to file this lawsuit. That is, if he was acting on their behalf, he was doing so without their prior authorization.

The Complaint was served on the Respondent on the morning of June 25, 2013. This then generated a series of phone calls between Betulovici, Raspudic and Sikora about the lawsuit. (Betulovici was still in Poland). Also on this morning, Sikora opened a letter from Arsovski's lawyer and apparently after communicating its contents to Betulovici, had a phone conversation with Arsovski where she told him that they were "shocked" at Arsovski's actions.

As Arsovski was scheduled to work the dinner shift on June 25, he arrived at the restaurant in the afternoon. When he arrived he saw that his name was not on the work schedule. Thereafter, he, Raspudic and Sikora went upstairs to have a chat. According to Arsovski, Raspudic told him that the company had received a letter from his lawyer and that from that point on, the parties would communicate only through their lawyers. When Arsovski asked why had been removed from the schedule, Raspudic stated that Betulovici had told him that he didn't want Arsovski at the restaurant until he returned from his vacation. (He was scheduled to return in two weeks). According to Arsovski, when he again asked why he was being removed from the schedule, Raspudic said; "Well, you're filing a lawsuit. What do you expect? To work?" Arsovski also testified that Raspudic said that Betulovici was "done with him."

Arsovski's account of this meeting was largely corroborated by Raspudic who testified as follows:

> Q. Okay. So the three of you walk upstairs and then how does it begin? I mean
> A. I start the conversation. I said okay, listen, we have this lawsuit here we got in the restaurant. I don't know what is it about, honestly, but I spoke to Julian about it. He don't want you in the restaurant right now. He's going to deal with this when he comes back.
> Q. Okay. Did he say he – did you tell him that Mr. Betulovici was done with Mario? Did –
> A. I don't remember.
> Q. Okay. And so did you tell Mario that the owner had removed him from the schedule because he was filing a lawsuit?
> Judge Green: Use those words?
> The Witness: I don't remember if I used those words.
> By Mr. Koike:
> Q. But that was the spirit?
> A. Probably that was the spirit. That was not the reason why he's getting fired – why he got fired.
> Q. Oh, so did he get fired?
> A. Sir that was not the reason why he got fired.
> Q. Okay. What was the reason why he got fired?

A. He was engaged in a personal relationship with the bookkeeper.
Q. Okay. Well, did you mention this during this meeting with Mister –
A. Not at this meeting, no. I mention it before that.
Q. You mentioned it before that with Mario?
A. When Anna was resigning we had this little drama incident in the restaurant. The owner discovered that they were in a relationship. He wanted him to be fired. He told me that over the phone.
Judge Green: But that sound like its back in May.
The Witness: That's back before this lawsuit, yes.

After the meeting described above, Arsovski went home. Betulovici returned at some point in early July. At no time, did any one contact Arsovski and tell him that he could return to work. In my opinion, Arsovski was, in fact fired, even if those or similar words were not used on June 25, 2013. [3] Indeed, the Respondent's Brief admits that Arsovski was terminated.

Analysis

I have no doubt and conclude that Arsovski was fired because he filed an FLSA lawsuit that was received by the Respondent on the morning of June 25, 2013; the very day that his employment was terminated. I reject the contention that he was discharged for any prior misconduct relating to his affair with the former bookkeeper or with her alleged taking of certain records from the restaurant. The Respondent's owner became aware of those situations a month before June 25, but Arsovski remained employed. Indeed he continued to work, clearly with the knowledge of Betulovici, who was in daily contact with Raspudic after he allegedly told Raspudic to fire Arsovski on May 25. Thus, whatever transgressions may have occurred in May 2013, it is clear to me that these were not deemed by the Respondent to be sufficient reasons to fire Arsovski *until he filed his lawsuit*. [4]

The legal question here is whether in filing the FLSA lawsuit relating to wages, Arsovski was engaged in concerted activity within the meaning of Section 7 of the Act. Or was he acting solely in pursuit of his own interests?

The General Counsel cites the Board's decision in *D.R. Horton Inc.*, 357 NLRB No. 184 (2012). However, the holding of that case did not involve a situation like this. Rather, the actual holding in Horton was that an employer violated Section 8(a)(1) when it compelled its employees, as a condition of hire, to sign an agreement that "precluded them from filing joint, class, or collective claims addressing their wages, hours or other working conditions … in any forum, arbitral or judicial." Nevertheless, the General Counsel relies on that portion of the decision that states:

> To be protected by Section 7, activity must be concerted, or "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 281 NLRB 882, 885 (1986), affd. sub

[3] In order for a discharge be found, it is not necessary that the words, "discharged" "fired" or "laid off" be used. The test is whether an employer's statements would reasonably lead an employee to believe that he had been discharged. *Dublin Town Ltd.*, 282 NLRB 307, 308 (1986).

[4] The issue here is whether the employer discriminated against Arsovski because he filed a lawsuit challenging certain of the Respondent's wage and hour policies. I have no opinion and make no conclusions as to the merits of any claims or counterclaims in that lawsuit.

nom. *Prill v. NLR* , 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). When multiple named-employee plaintiffs initiate the action, their activity is clearly concerted. In addition, the Board has long held that concerted activity includes conduct by a single employee if he or she "seek[s] to initiate or to induce or to prepare for group action." *Meyers*, supra at 887. Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.

Clearly, the evidence in this case does not establish that Arsovski acted in concert with, or on the authority of any of the other employees. His lawsuit was not filed with their consent, or except perhaps in one case, even with their knowledge. On the other hand, his Complaint does allege that it was filed on behalf of a class of similarly situated employees who work or have worked at the Respondent over a three year period of time. In this regard, it could be argued that Arsovski sought "to initiate or to induce or to prepare for group action."

Moreover, I think that it is reasonable to conclude that when the FLSA Complaint was received and read, the Respondent believed or at least suspected that Arsovski was engaged in concerted group action. This is because the document states, clearly and unequivocally, that it represents an action on behalf of a class of present and former employees. Therefore, if Arsovski was discharged because the employer believed or suspected that he was engaged in concerted activity that would be sufficient to find a violation of the Act. Thus, when a discharge is motivated by the employer's belief or suspicion that the employee is engaged in conduct that is protected by the Act, the discharge would be deemed unlawful, even if that belief was mistaken. *NLR v. Scrivener*, 415 U.S. 117 (1972); *Trayco of S.C.*, 297 NLRB 630 (1990).

On these findings of fact and on the entire record, I issue the following conclusions and recommended [5]

Conclusions of Law

The Respondent, 200 East 81st Restaurant Corp., d/b/a Beyoglu, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities, including the filing of a lawsuit regarding the wages of themselves and other employees.

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

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

[5] 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.

(a) Within 14 days from the date of this Order, offer Marjan Arsovski full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Arsovski whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this Decision

(c) Reimburse Arsovski an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against him.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Arsovski it will be allocated to the appropriate periods.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful action against Arsovski and within three days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in New York, copies of the attached notices marked "Appendix." [6] Copies of the notices, on forms provided by the Regional Director for Region 2, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the

[6] 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."

Respondent shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 25, 2013.

Dated, Washington, D.C. April 29, 2014

Raymond P. Green
Administrative Law Judge

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because they engage in protected concerted activities including filing lawsuits on behalf of themselves and others relating to their wages or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Marjan Arsovski full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make the above named employee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful actions against Arsovski and within three days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

200 East 81st Restaurant Corp. d/b/a Beyoglu
(Employer

Dated _____ **By** _____
(Representative **(Title**

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The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-115871 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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D. R. Horton, Inc. *and* Michael Cuda. Case 12–CA–25764

January 3, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

In this case, we consider whether an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial. For the reasons stated below, we find that such an agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable.[1] In the circumstances presented here, there is no conflict between Federal labor law and policy, on the one hand, and the FAA and its policies, on the other.

I. BACKGROUND

Respondent D. R. Horton, Inc. is a home builder with operations in more than 20 states. In January 2006, the Respondent, on a corporate-wide basis, began to require each new and current employee to execute a "Mutual Arbitration Agreement" (MAA) as a condition of employment. The MAA provides in relevant part:

> that all disputes and claims relating to the employee's employment with Respondent (with exceptions not pertinent here) will be determined exclusively by final and binding arbitration;
>
> that the arbitrator "may hear only Employee's individual claims," "will not have the authority to consolidate the claims of other employees," and "does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding"; and
>
> that the signatory employee waives "the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Company" and "the right to resolve employment-related disputes in a proceeding before a judge or jury."

In sum, pursuant to the MAA, all employment-related disputes must be resolved through individual arbitration, and the right to a judicial forum is waived. Stated otherwise, employees are required to agree, as a condition of employment, that they will not pursue class or collective litigation of claims in any forum, arbitral or judicial.

Charging Party Michael Cuda was employed by the Respondent as a superintendent from July 2005 to April 2006. Cuda's continued employment was conditioned on his signing the MAA, which he did. In 2008, his attorney, Richard Celler, notified the Respondent that his firm had been retained to represent Cuda and a nationwide class of similarly situated superintendents. Celler asserted that Respondent was misclassifying its superintendents as exempt from the protections of the Fair Labor Standards Act (FLSA), and he gave notice of intent to initiate arbitration. The Respondent's counsel replied that Celler had failed to give an effective notice of intent to arbitrate, citing the language in the MAA that bars arbitration of collective claims.

Cuda filed an unfair labor practice charge, and the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(1) by maintaining the MAA provision stating that the arbitrator "may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding." The complaint further alleged that the Respondent violated Section 8(a)(4) and (1) by maintaining arbitration agreements requiring em-

[1] On January 3, 2011, Administrative Law Judge William N. Cates issued the attached decision. The Acting General Counsel and the Respondent each filed exceptions, a supporting brief, and an answering brief. The Acting General Counsel filed a reply brief. In addition, the Respondent filed a supplemental brief in support of its exceptions and in opposition to the Acting General Counsel's exceptions, and the Acting General Counsel filed a letter in response.

On June 16, 2011, the National Labor Relations Board issued an invitation to interested amici curiae to file briefs. Amicus briefs were filed by American Federation of Labor-Congress of Industrial Organizations (AFL–CIO); Change to Win; Coalition for a Democratic Workplace; Council on Labor Law Equality; Equal Employment Advisory Council, HR Policy Association, Society for Human Resource Management, California Employment Law Council, and Employers Group; National Retail Federation; Pacific Legal Foundation; Public Justice, P.C., National Employment Lawyers Association, et al.; Retail Industry Leaders Association; Service Employees International Union, Alton Sanders, and Taylor Bayer; Spiro Moss LLP; United States Chamber of Commerce; and United States Secretary of Labor and Equal Employment Opportunity Commission (EEOC). The Respondent filed three answering briefs in response to the briefs of various amici.

Member Hayes is recused and did not participate in deciding the merits of the case.

ployees, as a condition of employment, "to submit all employment related disputes and claims to arbitration . . . , thus interfering with employee access to the [NLRB]."

The judge found that the MAA violated Section 8(a)(4) and (1) because its language would lead employees reasonably to believe that they were prohibited from filing unfair labor practice charges with the Board. We affirm the judge's finding of a Section 8(a)(1) violation in this respect, essentially for the reasons stated by the judge.[2]

The judge dismissed the allegation that the class-action waiver violated Section 8(a)(1). For the reasons stated below, we reverse the judge and find the violation.

II. DISCUSSION

A. The MAA Prohibits the Exercise of Substantive Rights Protected by Section 7 of the NLRA

1.

Section 7 of the NLRA vests employees with a substantive right to engage in specified forms of associational activity. It provides in relevant part that employees shall have the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. §157. It is well settled that "mutual aid or protection" includes employees' efforts to "improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978). The Supreme Court specifically stated in *Eastex* that Section 7 "protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums." Id. at 565-566. The same is equally true of resort to arbitration.

The Board has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation. Not long after the Act's passage, the Board held that the filing of a Fair Labor Standards Act suit by three employees was protected concerted activity, see *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–949 (1942), as was an employee's circulation of a petition among coworkers, designating him as their agent to seek back wages under the FLSA, see *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853–854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953).[3] In the decades that followed, the Board has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7.[4]

Collective pursuit of a workplace grievance in arbitration is equally protected by the NLRA. When the grievance is pursued under a collectively-bargained grievance-arbitration procedure, the Supreme Court has observed, "No one doubts that the processing of a grievance in such

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[2] The violation follows directly from the Board's decisions in *Bill's Electric*, 350 NLRB 292, 296 (2007), and *U-Haul Co. of California*, 347 NLRB 375 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), where arbitration policies contained language that, if anything, was more ambiguous concerning the preclusion of Board charges than the MAA here. It is clear that the language of the MAA reasonably would lead employees to believe that they were prohibited from filing charges with the Board. Sec. 1 of the MAA states that all disputes between employees and the Respondent "shall be determined exclusively by final and binding arbitration," and no exception for unfair labor practice charges is made. Sec. 6 of the MAA, in turn, waives the "right to file a lawsuit *or other civil proceeding* relating to . . . employment." No extrinsic evidence counters the clear implications of the MAA's language. True, the Respondent furnished its supervisors a list of frequently asked questions about the MAA, together with appropriate responses, and one response was to tell employees who expressed concern about the scope of the MAA that they would still be able to bring complaints to the EEOC or similar agencies. But there is no evidence that the Respondent ever communicated this ambiguous clarification to its employees.

We find it unnecessary to pass on the judge's 8(a)(4) finding, because that additional violation would not materially affect the remedy.

[3] In *Salt River Valley*, supra the Ninth Circuit observed:

> By soliciting signatures to the petition, [the employee] was seeking to obtain such solidarity among the [workers] as would enable group pressure upon the [employer] in regard to possible negotiation and adjustment of the [workers'] claims. If suit were filed, such solidarity might enable more effective financing of the expenses involved. Thus, in a real sense, circulation of the petition was for "mutual aid or protection." The [employer] argues that any legal rights to backpay on the part of the [workers] were individual rights and that therefore there could be no "mutual" aid or protection. But the [employer] ignores the fact that "concerted activity for the purpose of ... mutual aid or protection" is often an effective weapon for obtaining that to which the participants, as individuals, are already "legally" entitled.

206 F.2d at 328.

[4] See, e.g., *Le Madri Restaurant*, 331 NLRB 269, 275 (2000) ("the filing of a civil action by employees is protected activity unless done with malice or in bad faith"); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978) (same); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982) (class-action lawsuit alleging that employer failed to provide rest periods required by state statute was protected concerted activity). See generally Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173, 187–200 (2003) (tracing doctrinal developments).

The Board's position has been uniformly upheld by the courts of appeals. See, e.g., *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the National Labor Relations Act") (emphasis in original); *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000) (petition for injunction supported by fellow employees and co-signed by a coworker was protected concerted activity).

a manner is concerted activity within the meaning of § 7." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984). And the same is true when the grievance is pursued under a unilaterally created grievance/arbitration procedure so long as its pursuit is concerted. Thus, the Board held in 1976,

> It is equally well settled that the advancement of a collective grievance is protected activity, even if the grievance in question is not formally stated or does not take place under the auspices of a contractual grievance procedure. *N.L.R.B.* v. *Washington Aluminum Company, Incorporated*, 370 U.S. 9 (1962); *N.L.R.B.* v. *Walls Manufacturing Company*, 321 F.2d 753 (C.A.D.C., 1963); *N.L.R.B.* v. *Hoover Design Corporation*, 402 F.2d 987 (C.A. 6, 1968).

Clara Barton Terrace Convalescent Center, 225 NLRB 1028, 1033 (1976). See also *Brad Snodgrass, Inc.*, 338 NLRB 917, 923 (2003) (nonemployee business agent was "engaging in protected activity on behalf of Respondent's employees when as Local 20's business agent he initiated grievances and complaints on their behalf while he was attempting to enforce what he believed to be . . . the applicable collective-bargaining agreements"); *UForma/Shelby Business Forms*, 320 NLRB 71, 77 (1995), enf. denied on other grounds 111 F.3d 1284 (6th Cir. 1997) (elimination of shift violated Sec. 8(a)(3) when done in retaliation for union members' pursuit of grievance to arbitration); *El Dorado Club*, 220 NLRB 886 (1975), enfd. 557 F.2d 692 (9th Cir. 1977) (employee was unlawfully discharged for participating in another employee's arbitration). Thus, employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.

In enacting the NLRA, Congress expressly recognized and sought to redress "[t]he inequality of bargaining power between employees who do not possess full freedom of association . . . and employers who are organized in the corporate form or other forms of ownership association." 29 U.S.C. § 151. Congress vested employees with "full freedom of association . . . for the purpose of . . . mutual aid or protection," in order to redress that inequality. Id. Both the Board and the courts have recognized that collective enforcement of legal rights in court or arbitration serves that congressional purpose. For example, the Ninth Circuit explained in *Salt River Valley*, supra at 328, "By soliciting signatures to the petition, [the employee] was seeking to obtain such solidarity among the [workers] as would enable group pressure upon the [employer] in regard to possible negotiation and adjustment of the [workers'] claims. If suit were filed, such solidarity might enable more effective financing of the expenses involved. Thus, in a real sense, circulation of the petition was for 'mutual aid or protection.'" Employees are both more likely to assert their legal rights and also more likely to do so effectively if they can do so collectively. Cf. *Special Touch Home Care Services*, 357 NLRB No. 2, slip op. at 7 (2011) ("The premises of the Act . . . and our experience with labor-management relations all suggest that permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on the right to strike).[5]

Depending on the applicable class or collective action procedures, of course, a collective claim or class action may be filed in the name of multiple employee-plaintiffs or a single employee-plaintiff, with other class members sometimes being required to opt in or having the right to opt out of the class later. See, e.g., 29 U.S.C. § 216(b); Fed. R. Civ. P. 23(c)(2)(B)(v). To be protected by Section 7, activity must be concerted, or "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 281 NLRB 882, 885 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). When multiple named-employee-plaintiffs initiate the action, their activity is clearly concerted. In addition, the Board has long held that concerted activity includes conduct by a single employee if he or she "seek[s] to initiate or to induce or to prepare for group action." *Meyers*, supra at 887. Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.

These forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7. Such conduct is not peripheral but central to the Act's purposes. After all, if the Respondent's employees struck in order to induce the Respondent to comply with the FLSA, that form of concerted activity would clearly have been protected. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

[5] Employees surely understand what several federal courts have recognized: that named plaintiffs run a greater risk of suffering unlawful retaliation than unnamed class members. See *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85–86 (S.D.N.Y. 2001); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001); *Adams v. Mitsubishi Bank Ltd.*, 133 F.R.D. 82, 89 (E.D.N.Y. 1989); *Slanina v. William Penn Parking Corp.*, 106 F.R.D. 419, 423–424 (W.D. Pa. 1984). This risk of retaliation is virtually unique to employment litigation compared, for example, to securities or consumer fraud litigation. Thus, in a quite literal sense, named-employee-plaintiffs protect the unnamed class members.

Surely an Act expressly stating that "industrial strife" can be "avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with one another," equally protects the concerted pursuit of workplace grievances in court or arbitration. To hold otherwise, the Supreme Court recognized in *Eastex*, "could 'frustrate the policy of the Act to protect the right of workers to act together to better their working conditions.'" 437 U.S. at 567 (quoting *Washington Aluminum*, 370 U.S. at 14).

As stated above, the MAA requires employees, as a condition of their employment, to refrain from bringing collective or class claims in any forum: in court, because the MAA waives their right to a judicial forum; in arbitration, because the MAA provides that the arbitrator cannot consolidate claims or award collective relief. The MAA thus clearly and expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA.[6]

2.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C. §158(a)(1). The MAA was imposed on all employees as a condition of hiring or continued employment by the Respondent, and it is properly treated as the Board treats other unilaterally implemented workplace rules. In evaluating whether an employer has violated Section 8(a)(1) by maintaining such a mandatory arbitration policy, the Board thus applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007) (finding policy unlawful because employees would reasonably read it to require resort to arbitration and preclude filing of Board charges). Under *Lutheran Heritage Village*, our inquiry begins with whether the rule explicitly restricts activities protected by Section 7. If so, the rule is unlawful. If the rule does not explicitly restrict protected activity, the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule 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. 343 NLRB at 646–647. We find that the MAA expressly restricts protected activity.

That this restriction on the exercise of Section 7 rights is imposed in the form of an agreement between the employee and the employer makes no difference. From its earliest days, the Board, again with uniform judicial approval, has found unlawful employer-imposed, individual agreements that purport to restrict Section 7 rights – including, notably, agreements that employees will pursue claims against their employer only individually.[7]

In *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), the Supreme Court upheld the Board's holding that individual employment contracts that included a clause discouraging, if not forbidding, a discharged employee from presenting his grievance to the employer "through a labor organization or his chosen representatives, or in any way except personally" was unlawful and unenforceable. Id. at 360.[8] The Court agreed that the contracts "were a continuing means of thwarting the policy of the Act. Id. at 361. "Obviously," the Court concluded, "employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes." Id. at 364.

Four years later, the Court reaffirmed the principle that employers cannot enter into individual agreements with employees in which the employees cede their statutory rights to act collectively. In *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), the Court held that individual employment contracts predating the certification of a union as the employees' representative cannot limit the scope of the employer's duty to bargain with the union. The Supreme Court observed that:

> Individual contracts no matter what the circumstances that justify their execution or what their

[6] The Respondent argues that the MAA's restriction on class or collective actions in arbitration is phrased as a restriction not on employees, but on the authority of the arbitrator. We find the distinction is one of form and not substance. The MAA bars employees from pursuing their claims in any forum except arbitration and precludes collective actions in that arbitral forum. The result is that there is no forum in which employees may pursue a class or collective claim.

[7] See, e.g., *Adel Clay Products Co.*, 44 NLRB 386, 396 (1942), enfd. 134 F.2d 342 (8th Cir. 1943) (finding unlawful employer's conditioning employment on the signing of individual agreements not to engage in self-organization and collective bargaining); *Western Cartridge Co.*, 44 NLRB 1, 7–8 (1942), enfd. 134 F.2d 240, 243–44 (7th Cir. 1943) (same); *Jahn & Ollier Engraving Co.*, 24 NLRB 893, 900-901, 909–911 (1940), enfd. 123 F.2d 589, 593 (7th Cir. 1941) (finding unlawful individual "profit-sharing" agreements that forfeited employees' right to negotiate wage increases and to strike); *Vincennes Steel Corp.*, 17 NLRB 825, 831–833 (1939), enfd. 117 F.2d 169, 172 (7th Cir. 1941) (finding unlawful employer's stock purchase plan, which required subscribing employees to agree not to seek wage increases; "[t]he individual agreements to refrain from requesting wage increases constitute on their face, a limitation on the exercise of the right to engage in concerted activities and to bargain collectively regarding wages").

[8] The clause permitted the discharged employee to present facts contesting the reasonableness of his discharge, but provided that the "question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation." *Nat'l Licorice Co.*, 309 U.S. at 360.

terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act. . . .

. . . .

Wherever private contracts conflict with [the Board's] functions [of preventing unfair labor practices], they obviously must yield or the Act would be reduced to a futility.

Id. at 337.

During this same period of time, the Board held unlawful a clause in individual employment contracts that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration. *J. H. Stone & Sons*, 33 NLRB 1014 (1941), enfd. in relevant part, 125 F.2d 752 (7th Cir. 1942).[9] "The effect of this restriction," the Board explained, "is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer." Id. at 1023 (footnote omitted). The Seventh Circuit affirmed the Board's holding, describing the contract clause as a *per se* violation of the Act, even if "entered into without coercion," because it "obligated [the employee] to bargain individually" and was a "restraint upon collective action." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).[10] These precedents compel the conclusion that the MAA violates the NLRA.

Just as the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7, the prohibition of individual agreements imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section 8. Understanding why this is so requires consideration of the origins of Section 7 rights. In construing the NLRA, we must "reconstitute the gamut of values current at the time when the words [of the statute] were uttered." *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 620 & fn. 5 (1967).

Modern Federal labor policy begins not with the NLRA, but with earlier legislation, the Norris-LaGuardia Act of 1932,[11] which aimed to limit the power of Federal courts both to issue injunctions in labor disputes and to enforce "yellow dog" contracts prohibiting employees from joining labor unions.[12] Thus, Congress has aimed to prevent employers from imposing contracts on individual employees requiring that they agree to forego engaging in concerted activity since before passage of the NLRA.

In fact, the provisions of the Norris-LaGuardia Act prohibit the enforcement of a broad array of "yellow dog"-like contracts, including agreements comparable to that at issue here. Section 2 of the Norris-LaGuardia Act, which declares the "public policy of the United States," observes that the "individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." 29 U.S.C. § 102. Accordingly, Congress determined that workers should "have full freedom of association" and "shall be free from the interference, restraint, or coercion of employers" in "concerted activities for the purpose of collective bargaining *or other mutual aid or protection*." Id. (emphasis added). In turn, Section 3 of the statute provides that "*any* . . . undertaking or promise in conflict with the public policy declared in" Section 2—not only the "yellow dog" contract—"is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." 29 U.S.C. § 103 (emphasis added). In specifying what acts are *not* subject to restraining orders or injunctions, Section 4 of the statute identifies various types of activity, whether undertaken "singly or in concert," including "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is *prosecuting, any action or*

[9] Paragraph 8 of the contract read:

> 8. ADJUSTMENTS. The Company will endeavor to adjust with the Employee all complaints and disputes by negotiation, if possible. If it cannot be so adjusted, the Employee hereby selects _____ as his representative and arbitrator, and the Company selects its superintendent as its representative and they shall promptly hear and adjust all such complaints, or failing to do so shall select a third disinterested arbitrator, which three shall promptly hear, adjust and arbitrate every such complaint or dispute. The decision of a majority of such Board to be final on both Employee and Employer.

33 NLRB at 1023.

[10] For contemporary discussion of the case, see Recent Case, Labor Law—National Labor Relations Act – Arbitration Provision in Individual Contract Held to Be Unfair Labor Practice, 55 Harv. L. Rev. 1391, 1392 (1942). The Seventh Circuit's holding was anticipated by its earlier decision in a case involving the same clause in an individual employment contract. *NLRB v. Superior Tanning Co.*, 117 F.2d 881 (7th Cir. 1941), enfg. 14 NLRB 942 (1939).

[11] 29 U.S.C. § 101 et seq.

[12] See Edwin E. Witte, *The Federal Anti-Injunction Act*, 16 Minn. L. Rev. 638, 641–647 (1932). Since the enactment of the Norris-LaGuardia Act, all variations of a "yellow-dog" contract are deemed invalid and unenforceable, including "[a]ny promise by a statutory employee to refrain from union activity or to report the union activities of others." *Barrow Utilities & Electric*, 308 NLRB 4, 11 fn. 5 (1992).

suit in any court of the United States or of any State." 29 U.S.C. § 104(d) (emphasis added).[13] "Labor dispute," in turn, is broadly defined in Section 13 to include "any controversy concerning terms or conditions of employment." 29 U.S.C. § 113. Finally, Section 15 provides that "[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed." 29 U.S.C. § 115.

The Norris-LaGuardia Act, in sum, protects concerted employment-related litigation by employees against federal judicial restraint based upon agreements between employees and their employer. Consistent with the terms and policy of the Norris-LaGuardia Act, an arbitration agreement imposed upon individual employees as a condition of employment cannot be held to prohibit employees from pursuing an employment-related class, collective, or joint action in a Federal or State court. Such a lawsuit would involve a "labor dispute" under Section 13 of the Norris-LaGuardia Act: a "controversy concerning terms or conditions of employment." The arbitration agreement, insofar as it sought to prohibit a "lawful means [of] aiding any person participating or interested in" the lawsuit (Sec. 4) such as pursuing or joining a putative class action—would be an "undertaking or promise in conflict with the public policy" of the statute (Sec. 3).

The NLRA, passed in 1935, built upon and expanded the policies reflected in the Norris-LaGuardia Act, echoing much of the language of the earlier law. As the Board has observed, "The law has long been clear that all variations of the venerable 'yellow dog contract' are invalid as a matter of law." *Barrow Utilities & Electric,* 308 NLRB 4, 11 fn. 5 (1992). The agreement at issue here, then, not only bars the exercise of rights at the core of those protected by Section 7, but implicates prohibitions that predate the NLRA and are central to modern Federal labor policy.

3.

Some amici contend that employees' Section 7 rights are not impaired by the MAA because employees can still discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims. It is true that the MAA does not interfere with employees' right to engage in any of these protected concerted activities. But if the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities. For example, if an employer refrains from interfering with concerted protests short of a strike, that does not entitle the employer to compel employees, as a condition of their employment, to waive the right to strike. The same is true here.[14]

Several amici urge the Board to endorse the narrow theory of violation set forth in a memorandum issued in 2010 by the then General Counsel ("GC Memo 10–06"), before the complaint issued in this case.[15] GC Memo 10–06 takes the position that a class-action waiver is not *per se* unlawful, so long as the waiver makes clear to employees that they may act concertedly to challenge the waiver itself and will not be subject to retaliation by their employer for doing so. Thus, under the rationale of the GC Memo 10–06, employees are free to bring an employment-related class action lawsuit, but the employer may seek to have the suit dismissed on the ground that the employees executed a valid waiver.[16]

We reject the construction of the Act advanced in GC Memo 10–06 for several reasons. First, it takes the erroneous view that an individual who files a class or collective action typically is engaged in "purely personal" activity outside the scope of Section 7. As explained above, that view is at odds with Board precedent holding that employees' class and collective actions are protected concerted activity in that they seek to initiate concerted activity for mutual aid or protection. The memorandum's position is also clearly wrong as a categorical matter because many class and collective actions are initiated by more than one named plaintiff, i.e., as a result of undeniably concerted activity.

[13] The legislative history of the statute describes federal injunctions that prohibited aid to employees who were being evicted from employer-owned housing as a consequence of striking in violation of "yellow dog" contracts and who challenged their eviction in court:

> Federal judges have been in the habit of issuing injunctions restraining outsiders ... from doing anything to assist the laborer in a forcible entry and detainer case pending in the State court.
>
> All persons are enjoined from furnishing bonds to take those cases up on appeal. All persons are enjoined from paying any money in the way of expenses in connection with such litigation in the State courts. The injunctions often go far enough to prevent an attorney from giving any advice to the employee who is trying to hold possession of a house belonging to the employer.

Sen. Rep. No. 163, 72d Cong., 1st Sess. 16 (Feb. 4, 1932).

[14] Moreover, the MAA is not a narrow ban on only one form of collective actions, pursuing a class action, but a broad ban on any form of collective litigation, including class and collective actions and even simple joinder of claims.

[15] The Memorandum, which represents the then-General Counsel's advice to the Board's Regional Offices, is not binding on the Board.

[16] This is not the theory underlying the complaint in this case. It is also not the theory advanced by the General Counsel during the litigation of this case. Therefore, there is no merit to the suggestion of Amici Equal Employment Advisory Council et al. that the Board is limited to passing on a theory of the case that is consistent with GC Memo 10–06.

Second, GC Memo 10–06 reasons that because choosing to initiate or participate in a class action is a purely individual act, waiving the right to do so is outside the scope of Section 7. At the same time, GC Memo 10–06 states that the wording of mandatory arbitration policies must make clear to employees that their right to act concertedly by pursuing class and collective claims is preserved. If a Section 7 right to litigate concertedly exists, then it defies logic to suggest, as GC Memo 10–06 does, that requiring employees to waive that right does not implicate Section 7. Moreover, the memo's rationale cannot be limited to waivers of the right to file and join class and collective actions. If choosing to initiate or participate in a class or collective action is a purely individual act, so is choosing to initiate or participate in *any* activity protected by Section 7. Based on the logic of GC Memo 10–06, an employer would be privileged to secure prospective individual waivers of *all* future Section 7 activity, including joining a union and engaging in collective bargaining. The memo's rationale is thus untenable.

Third, the memo's requirement that employers must expressly preserve employees' right to file a class or collective action challenging the validity of the required waiver has no substance. That is to say, GC Memo 10–06 does not state *on what ground* such a challenge might be brought. The memo could not have meant to suggest that the challenge could be based on interference with Section 7 rights, since the position of the memo is that individual class-action waivers do not implicate Section 7. But even assuming that a waiver-validity challenge would have a more than negligible chance of success, the addition of language assuring employees of their right to mount such a challenge, as GC Memo 10-06 requires, would not erase the tendency of the required waiver itself to interfere with the exercise of Section 7 rights. Employees still would reasonably believe that they were barred from filing or joining class or collective action,[17] as the arbitration agreement would still expressly state that they waive the right to do so. Employees reasonably would find an assurance that they may do so anyway either confusing or empty, or both: confusing, because employees would be told they have the right to do the very thing they waive the right to do; empty, because mandatory arbitration policies, such as Respondent's, are formal legal documents evidently prepared by, or with the aid of, counsel, and employees reasonably would assume that their employer would not go to the trouble and expense of drafting and requiring that they execute a legally invalid waiver.

Finally, GC Memo 10–06 recognizes, as it must under *Eastex*, that Section 8(a)(1) would be violated if an employer threatens to retaliate against an employee for filing a class or collective action. It fails to recognize, however, that this basic principle is fundamentally at odds with the memo's ultimate conclusion. When, as here, employers require employees to execute a waiver as a condition of employment, there is an implicit threat that if they refuse to do so, they will be fired or not hired. Moreover, as stated above, the applicable test is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity. That no employees are expressly threatened, disciplined, or discharged does not immunize the employer under existing precedent. We therefore reject the reasoning in GC Memo 10–06.

B. There Is No Conflict between the NLRA and the FAA Under the Circumstances Presented Here

Our analysis does not end, however, with the conclusion that the MAA restricts the exercise of rights protected by Federal labor law. The principal argument made by the Respondent and supporting amici is that finding the restriction on class or collective actions unlawful under the NLRA would conflict with the Federal Arbitration Act (FAA). The Respondent and amici contend that the Board has a duty to accommodate the FAA, and that dismissal of the 8(a)(1) allegation is therefore necessary.

[17] See *Bill's Electric*, 350 NLRB 292, 296 (2007) (finding mandatory arbitration policy unlawful under Sec. 8(a)(1) where it reasonably would be read "as substantially restricting" the filing of charges with the Board).

This is an issue of first impression for the Board.[18] In dismissing the allegation that the class-action waiver was unlawful, the judge cited Supreme Court decisions that he characterized as "reflect[ing] a strong sentiment favoring arbitration as a means of dispute resolution," and circuit court decisions more specifically supporting the use of arbitration to resolve employment disputes. He also observed that there is no Board precedent "holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims." None of the decisions cited by the judge, however, involved assertions that an arbitration clause interfered with NLRA rights.

The Board is responsible for administering the NLRA and enforcing the rights that the Act confers. But in doing so, the Board must be and is mindful of any conflicts between the terms or policies of the Act and those of other federal statutes, including the FAA. Where a possible conflict exists, the Board is required, when possible, to undertake a "careful accommodation" of the two statutes. *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 47 (1942). That does not mean, of course, that the Act must automatically yield to the FAA—or the other way around. Instead, when two federal statutes "are capable of co-existence," both should be given effect "absent a clearly expressed congressional intention to the contrary." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Thus, when circumstances arise that present a conflict between the underlying purposes of the Act and those of another federal statute, the Board has recognized that the issue must be resolved in a way that accommodates the policies underlying both statutes to the greatest extent possible. *Direct Press Modern Litho*, 328 NLRB 860, 861 (1999); *Image Systems*, 285 NLRB 370, 371 (1987).[19] For the reasons that follow, we conclude that finding the MAA unlawful, consistent with the well-established interpretation of the NLRA and with core principles of Federal labor policy, does not conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that the finding represents an appropriate accommodation of the policies underlying the two statutes.

1. The FAA

The FAA was originally enacted in 1925. Its general intent was to "reverse the longstanding judicial hostility to arbitration agreements" and to place private arbitration agreements "upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA manifests "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It further requires that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." Id. The FAA's primary substantive provision, Section 2, states in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal,

[18] Various amici supporting the Respondent cite two decisions in which Federal district courts have been presented with the issue and have ruled that a class-action waiver does not violate the NLRA: *Slawienski v. Nephron Pharmaceutical Corp.*, No. I:10-CV-0460-JEC, 2010 WL 5186622 (N.D. Ga. Dec. 9, 2010), and *Webster v. Perales*, No. 3:07-CV-00919-M, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008). Although the results in those cases favor the Respondent, the courts' reasoning does not.

In *Slawienski*, the district court simply wrote protected concerted activity other than union activity out of Sec. 7 altogether: "There is no legal authority," the court said, "to support plaintiff's position [that the arbitration agreement violates Sec. 8(a)(1)]. The relevant provisions of the NLRA . . . deal solely with an employee's right to participate in union organizing activities." In support of that claim, the court quoted Sec. 7 but omitted the provision that protects "concerted activities for the purpose of . . . other mutual aid or protection." The court then missed the point of the plaintiff's argument, saying that Sec. 7 rights were not implicated because plaintiff and those who would "opt in" to the collective action were pursuing FLSA claims, not claims under the NLRA. *Slawienski*, supra slip op. at *2.

In *Webster*, the employer required plaintiffs to sign an arbitration agreement as a condition, not of employment, but of enrolling in an injury benefit plan. The district court found that the class-action waiver was not unlawful under Sec. 8(a)(1) because (a) plaintiffs "expressly acknowledged that their agreement to arbitrate was made voluntarily and without duress, pressure, or coercion," and (b) the employer did not "threaten[ ] to terminate" employees who refused to sign the arbitration agreement. *Webster*, supra slip op. at *4. Whether or not *Webster* was correctly decided, here, in contrast to that case, signing the MAA was a condition of employment.

[19] The Respondent, citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), contends that whenever the Board's choice of remedies has conflicted with another federal statute or policy, the Board has been required to yield. The Respondent quotes the *Hoffman* Court's statement that it had "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." 535 U.S. at 144. We do not understand the Court's statement to suggest that the Board's exercise of remedial discretion under the NLRA must always yield to the policies underlying other federal statutes no matter how important the chosen remedy is to vindication of rights protected by the NLRA. Such a result obviously would violate the principle that the Federal "courts are not at liberty to pick and choose among congressional enactments." *Morton*, supra 417 U.S. at 551. Moreover, our holding here is that the MAA violates the substantive terms of the NLRA; it does not rest on an exercise of remedial discretion. Finally, our holding here does not require the FAA to yield to the NLRA, but represents an accommodation of the two statutes. In short, nothing in *Hoffman* precludes this result.

> shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.[20] The FAA permits the enforcement of private arbitration agreements, but those agreements remain subject to the same defenses against enforcement to which other contracts are subject.

An agreement falling within the terms of the FAA may provide for arbitration of federal statutory claims. See *Gilmer*, supra. The Supreme Court has repeatedly emphasized, however, that the FAA protects the right of parties to agree to resolve statutory claims in an arbitral forum so long as "a party does not forgo the substantive rights afforded by the statute." *Gilmer*, supra at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)). Thus, arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration. *Gilmer*, supra at 28 (quoting *Mitsubishi*, supra at 637).

2. Holding that the MAA violates the NLRA does not conflict with the FAA or undermine the policy underlying the FAA

Holding that the MAA violates the NLRA does not conflict with the FAA or undermine the pro-arbitration policy underlying the FAA under the circumstances of this case for several reasons. First, the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts. The Supreme Court, as explained, has made clear that "[w]herever private contracts conflict with [the] functions" of the National Labor Relations Act, "they obviously must yield or the Act would be reduced to a futility." *J. I. Case Co,* supra 321 U.S. at 337. To find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law. The MAA would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against the Respondent solely on an individual basis. It is thus clear that our holding, that the MAA conflicts with the NLRA, does not rest on "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011).

Second, the Supreme Court's jurisprudence under the FAA, permitting enforcement of agreements to arbitrate federal statutory claims, including employment claims, makes clear that the agreement may not require a party to "forgo the substantive rights afforded by the statute." *Gilmer*, supra at 26. The question presented in this case is *not* whether employees can effectively vindicate their statutory rights under the Fair Labor Standards Act in an arbitral forum. See *Gilmer*, supra.[21] Rather, the issue here is whether the MAA's categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates the substantive rights vested in employees by Section 7 of the NLRA.

Gilmer addresses neither Section 7 nor the validity of a class action waiver. The claim in *Gilmer* was an individual one, not a class or collective claim, and the arbitration agreement contained no language specifically

[20] Sec. 1 of the statute exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. That exemption – which is not at issue in this case -- has been construed by the Supreme Court, based on the statutory language, to cover only "contracts of employment of transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). The "legislative record on the § 1 exemption is quite sparse." Id. at 119. It seems fair to say, if immaterial to the Court's construction of the FAA, that the legislative history contains no discussion evincing a congressional intent to bring employment contracts of any sort under the statute. See id. at 119–121; see also id. at 125–128 (dissent of Justice Stevens, arguing that legislative history demonstrates congressional intent, in response to concerns of organized labor, to exclude all employment contracts from FAA).

[21] In *Gilmer*, the Supreme Court held that a claim under the Age Discrimination in Employment Act (ADEA) could be subjected to compulsory arbitration pursuant to an agreement in a securities registration application.

The plaintiff, employed as a financial services manager, had registered as a securities representative with several stock exchanges, and the registration application provided for arbitration in accordance with the rules of the various exchanges. After being discharged by his employer, the plaintiff brought an action in Federal court alleging that his termination violated the ADEA.

The Court noted that not all statutory claims will be appropriate for arbitration, but that, "having made the agreement to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26 (quoting *Mitsubishi Motors,* 473 U.S. at 628). The Court stated that such intent, if it exists, must be shown by the party seeking to avoid arbitration, and will be found "in the text of the ADEA, its legislative history, or "an 'inherent conflict' between arbitration and the ADEA's underlying purposes." Id. (quoting *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987)).

The plaintiff in *Gilmer* conceded there was no contrary intent in the ADEA or its legislative history. The Court therefore focused on whether there was an "inherent conflict" and found none. The Court acknowledged the public policies underlying the ADEA, but found that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Id. at 28 (quoting *Mitsubishi*, supra at 637). The Court then found that arbitration would not undermine the EEOC's role in enforcing the ADEA, because, inter alia, an individual ADEA claimant can still file a charge with the EEOC, and the EEOC has independent authority to investigate even absent a charge. Id. at 28–29. The Court also rejected various challenges to the adequacy of arbitration generally, finding those arguments "out of step" with current policy. Id. at 30.

waiving class or collective claims.[22] Here, although the underlying claim the Charging Party sought to arbitrate was based on the FLSA (specifically, the Charging Party contends that the Respondent misclassified him and other superintendents as exempt from FLSA requirements), the right allegedly violated *by the MAA* is not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA. Thus, the question presented in this case is not whether employees can effectively vindicate their rights under the FLSA in arbitration despite a prohibition against class or collective proceedings, but whether employees can be required, as a condition of employment, to enter into an agreement waiving their rights under the NLRA.[23]

Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. The Respondent and supporting amici argue that class-action waivers do not implicate substantive rights under Section 7 because the right of a litigant to employ the class action procedures of Federal Rule of Civil Procedure 23 (or in corresponding State rules) or the collective action procedures under the FLSA (29 U.S.C. § 216(b)) "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980). There is no substantive Section 7 right to maintain a class or collective action, the Respondent and amici contend. To the extent they mean that there is no Section 7 right to class certification, they are surely correct.[24] Whether a class is certified depends on whether the requisites for certification under Rule 23 have been met. But that is not the issue in this case. The issue here is whether Respondent may lawfully condition employment on employees' waiving their right under the NLRA to take the collective action inherent in seeking class certification, whether or not they are ultimately successful under Rule 23. Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures is not.

The Respondent and amici also cite *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S.Ct. 1456 (2009), in which the Supreme Court held that a union, in collective bargaining, may agree to an arbitration clause that waives employees' rights to bring an action in court alleging employment discrimination under Title VII and the ADEA. It is well settled, however, that a properly certified or recognized union may waive certain Section 7 rights of the employees it represents—for example, the right to strike—in exchange for concessions from the employer. See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956). The negotiation of such a waiver stems from an *exercise* of Section 7 rights: the collective-bargaining process. Thus, for purposes of examining whether a waiver of Section 7 rights is unlawful, an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy, such as the MAA, imposed on individual employees by the employer as a condition of employment. Although the Court in *Penn Plaza* stated that it saw no "distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative,"

[22] The plaintiff did argue that enforcing his arbitration agreement was inconsistent with the ADEA because "arbitration procedures . . . do not provide for . . . class actions." Gilmer, 500 U.S. at 32. But the Court pointed out that the arbitration rules actually at issue in *Gilmer* "provide for collective proceedings." Id. The Court, in dicta, then stated, "the fact that the [ADEA] provides for the possibility of collective action does not mean that individual attempts at conciliation were intended to be barred." The Court's evaluation of the intention behind the ADEA is not relevant to the question of compelled waiver of NLRA rights at issue here.

[23] The court decisions holding that FLSA claims can be vindicated effectively in an arbitral forum are therefore inapposite. See, e.g., *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 297-298 (5th Cir. 2004) (finding no evidence that Congress intended to preclude individual arbitration of FLSA claims); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503, 506 (4th Cir. 2002) (same); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319–320 (9th Cir. 1996) (same). In any event, that issue remains unsettled. See, e.g., *Raniere v. Citigroup, Inc.*, 11 Civ 2448, 2011 WL 5881926, at *12-17 (S.D.N.Y. Nov. 22, 2011) (right to proceed collectively under FLSA cannot be waived); *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547 (S.D.N.Y. 2011) (finding class-action waiver provision unenforceable where prohibitive cost of pursuing FLSA claim on an individual basis precluded plaintiff from effectively vindicating her statutory rights). We note that the Secretary of Labor and the EEOC, in an amicus brief filed with the Board, argue that at least in some cases, FLSA rights *cannot* be properly vindicated absent the ability to proceed collectively. If it were necessary to decide that issue here, there might be reason to defer to the judgment of those agencies, see, e.g., *Kingston Constructors*, 332 NLRB 1492, 1500–1501 & fn. 57 (2000), which are responsible for administering and enforcing the FLSA, but our holding rests on an entirely separate ground.

[24] Nothing in our holding guarantees class certification; it guarantees only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law. Employees who seek class certification in Federal court will still be required to prove that the requirements for certification under Rule 23 are met, and their employer remains free to assert any and all arguments against certification (other than the MAA). Further, if an employee seeks class certification and fails–in other words, if the court determines that the claim fails to meet the requirements of Rule 23 and therefore must be pursued individually rather than as a class action–the resulting action would be subject to dismissal under the MAA in favor of arbitration.

see 556 U.S. at ___, 129 S.Ct. at 1465, the Court was addressing a different question: whether the agreement, to which only the union was party, improperly waived employees' *individual* rights under Title VII and the ADEA, not their right to engage in concerted activity under the NLRA. Furthermore, the Court emphasized that the decision to arbitrate Title VII and ADEA claims does not amount to a decision to forgo those statutes' substantive guarantees against workplace discrimination. Id. at 1464 fn. 5. That statement highlights the material distinction between the present case, on the one hand, and, on the other, *Penn Plaza* and other cases applying *Gilmer's* analytical framework: here, a requirement that employees' work-related claims be resolved through arbitration on an individual basis only *does* amount to a requirement that employees forgo the NLRA's substantive protections.

Accordingly, finding the MAA's class-action waiver unlawful does not conflict with the FAA, because the waiver interferes with substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed. Stated another way, under *Gilmer*, there is an inherent conflict between the NLRA and the MAA's waiver of the right to proceed collectively in any forum.

Third, nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable. To the contrary, Section 2 of the FAA, quoted above, provides that arbitration agreements may be invalidated in whole or in part upon any "grounds as exist at law or in equity for the revocation of any contract." This clause is fully consistent with the FAA's general intent to place arbitration agreements on the same footing as other contracts. Entirely apart from the Supreme Court's teachings in *National Licorice* and *J. I. Case*, supra—cases invalidating private agreements that restricted NLRA rights—it is a defense to contract enforcement that a term of the contract is against public policy. See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). In fact, this principle has been specifically followed in relation to contract provisions violating the NLRA.

> It is . . . well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes. . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948) (footnotes omitted).

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83–84 (1982).

Courts presented with such a defense apply a balancing test: where the interest in favor of enforcing a contract term is outweighed by a public policy against enforcement, the term is unenforceable. Restatement (2d) of Contracts §178(1). In assessing the weight to be given to the respective interests, one must consider "the strength of the public policy as manifested by legislation" and "the likelihood that a refusal to enforce the term will further that policy." Id. § 178(3). As explained above, Section 7 of the NLRA manifests a strong federal policy protecting employees' right to engage in protected concerted action, including collective pursuit of litigation or arbitration. Moreover, Section 8(a)(1) and other provisions of the NLRA derived from the earlier Norris-LaGuardia Act manifest a strong federal policy against agreements in the nature of yellow-dog contracts, in which individual employees are required, as a condition of employment, to cede their right to engage in such collective action. A refusal to enforce the MAA's class-action waiver would directly further these core policies underlying the NLRA.

A policy associated with the FAA and arguably in tension with the policies of the NLRA was explained by the Supreme Court in *AT&T Mobility v. Concepcion*, supra at 1748: The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." The "switch from bilateral to class arbitration," the Court stated, "sacrifices the principal advantage of arbitration—its informality." Id. at 1750. But the weight of this countervailing consideration was considerably greater in the context of *AT&T Mobility* than it is here for several reasons. *AT&T Mobility* involved the claim that a class-action waiver in an arbitration clause of any contract of adhesion in the State of California was unconscionable. Here, in contrast, only agreements between employers and their own employees are at stake. As the Court pointed out in *AT&T Mobility*, such contracts of adhesion in the retail and services industries might cover "tens of thousands of potential claimants." Id. at 1752. The average number of employees employed by a single employer, in contrast, is 20,[25] and most class-wide em-

[25] The U.S. Census Bureau reports that in 2008 there were 5,930,132 employers (with employees), and those employers employed 120,903,551 employees. See http://www.census.gov/econ/smallbus.html. Accord: See U.S. Census Bureau, Sector 00: Survey of Business Owners (SBO): Company Statistics Series: Statistics for All U.S. Firms by Geographic Area, Industry, Gender, Ethnicity, and Race: 2007, available at

ployment litigation, like the case at issue here, involves only a specific subset of an employer's employees. A class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court in *AT&T Mobility*—speed, cost, informality, and risk—when the class is so limited in size. 131 S.Ct. at 1751–1752. Moreover, the holding in this case covers only one type of contract, that between an employer and its covered employees, in contrast to the broad rule adopted by the California Supreme Court at issue in *AT&T Mobility*. Accordingly, any intrusion on the policies underlying the FAA is similarly limited.

Thus, whether we consider the policies underlying the two statutes as part of the balancing test required to determine if a term of a contract is against public policy and thus properly considered invalid under Section 2 of the FAA, or as part of the accommodation analysis required by *Southern Steamship*, *Morton*, and other Supreme Court precedent, our conclusion is the same: holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.

Finally, even if there were a direct conflict between the NLRA and the FAA, there are strong indications that the FAA would have to yield under the terms of the Norris-LaGuardia Act. As explained above, under the Norris-LaGuardia Act, a private agreement that seeks to prohibit a "lawful means [of] aiding any person participating or interested in" a lawsuit arising out of a labor dispute (as broadly defined) is unenforceable, as contrary to the public policy protecting employees' "concerted activities for . . . mutual aid or protection." To the extent that the FAA requires giving effect to such an agreement, it would conflict with the Norris-LaGuardia Act. The Norris-LaGuardia Act, in turn—passed 7 years *after* the FAA,—repealed "[a]ll acts and parts of act in conflict" with the later statute (Section 15).[26]

C. The Supreme Court's Restriction on Compelling Class Arbitration Is Not Implicated Here

The Respondent and some amici further argue that holding that the MAA violates the NLRA would be inconsistent with two recent Supreme Court decisions stating that a party cannot be required, without his consent, to submit to arbitration on a classwide basis. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1775–1776 (2010) (arbitration panel exceeded its authority by permitting class antitrust claim when commercial shipping charter agreement's arbitration clause was silent on class arbitration); *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1751–1753 (2011) (claim that class-action waiver in consumer arbitration agreement was unconscionable under state law was preempted by FAA). Neither case is controlling here. Neither involved the waiver of rights protected by the NLRA or even employment agreements. Furthermore, *AT&T Mobility* involved a conflict between the FAA and state law, which is governed by the Supremacy Clause, whereas the present case involves the argument that two federal statutes conflict. Finally, nothing in our holding here requires the Respondent or any other employer to permit, participate in, or be bound by a class-wide or collective arbitration proceeding.

We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis.

III.

We emphasize the limits of our holding and its basis. Only a small percentage of arbitration agreements are potentially implicated by the holding in this case. First, only agreements applicable to "employees" as defined in the NLRA even potentially implicate Section 7 rights.[27]

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http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=D&-ds_name=SB0700CSA01&-_lang=en . Employers covered by the Act may, on average, employ slightly more employees because only employers engaged in interstate commerce are covered, but that exclusion may be balanced by the exclusion of employers covered by the Railway Labor Act, which on average employ more employees than those covered by the NLRA.

[26] In addition, the Supreme Court has held that when two federal statutes conflict, the later enacted statute, here the NLRA, must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Chicago & N. W. Ry. Co. v. United Transp. Union*. 402 U.S. 570, 582 fn. 18 (1971); *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) see also *Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 948 (11th Cir. 2001); Sutherland Stat Const § 51.02 (5th ed.) ("Where two statutes are involved each of which by its terms applies to the facts before the court, the statute which is the more recent of the two irreconcilably conflicting statutes prevails.").

[27] Sec. 2(3) of the Act provides that the term "employee" excludes

> any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervi-

Second, the employment-related contracts of those transportation workers covered by the Act (e.g., interstate truck drivers) appear already to be exempted from the FAA, by section 1 of that statute. See fn. 20, supra. Finally, only those agreements that would be reasonably read to bar protected, concerted activity are vulnerable. For example, an agreement requiring arbitration of any individual employment-related claims, but not precluding a judicial forum for class or collective claims, would not violate the NLRA, because it would not bar concerted activity. Thus, contrary to the suggestion of the Respondent and supporting amici, finding the MAA's class-action waiver unlawful will not result in any large-scale or sweeping invalidation of arbitration agreements.[28]

Nor does our holding rest on any form of hostility or suspicion of arbitration. Indeed, arbitration has become a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement. . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."); *Collyer Insulated Wire*, 291 NLRB 837, 839–843 (1971) (pre-award deferral); *Spielberg Mfg. Co.*, 112 NLRB 1080, 1081 (1955) (post-award deferral). Rather, our holding rests not on any conflict between an agreement to arbitrate and the NLRA, but rather solely on the conflict between the compelled waiver of the right to act collectively in any forum, judicial or arbitral, in an effort to vindicate workplace rights and the NLRA.

We thus hold, for the reasons explained above, that the Respondent violated Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial.

sor, or any individual employed by an employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.

Sec. 2(2) of the Act, in turn, defines "employer" to exclude, inter alia, employees of the federal government or any state or political subdivision. Thus, significant numbers of workers typically considered to be "employees" in lay terms—supervisors, government employees, and independent contractors being perhaps the largest groups—are not covered by Sec. 7, and therefore any class or collective action waiver to which they are subject cannot be challenged on Sec. 7 grounds.

[28] Moreover, we do not reach the more difficult questions of (1) whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration and (2) whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 2.

"2. By maintaining a mandatory arbitration agreement provision that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial, and that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act."

AMENDED REMEDY

Because the Respondent utilized the MAA on a corporate-wide basis, we shall order, in addition to the relief ordered by the administrative law judge, that the Respondent post a notice at all locations where the MAA was in effect. See, e.g., *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

ORDER

The National Labor Relations Board orders that the Respondent, D. R. Horton, Inc., Deerfield Beach, FL, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board.

(b) Maintaining a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

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

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

(a) Rescind or revise the Mutual Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions and does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 14 days after service by the Region, post at its facility at Deerfield Beach, Florida, and any other facility where the Mandatory Arbitration Agreement has been in effect, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 12 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, 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. 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 August 3, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 12 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.

Dated, Washington, D.C. January 3, 2012

Mark Gaston Pearce, Chairman

Craig Becker, 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 a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a mandatory arbitration agreement that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the Mutual Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions and does not restrict employees' right to file charges with the National Labor Relations Board.

WE WILL notify employees of the rescinded or revised agreement, including providing them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

D. R. HORTON, INC.

John F. King, Esq., or the General Counsel.
Mark Stubley, Esq. & Bernard P. Jeweler, Esq., (Ogletree Deakins , for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This matter arises out of a consolidated complaint and notice of hearing issued on November 26, 2008, against D.R. Horton, Inc. (the Respondent), stemming from unfair labor practice (ULP) charges filed by Michael Cuda, an individual. The complaint, as amended, alleges that the Respondent violated Section 8(a)(1) and (4) of the National Labor Relations Act (the Act) by maintaining and enforcing individual arbitration agreements that employees have been required to execute as a condition of employment. [1]

[29] 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."

[1] On April 20, 2009, the Regional Director issued an order severing cases, approving withdrawal of certain allegations of complaint, and approving withdrawal of charge in Case 12–CA–25766. As a result,

Pursuant to notice, I conducted a trial in Miami, Florida, on November 8, 2010, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

1) Has the Respondent violated Section 8(a)(1) by maintaining and enforcing a mandatory arbitration agreement with its employees that unlawfully prohibits them from engaging in protected concerted activities, including joint arbitration claims or class action lawsuits?

2) Do such agreements lead employees reasonably to believe that they are barred or restricted from filing charges with the NLRB, thereby violating Section 8(a)(4) and (1)?

Facts

Based on the entire record, including testimony, documents, and stipulations, as well as the thoughtful post trial briefs filed by the General Counsel and the Respondent, I find the following.

The salient facts are undisputed. The Respondent, a Delaware corporation with an office and place of business located in Deerfield Beach, Florida (the facility), is engaged in the business of building and selling homes. The Respondent has admitted Board jurisdiction as alleged in the complaint, and I so find.

In January 2006, Respondent, on a corporate-wide basis, implemented a policy of requiring each current and new employee to sign a mutual arbitration agreement as a condition of employment.[2] The agreement provides, inter alia, that all employment disputes and claims shall be determined exclusively by final and binding arbitration before a single, neutral arbitrator. Specifically included are claims for discrimination or harassment; wages, benefits, or other compensation; breach of contract; violations of public policy; personal injury; and tort claims. In reference to employees' statutory rights, the only express exclusions are employee claims for workers' compensation or unemployment benefits.

Paragraph six of the agreement states:

> [T]he arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

At around the time of the distribution of the arbitration agreement to employees, the Respondent provided facility supervisors with a list of employees' frequently asked questions and the appropriate responses.[3] One of the instructions was to tell employees who expressed concern about the scope of the agreement that the agreement applied to relief sought through the courts and that they would still be able to go to the EEOC or similar agency with a complaint. However, the Respondent did not provide these questions and answers to employees at the time, and there is no evidence it ever communicated to them the above clarification of the scope of the agreement to its employees.

By letter dated February 13, 2008,[4] Cuda's attorney, Richard Celler, notified the Respondent that his law firm had been retained to represent Cuda and a class of similarly situated current and former "Superintendents" the Respondent employed on a national basis, to contest the Respondent's "misclassification" of them as exempt employees under the Fair Labor Standards Act.[5] The letter went on to state it constituted formal notice of a request to commence the arbitration process under paragraph 3 of the arbitration agreement. By letter of the same date, Celler advised Respondent his firm was also representing five other named employees.[6] By letter of February 21, Celler notified Respondent he was similarly representing employee Mario Cabrera and a class of similarly situated current and former "Superintendents" Respondent employed on a national basis.[7]

By letter of March 14, Michael Tricarloo, Respondent's counsel, replied to Celler's February 13 letter concerning the five-named employees.[8] Citing the language in paragraph 6 barring arbitration of collective claims, he denied the February 13 letter constituted effective notice of intent to initiate arbitration. For the same reason, Ticarloo, by letter of March 20, denied the validity of Cabrera's notice of intent.[9]

Analysis and Conclusions

Preliminarily, in reaching my conclusions about the legality of the provisions in question, I do not rely on the Region's initial determination or the contrary result of the General Counsel's Office of Appeals.[10] Further, I will not consider as dispositive Memorandum GC-10-06, cited in the Respondent's brief (at 5). The Board has repeatedly held that policies set out in the General Counsel's Casehandling Manual are not binding on the Board (or the General Counsel, for that matter). *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 553 fn. 4 (2007); see also *Children's National Medical Center*, 322 NLRB 205, 205 fn. 1 (1996) . The same logic applies to other internal pronouncements the General Counsel issues.

I. DOES THE MANDATORY ARBITRATION AGREEMENT VIOLATE SECTION 8(A)(1) BY UNLAWFULLY PROHIBITING EMPLOYEES FROM ENGAGING IN PROTECTED CONCERTED ACTIVITIES?

Section 7 of the Act, as amended, 29 U.S.C. § 157, provides in relevant part that employees have the right to engage in concerted activities for their "mutual aid or protection." The Supreme Court has held that this "mutual aid or protection" clause encompasses employees acting together to better their working

co-respondent DHI Mortgage Co. LTD, a subsidiary of the Respondent, was removed from the complaint. Accordingly, I will not address evidence that pertained to it as distinct from the Respondent per se.

[2] Jt. Exh. 2.

[3] E. Exh. 1.

[4] All dates hereinafter occurred in 2008 unless otherwise stated.

[5] Jt. Exh. 4.

[6] Jt. Exh. 5.

[7] Jt. Exh. 6.

[8] Jt. Exh. 8.

[9] Jt. Exh. 10.

[10] See E. Exhs. 3 & 2, respectively.

conditions through resort to administrative and judicial forums. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–567 (1978). In *Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1536 (11th Cir. 1987), the Circuit Court cited *Eastex* for the proposition that Section 7 is liberally construed to protect a broad range of employees concerns. Filing a class action lawsuit constitutes protected activity unless done with malice or in bad faith. *Harco Trucking, LLC*, 344 NLRB 478 (2005); *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005).

The crux of the matter here is the efficacy of a mandatory arbitration provision that restricts employees' from joining arbitration claims or collectively seeking recourse outside of arbitration. The General Counsel does not contend arbitration agreements are per se unlawful (GC br. at 12).

ndeed, decisions of the Supreme Court in recent years reflect a strong sentiment favoring arbitration as a means of dispute resolution. A leading case in the employment area is *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Therein, the Court held an Age Discrimination in Employment Act (ADEA) claim can be subject to compulsory arbitration. The Court reviewed the Federal Arbitration Act (FAA), originally enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code, concluding its provisions manifest a "'liberal federal policy favoring arbitration agreements.' *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)." Id. at 25 (footnote omitted).

The Court went on to state (Id. at 26) (citations omitted):

> Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." . . . [T]he burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims . . . . "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."

The Court noted an individual ADEA claimant subject to an arbitration agreement was still free to file a charge with the Equal Employment Opportunity Commission, even though barred from instituting private judicial action.

In *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1465 (2009), the Court held the *Gilmer* Court's interpretation of the ADEA fully applied in the collective-bargaining context so that a provision in a collective-bargaining agreement requiring union members to arbitrate ADEA claims was enforceable as a matter of federal law.

The Eleventh Circuit Court of Appeals has also expressed judicial support for the use of arbitration in the employment arena. See *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) ("[C]ompulsory arbitration agreements are now common in the workplace, and it is not an unlawful employment practice for an employer to require an employee to arbitrate, rather than litigate, rights under various federal statues, including employment-discrimination statutes"); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1313 (11th Cir. 2002) ("[A]rbitration agreements encompassing claims brought under federal employment discrimination statutes have also received near universal approval").

I am not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims. On the other hand, in *Stolt-Nielsen S.A. v. Animal Feeds*, 130 S. Ct. 1758, 1773–1775 (2010), the Supreme Court emphasized the consensual nature of private dispute resolution and held "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so" (emphasis in original).

In light of the above pronouncements of the Supreme Court and the Eleventh Circuit Court of Appeals, and the absence it appears of direct Board precedent, I decline to conclude that the provision in question violates Section 8(a)(1) by unlawfully prohibiting employees from engaging in protected concerted activities.

DOES THE MANDATORY ARBITRATION AGREEMENT VIOLATE SECTION 8(A)(4) AND (1)BY LEADING EMPLOYEES REASONABLY TO BELIEVE THEY CANNOT FILE CHARGES WITH THE NLRB?

In at least two cases, the Board has dealt with the issue of mandatory arbitration policies in unorganized workforces. In *U-Haul Co. of California*, 347 NLRB 375 (2006), enforcement granted, 255 Fed.Appx. 527 (D.C. Cir. 2007), rehearing en banc denied (2008), the Board addressed a mandatory arbitration policy that enumerated various types of disputes and claims and included "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations." The Board held this language unlawful under Section 8(a)(4) and (1) because employees reasonably could conclude they were precluded from filing NLRB charges. Id. at 377–378. The Board specifically rejected the respondent's argument the arbitration policy was not unlawful because the memo announcing it included the statement the "arbitration process is limited to disputes, claims or controversies that a court of law would be authorized to entertain or would have jurisdiction over to grant relief." As the Board explained (ibid):

> The reference to a "court of law" in this part of the memo does not by its terms specifically exclude an action governed by an administrative proceeding such as one conducted by the National Labor Relations Board. . . . Further, inasmuch as decisions of the National Labor Relations Board can be appealed to a United States court of appeals, the reference to a "court of law" does nothing to clarify that the arbitration policy does not extend to the filing of unfair labor practice charges. While . . . it is the NLRB, and not the individual, who presents the case to court, we believe that most nonlawyer employees would not be familiar with such intricacies of Federal court jurisdiction, and thus the language is insufficient to cure the defects in the policy.

Similarly, in *Bills Electric, Inc.*, 350 NLRB 292, 296

(2007), the Board found unlawful a mandatory arbitration provision providing that arbitration be "the exclusive method of resolution of all disputes," although it expressly stated that "this shall not be a waiver of any requirement for the Employee to timely file any charge with the NLRB, EEOC, or any State Agency." As the Board stated, after analyzing all of the factors present, "At the very least, the mandatory grievance and arbitration policy would reasonably be read by affected applicants and employees as substantially restricting, if not totally prohibiting, their access to the Board's processes." Ibid.

The ultimate test it appears, then, is determining whether nonlawyer employees would reasonably conclude they are barred or restricted from filing NLRB charges. Although the Respondent's instructions to its supervisors clarified the right of employees to access the Board's processes, such was never communicated to employees and therefore is of no operative effect. I conclude the language of the mandatory arbitration agreement, on its face, would lead employees reasonably to believe they could not file charges with the Board.

Even if I deemed the language to be ambiguous, it is well settled, as a general precept, ambiguous policies or rules that reasonably could be interpreted as violative of employee rights will be construed against the maker of the policy or rule and, even if not followed, will be found to violate the Act. *St. Francis Hotel*, 260 NLRB 1259, 1260 (1982); see also *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

Accordingly, I conclude Respondent's maintenance of the mandatory arbitration agreement violates Section 8(a)(4) and (1) of the Act.

CONCLUSION OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration provision that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violates Section 8(a)(4) and (1) of the Act.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The Respondent, D.R. Horton, Inc., Deerfield Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board.

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

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

(a) Rescind or revise the mutual arbitration agreement to make it clear to employees the agreement does not in any way bar or restrict their right to file charges with the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 14 days after service by the Region, post at its facility at Deerfield Beach, Florida, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 12 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, 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. 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 August 3, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 12 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.

Dated Washington, D.C., January 3, 2011.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
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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.

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Choose representatives to bargain with us on your behalf

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WE WILL rescind or revise the mutual arbitration agreement to make it clear the agreement does not in any way bar or restrict your right to file charges with the National Labor Relations Board.

WE WILL provide to you copies of the revised agreement, or notify you in writing we have rescinded the agreement.

D. R. HORTON, INC.

JD(SF)–04-12
Phoenix and Tucson, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

AMERICAN RED CROSS ARIZONA BLOOD SERVICES REGION

And **Case 28-CA-23443**

LOIS HAMPTON, an Individual

Mary Davidson, Esq., and *Paul Irving, Esq.*, Phoenix, AZ, for the General Counsel.
Howard Cole, Esq., Las Vegas, NV, *Abbe Goncharsky, Esq.*, and *Sarah Selzer, Esq.*, Phoenix, AZ, for the Respondent.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, on September 20-23 and November 14-16, 2011. Lois Hampton, an individual (the Charging Party or Hampton), filed an unfair labor practice charge in this case on April 12, 2011.[1] Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a Complaint and Notice of Hearing (the complaint) on June 30, 2011. The complaint alleges that American Red Cross Arizona Blood Services Region (the Respondent, the Employer, or the Red Cross) violated Section 8(a)(1) of the National Labor Relations Act (the Act).[2] The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[3] I now make the following findings of fact and conclusions of law.

---

[1] G.C. Ex. 1(a) and 1(b) establish the filing and service of the charge as alleged in the complaint.

[2] At the hearing, the correct name of the Respondent, as reflected above, was stipulated to by the parties, and counsel for the General Counsel amended the formal papers to reflect that name.

[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

Findings of Fact

I. Jurisdiction

During the hearing, the parties agreed to the following jurisdictional facts as set forth in the Respondent's answer: The Respondent is a federally-charted, non-profit corporation headquartered in Washington, D.C. At all relevant times, it has had offices in Phoenix and Tucson, Arizona. Since October 12, 2010, it has been engaged in the collection, processing, and distribution of blood products in the State of Arizona.

Further, at the hearing, the Respondent admitted the allegations in the complaint that during the 12-month period ending April 12, 2011, the Respondent, in conducting its business operations, derived gross revenues in excess of $250,000; and during the same period it purchased and received at its Arizona facilities goods valued in excess of $50,000 directly from points outside the State of Arizona. In its answer, the Respondent admitted that "it falls within both the statutory and discretionary standards for exercise of jurisdiction by the Board."

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4]

II. Alleged Unfair Labor Practices

A. The Dispute

It is the General Counsel's contention that the Respondent discharged its employee Lois Hampton because she engaged in protected concerted activity. Allegedly, that activity included complaining to the Respondent's supervisors about working conditions, specifically the improper conduct of Hampton's immediate supervisor, Beverly Arriaga. The alleged protected concerted activity also included Hampton's conversations with other employees about this matter, and her efforts to garner support from her fellow employees. Further, the General Counsel contends that the Respondent has unlawfully maintained an allegedly overly-broad and discriminatory provision in its "Agreement and Acknowledgement of Receipt of Employee Handbook" form (the acknowledgment form), which employees are required to sign.

The Respondent denies the commission of any unfair labor practices. According to counsel for the Respondent, Hampton was fired because of her poor production and failure to achieve the blood drive goals set for her, and because she falsified information regarding those

[4] The parties could not agree on what period constituted "at all times material herein." Counsel for the Respondent offered to stipulate such material times would begin in August of 2010, which counsel argues "is the earliest named date as a relevant time in the complaint." However, counsel for the General Counsel would not agree to limit the phrase in this way. In any event, I do not believe this is a significant dispute. The Board's jurisdiction has been established, and those "times material" would include the entire period of the Charging Party's employment, during which time she is alleged to have engaged in protected concerted activity, as well as the period of time during which the Respondent is alleged in the complaint to have committed unfair labor practices. Those unfair labor practices alleged in the complaint do not run afoul of the statute of limitations under Section 10(b) of the Act. As I have so concluded, no further specific findings need be made.

drives, was deceptive and created "phantom" drives. According to the Respondent, Hampton's complaints about her supervisor's job performance or other concerted activity in which she may have engaged were unrelated to her termination. Further, counsel for the Respondent denies that the acknowledgment form, which employees were required to sign, was unlawful. In any event, the Respondent has recently changed the language on the acknowledgment form, which new language allegedly remedies any previous overly-broad and discriminatory provisions.

B. Background Facts

The Respondent is an autonomous region under the structure of the American Red Cross, a national organization that provides relief to victims of disaster, and helps individuals and organizations prepare for and respond to emergencies. The Respondent's principal office is in Tucson, Arizona, with a smaller satellite office located in Phoenix, Arizona. It provides blood services through voluntary blood donations collected at blood drives hosted by volunteer sponsor organizations held within the State of Arizona. The Respondent's Donor Recruitment Department (DRD) plans, coordinates, and implements the blood drives in Arizona, and is currently managed by Robert Meketa, who began working for the Respondent in the fall of 2009. Donor Recruitment Representatives (DRRs) recruit, retain, and manage the blood drive sponsors. Meketa has overall supervision of the DRRs, with direct supervision of those DRRs who work in Tucson, and with indirect supervision of those DRRs who work in Phoenix, where a DRR supervisor is located. The DRR supervisor in Phoenix from approximately June 2009 through March 25, 2011 was Beverly Arriaga.

Lois Hampton was first employed as a DRR in the Respondent's Phoenix office in February 2005.[5] It is uncontested that for the first three to four years of her employment, Hampton was a productive employee, with the General Counsel taking the position that she was a superior employee. The record evidence established that in January and April 2009, Hampton received two awards from the Respondent, one for "Outstanding Service 'Above & Beyond'" and the other for "Outstanding External Customer Service." (G.C. Ex. 26, 27.) Further, in May 2009, Human Resources Manager Laura Reed recognized Hampton for her "hard work and dedication during this time of transition" and awarded her an "interim hardship incentive equal to 10% of [her] current base salary." (G.C. Ex. 29.) However, it is important to note that these awards were given to Hampton just shortly prior to the time that Arriaga became her supervisor.

The DRRs are responsible for reaching specific monthly goals, measured in "blood units," for those blood drives that they arrange. According to Meketa's testimony, the basic requirement for each DRR is "roughly 500 units per month," but with that goal "fine-tuned" from month to month. He testified that such fine-tuning "has a lot to do with the account or accounts that are assigned to [each DRR]." The goals are set my management, with the supervisor in Phoenix typically making those assignments to the DRRs that she supervises. To some extent, the individual monthly goals are a product of the type of accounts assigned to each DRR. If in a given month a DRR has a drive scheduled with a particularly large account, that monthly goal would likely be in excess of the basic requirement. If the next month the DRR has only drives scheduled with small accounts, it would likely result in a monthly goal lower than the basic requirement. According to Meketa, the object is to "try to balance" each DRRs monthly goal so

[5] While counsel for the General Counsel's brief indicates that Hampton was hired in February 2006, Hampton's testimony was that she began her employment with the Respondent the previous year.

that over the course of a year the basic requirement is met. In this way, the expectation is that the region as a whole will meet the goal set for the region by the parent organization, the American Red Cross.

It appears from the testimony of the various current and former DRRs and from Meketa's own testimony that the monthly goals were somewhat fluid, and could change and be adjusted by management prior to the start of any given month, and even during a given month, if necessary. Both Meketa and the supervisor in Phoenix had the authority to change a DRR's goals if factors so warranted. Since there are frequently problems that develop in any blood drive that may serve to cause the blood collected to be lower than anticipated, the DRRs are actually expected monthly to book drives that would exceed 100% of goal, assuming all drives for the month met expectations.

Regarding the individual blood drives, each sponsoring organization would designate a blood drive coordinator (BDC) with whom a DRR would work to ensure the success of the drive. Each individual blood drive would have a goal as to a specific number of blood units expected to be collected during that drive. For sponsors that had held previous drives, the individual drive goals would usually be derived from the average of the previous three drives. However, that was not always the case, as other factors used in determining drive goals would include the date and time of the drive, and whether the employee complement had changed. The success of any particular drive was measured by the number of blood units collected. For the DRRs, their success and corresponding evaluations were measured in both their ability to meet goal each month, as well as the efficiency of each individual drive, meaning whether the individual drive met its goal.

The Respondent expects that its DRRs will book drives two or three months in advance and will remain in contact with the sponsoring organization's BDC during that period of time. It is the responsibility of the DRR to see that notices alerting employees/members of the sponsor to the location, time, and date of the drive are printed and delivered to the BDC. Further, the DRR is expected to coordinate with the BDC as to the location at which the blood will be given, and whether that will be a room made available by the sponsor, or a "bus" utilized for that purpose by the Respondent.

The Respondent's resources are obviously not unlimited. It has only a finite number of employees, equipment, and vehicles that can be devoted to the collection of blood on any given day. Accordingly, those resources must be properly allocated and shared among all the drives scheduled monthly by the DRRs. Therefore, the actual "booking" of drives by the DRRs is of critical importance to the Respondent's managers. It is the Respondent's Acquisition, Planning, and Scheduling Department that is ultimately responsible for coordination with the DRRs as to their scheduled drives and specific drive requirements, and for allocating resources to those drives.

During the hearing, a good deal of time and testimony was devoted to the mechanics of the booking process. Unfortunately, the parties disagree as to the specifics of that process. The testimony of current and former DRRs, and of Meketa, and of the Senior Manager, Acquisition, Planning, and Scheduling, Erna Goldkuhl, were somewhat at variance with each other regarding both the Respondent's stated requirements and the actual practice of booking drives. Further, the booking process has been a work in progress, with various adjustments, changes, and fine tuning to the process occurring throughout the last several years. In any event, I have attempted to reconcile the conflicting evidence to the extent possible, setting forth both the Respondent's stated position on the booking process, as well as the Charging Party's contention, shared by several other DRRs, as to how the process really worked in practice.

The Respondent's software system, known as "Hemasphere," is designed to maintain its state-wide blood drive calendar and allow the Respondent to allocate and track its drive resources. It is the Respondent's position that the Scheduling Department would not place a blood drive into Hemasphere until the DRR confirmed that the drive was an "actual drive," meaning that the DRR had already confirmed with the drive's sponsor the date, time, location, and size of the drive. However, according to the Charging Party, as well as former DRR Nikole Holverson and current DRR Christa Mitchell, in practice things were not so exact. In this regard, I credit the testimony of Mitchell, Holverson, and Hampton, as these DRRs generally supported each others testimony, and as the persons ultimately responsible for the success of the drives, they were in the best position to note how the booking system worked in practice, rather than just theoretically.

According to the testimony of the DRRs, blood drives put on the schedule were not necessarily fully confirmed. While that would have been ideal, Mitchell testified that only about "75 percent of the drives go as planned." She indicated that even after scheduling, the goal could change, or the equipment, the location, or time could change. As a preliminary step to placing a drive on Hemasphere, all the DRRs state-wide would attempt to place their drives on a master calendar. In this regard, on July 12, 2010, the Respondent held a "booking-meeting" or "booking-party," for all DRRs at its headquarters in Tucson. This was not the first such meeting of its kind, but was significant as it occurred at a time of transition for the scheduling process.

During this meeting, the DRRs were expected to place their anticipated blood drives on a master calendar, a white-board, for a three month period, indicating the date of the drive, the expected number of blood units to be collected, and whether a "bus," which was supplied by the Respondent, would be needed. Although the Respondent contends that these drives were intended to be "real" drives, the credible evidence in the form of the testimony of the DRRs indicates that these were merely anticipated or tentative drives. Meketa did clearly indicate to the DRRs that following such a meeting, they were to quickly contact their sponsor's blood drive coordinator (BDC) to confirm the date, time, place, and expected blood units of those drives placed on the master calendar. Once that was done, the DRRs were expected to submit a list of their drives to the scheduling department, which the DRRs claim was then responsible for placing the drives into Hemasphere within a few days. However, as the DRRs have noted, even after a drive was placed into Hemasphere changes could be made, and apparently the only really solid result of having a drive placing into Hemasphere was that the Respondent was committing its resources to that drive.

In any event, as noted, the booking system was a work in progress, with DRR Holverson testifying that originally it was necessary to have Hemasphere confirm that the resources were available for a drive before that drive was confirmed with the sponsor. At some point the procedure changed to more reflect that system as discussed above. But unfortunately, it is difficult to determine precisely when this change was fully implemented. Erna Goldkuhl testified that there had been a "significant disarray in booking drives," so that a new system was announced in May 2010. However, she admits that there was a "learning curve" with the new system. She acknowledges that this was apparent following the July 2010 booking meeting, when most of the drives placed on the master calendar were "holds," until such time as the DRRs could confirm the drives with their sponsors.

While I can not definitively determine to what extent the Respondent had attempted to fully implement the new booking system as of the time of the July 12 booking meeting, I do find that even as of that date the system continued to be in disarray. This leads me to conclude, based primarily on the credible testimony of the DRRs, that it was reasonable as of that date for the DRRs, including Hampton, to believe that drives placed into Hemasphere could legitimately

constitute "holds," which still needed confirmation from the sponsor, and could, therefore, be altered in Hemasphere if necessary. In fact, the Respondent utilized an "exemption" form for making changes to drives that had already been placed into Hemasphere, which form apparently was used with some regularity.

There is no question that Hampton did not get along with Beverly Arriaga who became her supervisor in the summer of 2009. All parties seem to agree that Arriaga was an abusive manager, although they may somewhat disagree as to the extent of that abuse. All the DRRs who testified provided lurid details of their abuse at the hands of Arriaga. She was a micro-manager who treated the DRRs with disrespect and used intimidation, threats, histrionics, and verbal abuse to supervise them on a daily basis. It appears that she caused a constant turnover of DRRs in the Phoenix office. In an effort to unite against her and protect each other from her abuse, the DRRs maintained a kind of code to alert each other as what type of mood Arriaga was in on any given day. Upon entering the office, the DRRs would inquire as to the weather, meaning how Arriaga was acting. A report that the weather was stormy meant that she was in a bad mood and they should take care in dealing with her.

Hampton testified that in August or September of 2009, shortly after Arriaga became the supervisor in the Phoenix office, she and Ronda Brown, another DRR, began to discuss the problems and complaints that they had with Arriaga. In the late summer and early fall that year, Hampton called the Human Resource Manager, Laura Reed, in Tucson and complained about Arriaga. However, matters got progressively worse, and later in the fall Brown and Hampton were in Tucson for a meeting and used the opportunity to talk in person with Reed about Arriaga's abusive behavior, which included threats of discharge, yelling, screaming, and an overall "hostile work environment." This testimony was unrebutted as Reed, who was no longer employed as the Respondent's Human Resource Manager in Tucson, did not testify. Conditions in the Phoenix office did not improve, and in November Brown resigned. That left only two DRRs in the Phoenix office, the Charging Party and Nikole Holverson. While the Phoenix office was designed to be a three DRR office, because of turnover, that has frequently not been the case.

In his post-hearing brief, counsel for the Respondent acknowledges that Hampton raised her concerns about Arriaga on "multiple occasions with Robert Meketa." In March 2010,[6] all the DRRs were in Tucson for a training session. Hampton used that opportunity to discuss her concerns about Arriaga with Meketa. She again expressed her complaints about Arriaga to Meketa in late June in Tucson. Additionally discussed at that time, according to both Meketa and Hampton, was Meketa's concern that the Charging Party's work's "performance was slipping," and that she was "not making goal." According to Meketa, Hampton did not really offer any excuse for her recently poor production, except perhaps the difficult work environment created by Arriaga. Meketa testified that he told Hampton that "she needed to buckle down and get the job done." At the time of the meeting, Meketa knew that Hampton was going to be placed on a Performance Improvement Plan (PIP) within the next week or two, and so was somewhat uncomfortable having this conversation with her.

It is very significant that Meketa acknowledges that during the meeting he had with Hampton in February 2010[7] where she complained about Arriaga's conduct, that he "counseled [Hampton] to take a leadership role to bring the team together." He considered Hampton to be

[6] All remaining dates are in 2010, unless otherwise indicated.

[7] While Meketa places this meeting in February, it is more likely that it occurred the following month and was the March meeting referred to by Hampton.

one of the "senior people," and told her "to try to make it a team-enhanced work environment and not to be the one constantly behind the scenes or in front of the scenes, prodding, stirring the pot or whatever." He testified that he "counseled [Hampton] on this several times."

The testimony of Hampton, Holverson, and Christa Mitchell, who was hired as a DRR in the Phoenix office in May 2010, was uncontested that Arriaga was continuing her abusive behavior, and that they would discuss on an almost daily basis what do to about their mistreatment. According to Holverson, it was Hampton who would stand up to Arriaga when the other DRRs in the office were fearful of doing so. She described Arriaga as engaging in "screaming matches" when Hampton would stand up to her. Holverson testified that she did not want to "emulate" what Hampton did because Arriaga was acting in a very negative way towards Hampton. Holverson characterized the situation as being "like the tall nail gets hammered down....It was not a good environment to question or challenge anything."

In mid-June, Arriaga gave Hampton a form to sign acknowledging the receipt of the employee handbook. A few days after receiving this "Agreement and Acknowledgement of Receipt of Employee Handbook " form, Hampton informed Arriaga that she did not agree with some of the language on the form, specifically that language listing the actions that the Respondent could unilaterally take against an "at-will" employee. She told Arriaga that she wanted a new form to sign that would show she specifically did not agree with the language to which she objected. Hampton testified that Arriaga "was agitated that [she] wanted to do this." However, Arriaga did ultimately allow Hampton to cross out the language on the form that she found offensive, and so Hampton signed a redacted copy of the form. (G.C. Ex. 37, G.C. Ex. 79, "Exhibit 2.") Hampton discussed the acknowledgement form with the other DRRs in the Phoenix office, counseling Holverson and Mitchell to be careful what they signed.

As of July 1, the Respondent placed Hampton on a 60 day Performance Improvement Plan (PIP). Hampton was so advised by Arriaga and Linda Filep,[8] Human Resource Manager, on July 6. The decision to place Hampton on this PIP was made by Meketa, with input from Arriaga, Filep, and the Respondent's CEO, Nancy Mowry. According to the memorandum placing Hampton on the PIP, the reasons for the Respondent having taken the action included: 1. a failure to meet goal 6 months out of 12 months for the fiscal year, 2. a failure to be booked out a minimum of 3 months, and 3. a failure to provide excellent customer service and timely follow up with sponsors. (G.C. Ex. 35, Res. Ex. 11.[9])

Hampton testified that Arriaga told her not to discuss her PIP with anyone as "it was personal and confidential." However, Hampton did discuss the PIP with DRRs Mitchell and Holverson, as well as with Jayne Hudson, a customer service representative in the Phoenix office. According to Hampton, during a break room conversation with her co-workers about her PIP, Hampton raised the issue of their ongoing problems with Arriaga, that matters were not improving, and the impact the stress was having on their health. Hampton testified that about

[8] Filep had replaced Reed in that position.

[9] There are two copies of the PIP in evidence. The PIP makes reference to an "attached spreadsheet." That spreadsheet is the final page of Res. Ex. 11, while G.C. Ex. 35 does not contain the spreadsheet. During the hearing, the parties disagreed over whether the PIP document given to Hampton contained this spreadsheet. In any event, based on the record evidence and the context in which these documents were admitted into evidence, I am of the view that it is more likely than not that the PIP received by Hampton included the spreadsheet. Accordingly, I find that the PIP document received by the Charging Party did in fact include the spreadsheet, as reflected in Res. Ex. 11.

one week later she was orally reprimanded by Arriaga for "saying harassing things about her in the break room." Arriaga also complained that Hampton "was talking about her, and [Hampton] wasn't supposed to be doing that." Allegedly Arriaga also reminded Hampton that she had "told [her] not to talk about [her] PIP." As Arriaga did not testify at the hearing, the evidence of this conversation went unrebutted.

On about July 12, there was a "booking meeting" held in the Respondent's Tucson office, attended by all the DRRs, including those from Phoenix. The purpose of the meeting was to have the DRRs place their blood drives for a three month period on a master calendar white-board, also indicating the number of anticipated blood units for each drive, as well as whether the Respondent would need to provide a "bus" for any specific drive. This information would allow the Respondent to plan the allocation of its state-wide resources for those three months. Earlier in this decision I indicated at some length the parties differing positions regarding the definitive nature of the selections made by the DRRs. As noted, the Respondent takes the position that the drives listed on the calendar were expected to be "real drives," with relatively few changes occurring, while the General Counsel contends that the DRRs understood that these drives were merely "anticipated drives," which still needed sponsor confirmation and might be altered significantly, even after they were entered into Hemasphere.

The problems in the Phoenix office reached a boiling pointing in early August. Arriaga was apparently upset with a suggestion made by Hampton and Holverson as to how blood drive information was to be entered on a spreadsheet. Arriaga pounded on Hampton's desk and shouted, "Lois, you're not the manager. I want it done this way." Arriaga took Holverson into her office, from which Hampton and the other employees could hear yelling, screaming, and the pounding on desks. Subsequently, Holverson exited from Arriaga's office crying.

The three DRRs went to lunch together and talked about the situation. They decided that immediate action needed to be taken. When they returned to the office, calls were made to management in Tucson. However, there is some dispute as to exactly who made the calls.

According to Hampton, she called Meketa, spoke with him for 20 minutes, told him what had transpired, and regarding Arriaga said, "I think this woman is crazy, and I don't know what she's going to do, but she could go home and grab a gun and come back and shoot us all." Hampton claims that Meketa told her to tell "everyone to go home." However, according to Meketa, he believes it was Holverson who called him and reported the incident. He testified that she was very upset, describing a "confrontation" between Arriaga and Hampton, which "escalated to the point where people were yelling and shouting at each other." Meketa claims that he told Holverson to go home and to tell Mitchell to do the same. Meketa also sent Arriaga home, and then instructed Linda Filep to conduct an investigation of what had transpired in Phoenix. Filep testified that it was actually Arriaga who called first to tell her what had just happened in Phoenix, followed by calls from Holverson and Hampton.

In any event, Meketa and Filep were concerned enough about the incident to drive to Phoenix to speak with Arriaga and the three DRRs. The record evidence is somewhat unclear as to when the managers made this trip to Phoenix, whether it was the following day, or as late as a week later, or even whether there were actually two trips made during this time period. In any event, Meketa and Filep spoke with the three DRRs both as a group and individually. They also spoke separately with Arriaga. There is no question that the DRRs expressed their distress over the way Arriaga was managing the office and her behavior towards them. As a result of the investigation of the incident, the Respondent placed Arriaga on a PIP for poor performance as a supervisor, effective August 10. (G.C. Ex. 11.) The DRRs were told that while Arriaga was going to return to the office as their supervisor, that they were now permitted to work at home

three days a week. Presumably, this would ease the tension in the office, as they would have less contact with Arriaga.

When Holverson met with the managers she informed them that she was going to resign, making it clear that she could no longer handle the stress in the office and the way Arriaga treated the staff, creating an abusive work environment. When Hampton met with Filep and Meketa, she reminded them that she had told them for some time that things were going to escalate, and they finally had. She told them that she was "scared for her life." Clearly, Hampton was not happy with the news that Arriaga would be returning to the office. According to Hampton, Meketa reiterated that she could now work at home for part of the week, so things "will all work out." Filep allegedly added that Hampton had brought some of these problems on herself by "agitating [Arriaga,]" as Hampton had allegedly "talked back to her."

It is important to note certain comments that Meketa made while testifying under cross-examination by counsel for the General Counsel. Counsel asked him if it was true that during the 60 day period that Hampton was on her PIP that he had heard she was talking with the other DRRs about the Employer and about Arriaga. Meketa responded that he "had heard reports from different individuals that, yes, she was talking to people." He testified that he "wouldn't phrase the word talking. Inciting would be a better word. Again, stirring the pot. In other words, that she was bringing these issues up not at their request, but she was trying to cause trouble. That's the way [he] read it, interpreted the statements that [he] heard from other people." He felt that Hampton was being unprofessional and unproductive. Meketa went on to say that "there was a lot of turmoil" in the Phoenix office, that "people were going at it with each other," which he attributed to "a joint effort by Ms. Hampton and Ms. Arriaga."

Holverson gave several weeks notice to the Respondent of her resignation, during which period of time her accounts were distributed to the remaining DRRs, Mitchell, Hampton, and Arriaga. On August 24, Hampton wrote an email to Meketa, with the assistance of Holverson, complaining about the distribution of Holverson's accounts. Hampton stated in the email that she was concerned about the decision to have 175 units placed under Arriaga's name, but managed by Jayne Hudson. Hudson was the customer service representative in Phoenix, and Hampton felt that Hudson did not have adequate training as a DRR, and that both she and Arriaga were too busy to properly handle these accounts.

The following day, August 25, Arriaga presented Hampton with her yearly performance review. (G.C. Ex. 41.) Hampton received an "unsatisfactory" rating of one (on a scale of one to five) for not meeting the core competence of her monthly goals and for not meeting the core competence of booking her calendar 90 days in advance during the second half of the preceding year. Hampton's overall performance rating for the year was two (on the one to five scale), with two reflecting that "more is expected." This rating reflected the Respondent's contention that Hampton had missed reaching her performance goals for seven out of twelve months. It should be noted that under the "Ethics and Integrity" portion of the review, Arriaga wrote: "This is an area of concern because of gossip, not maintaining confidentiality and negative attitude that affects the team. This has been addressed with Lois." Hampton testified that she understood this comment to refer to the one conversation that she had with Arriaga about Hampton "gossiping" in the break room, when she was discussing Arriaga and Hampton's PIP with her coworkers, and during which Arriaga had told her that she was not supposed to discuss her PIP with anyone.

As of September 1, Hampton's PIP was extended for an additional 30 days. Arriaga presented her with the memorandum extending the PIP. (G.C. Ex. 47.) The document states that: "Although you have made strides in your bookings, not making goal for the first two months

of this FY, along with having more than 3 drives in a month (you had five) that fell below 70% of efficiency, and behavior concerns, constitute grounds to be placed on a PIP." The document showed specifically that in July only 56% of Hampton's goal was collected, but that in August 99% had been collected. It also indicated the future months where Hampton had failed to meet the minimum booking expectations, but complemented her achievement none-the-less, stating that, "You have made great progress with booking out thus far and are almost there." However, it should be noted that Arriaga also wrote, in part: "complaints from other employees continue as to your negative behavior and gossiping with several internal staff members in both Phoenix and Tucson. You have received repeated warnings about your negative attitude, unprofessional behavior with your manager and gossiping." According to Meketa, the decision to extend Hampton's PIP was made by him, with input from Arriaga, and Filep. It should also be added that at some point, although the exact date is uncertain, Meketa removed Arriaga from the PIP that she had been on since the incident occurring in the Phoenix office in early August.

Two days after having her PIP extended, on the Friday afternoon before the Labor Day weekend, Hampton sent an email to Meketa and Arriaga informing them that she was taking an indefinite medical leave of absence,[10] effective immediately. (G.C. Ex. 12.) Her first day of absence was Tuesday, September 7. At her request, Hampton's medical leave was extended a number of times, and untimely, she was off from work approximately 12 weeks.

Over the Labor Day weekend, Hampton sent emails to her managers referencing approximately 10 blood drives that she was working on, indicating the status of those drives and certain issues related to them. (G.C. Ex. 57.) Hampton testified that she also sent a long email to Meketa and Arriaga describing her upcoming drives and what still needed to be done on those drives. However, she never made a copy of this alleged email, and the Respondent's managers testified that they never received any such communication. It is undisputed that Meketa informed Hampton on approximately September 10 that she was to not perform any work for the Respondent while she was out on medical leave.

Hampton testified that she expected that while out on medical leave, her active blood drives would be assigned to other DRRs to complete, which procedure was used when DRRs were out of the office on vacation, medical, or other leave. In fact, it is the Respondent's position that Hampton's drives, those of which management was aware, were assigned to other employees in the Phoenix office who were to continue to process them. At the time that Hampton went out on medical leave the other employees in the Phoenix office who were in a position to do so were Arriaga, Christa Mitchell, and the customer service representative, Jane Hudson.

The Respondent contends that Arriaga, Mitchell, and Hudson were each allocated certain of Hampton's drives and proceeded to contact the sponsors and the blood drive coordinators (BDC) responsible for those drives. The intent was to continue those drives to completion and ensure their ultimate success. However, the Respondent also contends that in the course of doing so, the employees assigned the drives in Hampton's absence uncovered serious problems with many of the drives, which problems indicated that Hampton had at best been careless and inattentive to details in scheduling drives, and at worst she had been

[10] Although the email mentions the Family Medical Leave Act (FMLA), because of the size of the Phoenix office, it does not qualify under the FMLA. Accordingly, those employees who have medical issues are simply given a medical leave of absence.

fabricating blood drives in an effort to "fraudulently" improve her statistics. The Respondent takes the position that such conduct, along with her history of poor production, ultimately led to the decision to terminate Hampton.

According to the Respondent, it uncovered a disturbing pattern showing that Hampton had engaged in numerous efforts to artificially increase her performance data. It appears that the Respondent considered most egregious Hampton's alleged placement of multiple blood drives on the Hemasphere calendar without confirming the details of the drive, thereby committing the Respondent's limited resources without justification. Hampton denies any such conduct. The dispute is really with the parties different opinions as to what constitutes a confirmed drive. As I discussed earlier in this decision, it is the position of the Respondent that drives should not be placed into Hemasphere unless and until the DRR has confirmed with the sponsor all the various details of the drive. However, Hampton, Holverson, and Mitchell contend that the Respondent's stated position did not reflect actual practice. They testified that it was not unusual to have anticipated drives placed into Hemasphere even before the sponsor had agreed to all the details, which sometimes resulted in changes being made in Hemasphere.

The Respondent offered evidence that six different blood drives that were booked into Hemasphere by Hampton had not been confirmed by the sponsors' blood drive coordinators, specifically: JDA Software, the Knights of Columbus-Glendale, the Morristown Fire Department, Superior High School, the Outlets at Anthem, and Anthem Community. (Res. Ex. 24; 15; 16; 13; 1-2; 19.) As is reflected in the documentation, some of these sponsors' BDCs indicated that they had never even agreed to a date for the drive, let alone a time, place, or number of anticipated units of blood.

During her testimony, Hampton did not contend that she had finalized and confirmed all the details of the drives with the BDCs before having the drives placed into Hemasphere. She merely alleged that she followed the standard practice at the time and had anticipated drives placed into Hemasphere. She argued that in some cases Laura Mew, the scheduler, was late in adding these drives into Hemasphere, and so Hampton did not have an opportunity to confirm the drives with the BDCs before she left to go on medical leave. Hampton testified that she expected that in her absence, whichever DRRs were assigned to complete her drives would take care of confirming those drives with the BDCs.

It is important to note that Mitchell testified that she was not assigned to take care of Hampton's work while Hampton was on leave and was not aware of anybody being assigned to do so. However, Mitchell testified that Arriaga asked to be informed whenever Mitchell had any conversations with Hampton's BDCs. According to Mitchell, Arriaga said, "I want to know if there are any conflicts, if anything arises with Lois' accounts. I'm keeping track of this." Mitchell felt that the clear implication was that "while [Hampton] was away, Arriaga wanted to build a case against [Hampton]."

Of course, the Respondent takes the position that Hudson and Arriaga uncovered these deficiencies in Hampton's blood drives only in the course of trying to complete the work that Hampton had started. It then allegedly became apparent to management that Hampton had filled her calendar with blood drives that were not actually booked. According to the Respondent, Hampton's deceitful efforts had made it appear that her performance had improved, when actually it had not. This improvement had been the basis for the Respondent's willingness to extend Hampton's PIP (G.C. Ex. 47.), rather than to simply terminate her.

In addition to having drives placed into Hemasphere that were not fully confirmed with the BDCs, the Respondent contends that it also uncovered other deficiencies in Hampton's

work. Maricopa County was one of the Respondent's largest accounts. Hudson, who was assigned many of Hampton's drives to complete, testified that while Hampton had confirmed two separate blood drives with the Maricopa County BDC, she had never entered the information for either drive into Hemasphere. The result was that the drives could not be conducted on the dates agreed to with the BDC, as Hampton had failed to reserve the necessary resources by entering the drives into Hemasphere. Further, the Respondent discovered that in several instances Hampton had artificially increased the collection goal for drives without justification. Normally the appropriate goal for a blood drive is based on the average from the past three drives, with an increased goal approved for documented reasons. However, it is the position of the Respondent that Hampton increased certain drive goals without proper justification simply in an effort to improperly inflate her statistics. Finally, the Respondent discovered that Hampton had scheduled two blood drives at the same site within 56 days of each other, which is an improper procedure since donors are ineligible to give blood again within that limited period of time.

Based on the discoveries made during Hampton's medical leave, the Respondent concluded that she had attempted to deceive her managers into believing that her production and efficiencies were better than was truly the case. This created problems for the Respondent, the most significant of which was the commitment of resources for "phantom" drives, depriving genuine drives of those limited resources needed to successfully complete them.

On the other hand, Hampton testified, with some support from the other DRRs, that those drives that were unfinished at the time she went on medical leave required attention and continued processing. She testified that had she been at work, these problem issues would not have developed, as she would have completed the processing and brought these drives to successful conclusions. Hampton places most of the blame for these problems on the alleged failure of the Respondent to properly monitor her drives. The General Counsel contends that such inaction was deliberate, and an effort by Arriaga to make Hampton look bad, and, thus, give management a pretext for discharging her.

Meketa testified that he made the decision to terminate Hampton in consultation with, and following the approval of, Darrin Greenlee, the Respondent's CEO. In his post-hearing brief, counsel for the Respondent stresses that Arriaga did not have the authority to make that determination. Meketa instructed Arriaga to work with Linda Filep to draft Hampton's termination notice. That Notice of Termination dated November 13 charged that Hampton had failed to meet her goals, failed to have her calendar booked for future months, failed to have efficient drives, and failed to provide excellent customer service. (G.C. Ex. 13.)

Hampton was terminated the day that she returned from medical leave, on November 29. The termination notice was presented to her by Arriaga in the presence of Filep. Hampton disputed the reasons given for her termination, as is set forth above. Of course, it is the position of the General Counsel that Hampton was fired because she led the concerted efforts by the DRRs in Phoenix to have management take action against Arriaga who had created a hostile work environment in that office. Allegedly, in furtherance of the Respondent's efforts to terminate Hampton for having engaged in protected concerted activity, Arriaga had sabotaged the processing of Hampton's blood drives while she was on medical leave.

The Respondent acknowledges that Hampton and other DRRs complained about Arriaga's supervisory performance, but denies that those complaints were in any way related to Hampton's ultimate termination. The Respondent points to its having placed Arriaga on a PIP in

August as an indication that it took the complaints from the DRRs about her abusive behavior seriously, and, rather than resenting the complaints that Hampton and others raised, the Respondent relied on those complaints to take appropriate action against Arriaga.

Further, the Respondent offered evidence that when the DRRs in the Phoenix office continued to complain about Arriaga's poor performance as a supervisor, it terminated her employment effective March 25, 2011. Based on complaints that the Respondent received from Mitchell, and the new DRR in the Phoenix office, Rachael Greathouse, Meketa testified that he concluded Arriaga had reverted to the unacceptable behavior that she had exhibited in August 2010. This resulted in the decision to terminate her. (G.C. Ex. 9.) The Respondent argues that of all the DRRs who complained about Arriaga, namely Brown, Holverson, Mitchell, Hampton, and Greathouse, the only one to be terminated or otherwise disciplined was Hampton. In fact, Greathouse was ultimately promoted to supervisor, in place of the terminated Arriaga. This, the Respondent contends, is proof that Hampton's complaints about Arriaga were unrelated to Hampton's termination.

Finally, as was mentioned earlier, the General Counsel contends that the Respondent violated the Act by maintaining an allegedly overly-broad and discriminatory provision in an "Agreement and Acknowledgement of Receipt of Employee Handbook" form, which among other matters attempts to define an "at-will" employment relationship. In that definition is contained the following language: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." Employees are required to sign the acknowledgement form, whereby they acknowledge receipt of the employee handbook and agree to abide by the rules set forth in the handbook. As was noted earlier, Hampton objected to signing the acknowledgement form as worded, and was reluctantly permitted by Arriaga to strike out certain language in the form, including the above referenced language, before signing the form. (G.C. Ex. 4, 37, 38.)

According to the testimony of Linda Filep, she sent to the Respondent's managers by email dated September 19, 2011, a memorandum attaching a new acknowledgement form and "updated statement" regarding at-will employment, which "**replace[d]** the at-will employment policy set forth in the employee handbook (emphasis as is reflected in the email). Filep testified that the memorandum and form were to be distributed by the Respondent's managers to all employees, who were then to sign the acknowledgement form and return it to the human resources department. The attached new acknowledgment form did not contain the language that the General Counsel contends was unlawful. (Res. Ex. 25). The Respondent continues to deny that the cited language in the original acknowledgement form was in any way unlawful, and contends that the language was deleted merely out of "an abundance of caution." Further, counsel for the Respondent argues that as the alleged offending language has now been deleted, the allegation in the complaint dealing with this alleged unlawful language is now "moot."

III. Legal Analysis and Conclusions

A. Protected Concerted Activity

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…." Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1987); *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising the

right to engage in protected concerted activity. *Triangle Electric Co.,* 335 NLRB 1037, 1038 (2001); *Meyers Industries,* 268 NLRB 493, 479 (1984). An employer violates Section 8(a)(1) of the Act when it discharges and employee, or takes some other adverse employment action against him, for engaging in protected concerted activity. *Rinke Pontiac Co.,* 216 NLRB 239, 241, 242 (1975).

The Board, with court approval, has construed the term "concerted activities" to include "those circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries, Inc.,* 281 NLRB 882 (1986), affirmed 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); See *Mushroom Transportation Co., v. NLRB,* 330 F.2d 683, 685 (3rd Cir. 1964) (observing that "a conversation may constitute a concerted activity although it involves only a speaker and a listener" if "it was engaged in with the object of initiating or inducing or preparing for group action or…it had some relation to group action in the interest of employees"); See also *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing as an example "the lone employee" who "intends to induce group activity").

In the matter before me, there can be no doubt that Lois Hampton was engaged in protected concerted activity with other DRRs in the Phoenix office. The evidence is unrebutted that over an extended period of time, Hampton had numerous conversations with Brown, Holverson, and Mitchell regarding their displeasure with the manner is which Arriaga was supervising them. Hampton spoke with Brown, which conversations led to complaints made to Human Resource Manager Reed and Recruitment Manager Meketa, as well as repeated conversations with Holverson and Mitchell, which conversations led to complaints made to Human Resources Manager Filep and again with Meketa. While Hampton seemed to be the most outspoken of any of the DRRs, all the representatives shared the same general concern that Arriaga was abusive towards them, creating a hostile work environment through intimidation, threats, yelling, banging on desks, and micro-managing the staff. Obviously, such concerns involved the working conditions of the DRRs, and, as such, the most basic form of concerted activity.

The concerted activities of the DRRs did not end with merely having discussions among themselves. As noted above, they took their concerns directly to those supervisors who could most immediately resolve the problem. There is no question that Hampton, both individually and collectively with other DRRs, spoke by telephone and in person to Reed, Filep, and Meketa over a extended period of time about her concerns with Arriaga's conduct. While Hampton was still employed by the Respondent, her complaints, along with those of Mitchell and Holverson, resulted in Meketa and Filep conducting an investigation of Arriaga's conduct towards the DRRs in August 2010, and then in the placement of Arriaga on a PIP in an effort to improve her supervisory performance. In fact, so obvious were Hampton's complaints to the supervisors, that the Respondent does not deny her involvement in such protected conduct. The Respondent merely denies that Hampton's protected concerted activity was in any way involved in the decision to terminate her. That remains the gravamen of this case.

B. The Termination of Lois Hampton

In *Wright Line, A Division of Wright Line, Inc.,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's

decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a *prima facie* showing that Hampton's protected concerted activity was a motivating factor in the Respondent's decision to terminate her. In *Tracker Marine, L.L.C.*, 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line.* Under the framework, the judge held that the General Counsel must establish four elements by a preponderance of evidence. First the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. However, more recently the Board has stated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc.*, 352 NLRB 815, fn.5 (2008) (citing *Gelita USA, Inc.*, 352 NLRB 406, 407, fn.2 (2008)); *SFO Good-Nite Inn, L.L.C.*, 352 NLRB 268, 269 (2008); Also see *Praxair Distribution, Inc.*, 357 NLRB No. 91, fn.2 (2011). In any event, to rebut the presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Manno Electric, Inc.*, 321 NLRB 278, 280, fn.12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

It is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that the communication between employees "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." *Phoenix Transit Systems,* 337 NLRB 510 (2002) (citing *Container Corporation of America,* 244 NLRB 318, 322 (1979)).

As I have already found, there is no doubt that Hampton was engaged in protected concerted activity. She had numerous discussions with fellow DRRs, including Brown, Mitchell and Holverson, regarding their complaints about supervisor Arriaga. Many of these discussions occurred in the Phoenix office, specifically around their cubicles and in the break room. Arriaga was aware of these conversations, once even orally reprimanding Hampton regarding her and the other DRRs "gossiping" about Arriaga in the break room, and talking about Hampton's PIP, which Arriaga had instructed her not to do.

In addition to Arriaga, agents/supervisors Meketa, Reed, and Filep were aware of the complaints that the DRRs had with Arriaga's supervisory conduct as Hampton, and to a lesser extent Brown, Holverson, and Mitchell, had over an extended period of time spoken to them in person and by phone about this issue. On several occasions, Hampton, who clearly was the lead spokesperson for the DRRs in Phoenix, had spoken at length about Arriaga's abusive behavior. Meketa acknowledged that Hampton was the leader in this effort when he "counseled" her during a meeting that they had in February 2010 where Hampton complained about Arriaga, and he advised her "not to be the one constantly behind the scenes or in front of the scenes, prodding, stirring the pot or whatever." Further, Meketa testified that while Hampton was on her original 60 day PIP, he had heard from certain people that she was "stirring the pot,"

which he characterized as "trying to cause trouble." He felt that Hampton was being unprofessional and unproductive, and that "there was a lot of turmoil" in Phoenix, caused by the animosity between Hampton and Arriaga. Of course, Meketa and Filep were very aware of the problems that Arriaga was creating in the Phoenix office, placing her on a PIP in August 2010.

Meketa, Reed, and Filep were all admitted agents and supervisors of the Respondent. (Jt. Ex. 1.) The many conversations that Hampton had with fellow DRRs and with Meketa, Reed, and Filep regarding complaints about Arriaga, beyond question constituted protected activity. See *Champion Home Builders Co.,* 343 NLRB 671, 680 (2004). Further, supervisor Meketa, who allegedly made the decision to fire Hampton, supervisor Filep, and supervisor Arriaga herself were aware of Hampton's role in making these complaints. Accordingly, the Respondent's knowledge of Hampton's protected activity cannot be seriously denied.

Obviously, Hampton's discharge was an adverse employment action. But was the discharge retaliation for her concerted activities? As is reflected in the fact section of this decision, the Respondent had numerous stated reasons for terminating Hampton, specifically her low production and problems that developed with her blood drives while she was on medical leave. More will be said about these stated reasons for termination later in this decision. However, at this point it is very germane to the analysis to recall the testimony of Christa Mitchell. She is still employed by the Respondent as a DRR. To the extent that she testified adversely to the interests of the Respondent, her testimony is highly credible as she continues to be subject to the Respondent's evaluation of her performance.

Mitchell testified that while Hampton was on medical leave, although the only DRR left in the Phoenix office, she was not aware of anybody being assigned to take care of Hampton's work while Hampton was gone. Allegedly Hudson, although a customer service representative, under Arriaga's direction, was to process Hampton's blood drives to completion. Yet, according to Mitchell, Arriaga seemed interested not so much in completing those drives, as in building a case against Hampton. Mitchell credibly testified that Arriaga said, "I want to know if there are any conflicts, if anything arises with Lois' accounts. I'm keeping track of this." I find this statement very significant. It seems obvious to me that Arriaga was intent on finding reasons to take disciplinary action against Hampton. She knew that of all the DRR's, Hampton had taken the lead in bringing their complaints about her abusive supervisory style to management's attention. This had led to Arriaga receiving a PIP, for which she appears to have held Hampton responsible. Arriaga had earlier orally reprimand Hampton for "saying harassing things about her in the break room." She complained that Hampton "was talking about her, and [Hampton] wasn't supposed to be doing that."

I believe that the credible, probative evidence shows that Arriaga, Hampton's immediate supervisor, used the opportunity of Hampton's absence on medical leave to help build a case against her for termination. In her capacity as the DRR supervisor in Phoenix, she was in a position to either actively assist in the processing of Hampton's blood drives, or to act passively and allow some of those drives to fail to be completed. It appears to me that that is precisely what Arriaga allowed to happen. Her passive indifference to Hampton's drives resulted in some of them failing to be completed, or to cause them to need significant modification. She was, thereafter, able to use these "problem drives" to build a case for termination, which was a course of action Meketa appeared to need little encouragement to follow.

Further, I would note that Arriaga failed to testify as a witness. As Hampton's former supervisor and the person who worked closely with Meketa in placing before him those "facts" that he used to justify terminating Hampton, she should logically have been called to testify by the Respondent in order to support its defense. One would naturally assume that she would

testify favorably for the Respondent. Despite the fact that she was subsequently terminated by the Respondent and might well have been a reluctant witnesses, I shall draw an adverse inference from the Respondent's failure to call Arriaga to testify, or to offer a reason for failing to do so. I must, therefore, conclude that had Arriaga testified, her testimony would not have supported the Respondent's defense. *International Automated Machines,* 285 NLRB 1122, 1122-23 (1987), enfd. 861 F.2d 720 (6th Cir. 1988).

Finally, it is apparent to me that Meketa harbored animosity towards Hampton because she engaged in protected concerted activity. This animus was openly demonstrated when Meketa "counseled" Hampton in February 2010 that she should not constantly be "prodding, stirring the pot," and from his testimony that he believed she was "trying to cause trouble," and was "stirring the pot." He testified that he "counseled [Hampton] on this several times." Meketa's concerns about Hampton's conduct were all made in connection with her complaints about Arriaga's supervisory abuse.[11] They demonstrate that his ultimate decision to terminate Hampton was motivated, at least in part, by her protected concerted activity.

Having found that counsel for the General Counsel has offered sufficient evidence to meet her burden of establishing a *prima facie* case that the Respondent was motivated to discharge Hampton, at least in part, by her protected concerted activity, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizen Coordinating Counsel of Riverbay Community,* 330 NLRB 1100 (2000); *Regal Recycling, Inc.,* 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Company, Inc.,* 310 NLRB 865, 871 (1993). I am of the view that the Respondent has failed to meet this burden. The Respondent's reasons for terminating Hampton appear to be a pretext.

Counsel for the General Counsel issued a number of voluminous subpoenas directed to the Respondent for the production of documents. Ultimately, a veritable mountain of documents was admitted into evidence in this case. Further, throughout the course of the hearing much time was consumed by Counsel for the General Counsel arguing that the Respondent was not in compliance with the subpoena request. Following a number of rulings by the undersigned, and the production of still more documents by the Respondent, I concluded that the Respondent was in substantial compliance with the various subpoenas, and I denied counsel for the General Counsel's seemingly insatiable desire for still more documents, which I held were unnecessary for a proper adjudication of this case. In reviewing these documents, I am reminded of that well known adage from Mark Twain that, "There are three kinds of lies: lies, damned lies, and statistics." The production of so many pages of statistics concerning blood drive goals and efficiencies, reported on so many documents, with so many variables, regarding changing numbers of employees, over so many different periods of time created a mass of conflicting information. In my view, the result is that both the Respondent and the General Counsel are able to point to documents that each contends support their respective arguments.

The documents do tend to show that during the 2009-2010 fiscal year, Hampton's performance deteriorated sharply. Specifically, she missed her goal seven of those twelve months, and in those seven months, she missed her monthly goals by thirteen to forty-five percent. (G.C. 41, p. 8, the chart.) Further, as of July 2010, it appeared that she would continue to miss her goals, due to inadequate bookings, for at least two out of the next three months. (Res. Ex. 11.) However, Hampton was not the only employee with production

[11] Hampton's complaints ultimately resulted in Arriaga being place on a PIP in August 2010.

problems.

Carlos Apalategui was a DRR in the Respondent's Tucson office employed during some of the same time period as Hampton. On July 6, 2010, he was placed on a PIP by the Respondent for poor production. His PIP shows that he failed to make goal for May and June 2010, failed to book his calendar at the minimum required for July, August, and September 2010, and failed to bring his drives in at 70% or greater in May and June 2010. (G.C. Ex. 19.) Apalategui was not terminated, despite a significant period of very low production. Counsel for the General Counsel cross-examined Meketa extensively regarding why Apalategui was excused for his poor production and Hampton was not. According to Meketa, Apalategui was given a break because he was suffering from personal issues, specifically being the victim of a home invasion and beating, which were "affecting his day-to-day behavior and job performance." According to Meketa, "I took that into consideration when I wrote this [PIP]. The bottom line is, he wasn't getting the job done, but there were circumstances that I could attribute part of this happening, why he wasn't getting it done. It was something we were working through."

Meketa knew that Hampton's poor production was, at least in part, the result of the difficulty she was having with Arriaga, and due to the abusive atmosphere that Arriaga had created in the Phoenix office. However, he did not give Hampton the same consideration that he gave to Apalategui. It appears that he treated her in a disparate fashion, which I conclude was the result of Meketa's admitted feeling that Hampton was "stirring the pot." I believe that this constitutes a clear and unambiguous reference to Hampton's protected concerted activity in raising complaints with fellow-employees and managers about Arriaga's supervisory conduct.

I did not find Meketa to be a credible witness. He had difficulty recalling events, dates, who he spoke to, and what was said during certain very important conversations, including those that he had with Hampton. I found his answers to questions on cross-examination to be evasive. I did not find reasonable his attempt to distinguish Apalategui's poor production from that of Hampton. Further, he appeared to exaggerate and embellish the problems that Hampton's blood drives created during the period that Hampton was on medical leave. His suggestion that because Hampton had not fully confirmed certain of her drives that, she had engaged in stealing, cheating, and fraud was, in my view, certainly not justified and, frankly, "way over the top."

Regarding the difficulties encountered with Hampton's blood drives while she was on medical leave, I believe that some of those problems resulted from an intentional failure on the part of Arriaga to follow through and process those drives. Mitchell credibly testified that Arriaga seemed interested in building a case against Hampton. She attempted to do so by neglecting Hampton's drives. While Hampton's production was low and she certainly was not a model employee, I believe that she credibly testified that had she not been on medical leave, she would have appropriately finalized those drives and brought them to a successful conclusion.

Further, I believe that Hampton credibly testified regarding the scheduling of blood drives into the Hemasphere system. Her testimony was, for the most part, supported by the other DRRs that even after drives were placed into Hemasphere there could be significant changes made to those drives. It appears from the testimony of Erna Goldkuhl, senior manager acquisition planning and scheduling, that the entire scheduling system was in a state of flux at the time of the booking meeting in Tucson in July 2010. Her testimony that the DRRs were using the calendar to "hold" anticipated drives was very similar to the position taken by Hampton and her fellow DRRs. The issue of whether drives placed into the Hemasphere system were real drives or "phantom" drives is really just a matter of semantics. In actual practice, drives

placed into Hemasphere were subject to changes, which changes were in fact frequently made. Management understood this, and while the Respondent was attempting to institute changes to make the placement of drives into Hemasphere more definite, those changes had not yet been fully implemented.

Thus, it seems that Hampton's conduct in scheduling blood drives in July and August, prior to going on medical leave, did not deviated from the actual practice at the time. Had she not been on medical leave, she would have had the opportunity to finalize those drives, and hopefully bring them to a successful completion. Instead, she was left to rely on the Phoenix staff to process and complete her drives. Unfortunately, Arriaga was not as interested in successfully completing Hampton's drives as she was in making Hampton look bad by not processing those drives. She was then in a position to use the problems that developed in those drives as a basis for recommending that Hampton be terminated.

The credible evidence shows that Arriaga's interest in having Hampton terminated was really based on her resentment towards Hampton's effort to lead the DRRs into complaining about Arriaga's abusive conduct. As Hampton credibly testified, only shortly prior to going on medical leave, Arriaga orally reprimanded Hampton for gossiping and talking about Arriaga in the break room with the other office employees. Since Arriaga did not testify, Hampton's contention that Arriaga's animosity towards her was due to her protected concerted activity remained unrebutted. Unfortunately for Hampton, Meketa, who also harbored animus towards her protected activity, was very receptive to Arriaga's complaints about the problems that developed with Hampton's blood drives while she was on medical leave. In any event, as I have noted, I believe that the Respondent's stated reasons for Hampton's termination, as expressed by Meketa, were merely a pretext for the true reason, that being her concerted activity.

The Respondent argues that as it fired Arriaga on March 25, 2011, it must not have harbored any animosity towards Hampton for earlier making complaints about her. The Respondent points out that of all the DRRs who ever complained about Arriaga, specifically Brown, Holverson, Mitchell, Hampton and Greathouse, the only employee who was terminated was Hampton. However, I reject this rationalization.

Arriaga was by all accounts a very bad supervisor. The Respondent does not deny this. In fact, as noted above, Meketa placed Arriaga on a PIP on August 10, 2010, as a result of the events surrounding her August "blow-up." It was those same supervisory deficiencies that ultimately led to her termination. However, that does not change the fact that Meketa knew that Hampton was the leader in the effort by the DRRs to force management to do something about Arriaga's abusive behavior. His comment on several occasions that Hampton was "stirring the pot" was proof that not only did he have knowledge of her activities, but that he strongly disapproved of them. Further, it does not change the fact that Arriaga appears to have "set up" Hampton for termination by failing to properly process her blood drives while she was on medical leave. Arriaga shared Meketa's hostility towards Hampton because of her open efforts to mobilize the other DRRs and pressure management to do something about Arriaga's abusive conduct. It was that protected concerted conduct by Hampton that led Meketa to take action and terminate Hampton as she returned from medical leave. While Meketa ultimately fired Arriaga in March 2011, that was approximately four months after Meketa had relied, in part, on Arriaga's recommendation to fire Hampton.

As I find that the Respondent's defense is a pretext, it is, therefore, appropriate to infer that the Respondent's true motive in terminating Hampton was unlawful. *Williams Contracting, Inc.,* 309 NLRB 433 fn. 2 (1992); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705

F.2d 799 (6th Cir. 1982); *Shattuck Deann Mining Corp., v. NLRB,* 326 F.2d 466, 470 (9th Cir. 1966). I find that the real motive behind the Respondent's conduct in terminating Hampton was in retaliation for her protected concerted activity in complaining to fellow employees and management about Arriaga's abusive behavior.

Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act by discharging Lois Hampton on November 29, 2010, as alleged in complaint paragraphs 4(c), (d), and 5.

C. Agreement and Acknowledgement of Receipt of Employee Handbook Form

As noted above, following their receipt of an employee handbook, the Respondent's employees were required to sign a document entitled "AGREEMENT AND ACKNOWLEDGEMENT OF RECEIPT OF EMPLOYEE HANDBOOK." By that acknowledgement form, employees acknowledge receipt of, and agree to abide by, the rules set forth in the handbook. Among other matter, the acknowledgement form attempts to define an "at-will" employment relationship. In that definition is contained the following language: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." (G.C. Ex. 4, 37, 38.) The General Counsel contends that the Respondent violated the Act by maintaining and requiring employees to sign an acknowledgement form containing the above cited language, which is alleged to be overly-broad and discriminatory. Counsel for the Respondent denies that the cited language is unlawful, but, in any event, argues that the matter is now moot, as the alleged unlawful language has now been removed from the acknowledgement form.

In determining whether the existence of specific work rules violates Section 8(a)(1) of the Act, the Board has held that, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Further, where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." *Id.* See also, *Blue Cross-Blue Shield of Alabama,* 225 NLRB 1217, 1220 (1976).

The Board has further refined the above standard in *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646 (2004), by creating a two-step inquiry for determining whether the maintenance of a rule violates the Act. First, if the rule expressly restricts Section 7 activity, it is clearly unlawful. If the rule does not, it will none-the-less 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. *Id.* At 647; See *Northeastern Land Services, Ltd.,* 352 NLRB 744 (2009) (applying the Board's standard in *Lutheran Heritage Village, supra* at 647).

Regarding the acknowledgement form language in issue, it is somewhat questionable as to whether that language expressly restricts Section 7 activity. After all, the phrase in question does not mention union or protected concerted activity, or even the raising of complaints involving employees' wages, hours and working conditions. However, in my view there is no doubt that "employees would reasonably construe the language to prohibit Section 7 activity." (*Lutheran Heritage Village-Livonia).*

As counsel for the General Counsel correctly points out in her post-hearing brief, the signing of the acknowledgement form is essentially a waiver in which an employee agrees that his/her at-will status cannot change, thereby relinquishing his/her right to advocate concertedly,

whether represented by a union or not, to change his/her at-will status. For all practical purposes, the clause in question premises employment on an employee's agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship. Clearly such a clause would reasonably chill employees who were interested in exercising their Section 7 rights.

The Respondent never really tries to justify the clause in question. In his post-hearing brief, counsel merely argues that as Hampton was permitted, upon objecting to the language, to cross-out certain language from the acknowledgement form prior to signing it, therefore, it could not have restricted her Section 7 activity. However, in my view this argument misses the point. The Board has held that the simple maintenance of such language would reasonably restrict employees in the exercise of their Section 7 rights, even absent any effort to enforce that language. *Lafayette Park Hotel, supra; Blue Cross-Blue Shield of Alabama, supra.* Accordingly, I must conclude that the above cited language in the acknowledgement form constitutes a violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 4(a) and 5. Still, there remains the argument of counsel for the Respondent that this issue is now moot, by virtue of the Respondent having removing the offending language.

According to the testimony of Linda Filep, she sent to the Respondent's managers by email dated September 19, 2011, a memorandum attaching a new acknowledgement form and "updated statement" regarding at-will employment, which "**replace[d]**" the at-will employment policy set forth in the employee handbook. (emphasis as is reflected in the email) Filep testified that the memorandum and form were to be distributed by the Respondent's managers to all employees, who were then to sign the acknowledgement form and return it to the human resources department. The attached new acknowledgement form did not contain the language that the General Counsel contends was unlawful. (Res. Ex. 25.)

The Respondent continues to deny that the cited language in the original acknowledgement form was in any way unlawful, and contends that the language was deleted out of "an abundance of caution." In any event, counsel for the Respondent argues that as the alleged offending language has now been deleted, the allegation in the complaint dealing with this alleged unlawful language is now moot.

In "certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct." *Passavant Memorial Hospital,* 237 NLRB 138, 138 (1978). In order to be effective, the "repudiation must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other proscribed illegal conduct.'" *Id.* (citing *Douglas Division, The Scott & Fetzer Co.*, 228 NLRB 1016 (1977), and cases cited therein at 1024). "Furthermore, there must be adequate publication of the repudiation to employees involved." *Passavant Memorial,* 237 NLRB at 138. "And finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights." *Id, at* 138-39.

In *Passavant,* the employer published at statement in its employee newsletter to clarify unlawful threats it made to employees. *Id.,* at 138. The Board noted several reasons why the employer's newsletter publication "was ineffective to relieve [it] of liability and to obviate the need for further remedial action, including: 1) the attempted disavowal appeared only once in an employee newsletter; 2) it was uncertain that all employees were adequately informed of the retraction; and 3) the employer failed to show it made any additional efforts to communicate its disavowal. Further, the Board noted that "most importantly, [the] statement did not assure

employees that in the future [the employer] would not interfere with the exercise of their Section 7 rights by such coercive conduct." *Id.*, at 138-39.

In the matter at hand, I am of the view that the Respondent's dissemination to its employees of a "updated statement," which "replaced" the offending at-will employment language in its acknowledgement form did not relieve it of liability. It certainly was not timely. The Respondent's answer admits that since on or about October 12, 2010, the language in question has been contained in the acknowledgement form that employees are expected to sign. Yet, it was not until September 19, 2011, almost one year later, and after the issuance of the complaint, that the Respondent took efforts to remove the offending language.

Further, it does not appear that employees were given any assurances that their Section 7 rights would not be interfered with in the future, or even that they were adequately informed of the retraction. With the exception of Filep's memorandum, there is no evidence that the Respondent made any efforts to communicate its disavowal to its employees. As the Respondent has continued to insist that the original language in the acknowledgement form was not in violation of the Act, its retraction does not serve as sufficient assurance to its employees that in the future the Respondent will respect their right to engage in Section 7 activity.

The Respondent has fallen far short of meeting its burden of establishing effective repudiation of the unlawful language in the acknowledgement form. *Passavant Memorial, supra* at 138-139. Accordingly, having found that the Respondent violated Section 8(a)(1) of the Act by maintaining the unlawful language in the acknowledgement form, it must effectively remedy that violation as provided for below in the remedy and order sections of this decision.

Conclusions of Law

1. The Respondent, American Red Cross Arizona Blood Services Region, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Maintaining an overly-broad and discriminatory provision in its "Agreement and Acknowledgement of Receipt of Employee Handbook" form, which it requires its employees to sign, and which provision contains within it the following language: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way;" and

(b) Discharging its employee Lois Hampton because she engaged in protected concerted activity.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The evidence having established that the Respondent discriminatorily discharged its employee Lois Hampton, my recommended order requires the Respondent to offer her

immediate reinstatement to her former position, displacing if necessary any replacements, or if her position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges previously enjoyed. My recommended order further requires that the Respondent make Hampton whole for any loss of earnings, commissions, bonuses, and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F.W. Woolworth, Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizon for the Retarded,* 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. Denied on other grounds sub.nom., *ackson Hospital Corp. v NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).[12]

The recommended order further requires the Respondent to expunge from its records any reference to the discharge of Hampton, and to provide her with written notice of such expunction, and to inform her that the unlawful conduct will not be used as a basis for further personnel actions against her. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Further, the Respondent must not make reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office or reference seeker, or use the expunged material against Hampton in any other way.

Also, having found that a provision in the Respondent's "Agreement and Acknowledgement of Receipt of Employee Handbook" form contains language that is overly-broad and discriminatory, as referenced above, the recommended order requires that the Respondent revise or rescind the unlawful language, and advise its employees in writing that said provision has been so revised or rescinded.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physically posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. . *Picini Flooring,* 356 NLRB No. 8 (Oct. 22, 2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, American Red Cross Arizona Blood Services Region, its officers, agents, successors, and assigns, shall

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[12] In the complaint, the General Counsel requests as part of a remedy for the Respondent's unfair labor practices "an order requiring reimbursement by the Respondent of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination and that the Respondent be required to submit the appropriate documents to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods." However, counsel for the General Counsel cites no Board authority for such an extraordinary remedy. As I am unaware of any such authority, I hereby decline to order such a remedy, or to deviate from that which is standard is such cases.

[13] 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.

1. Cease and desist from:

(a) Maintaining or enforcing an overly-broad and discriminatory provision in its "Agreement and Acknowledgement of Receipt of Employee Handbook" form, which it requires its employees to sign, and which provision contains within it the following language: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way;"

(b) Discharging or otherwise discriminating against any of its employees because they engaged in protected concerted activities; and

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

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

(a) Within 14 days of the Board's Order, revise or rescind its "Agreement and Acknowledgement of Receipt of Employee Handbook" form, which it requires its employees to sign, and which has a provision containing within it the following language: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." To the extent that said cited language has already been removed from the provision, the Respondent shall so notify its employees;

(b) Within 14 days of the Board's Order, offer Lois Hampton full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed;

(c) Make Lois Hampton whole for any loss of earnings, commissions, bonuses, and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision;

(d) Within 14 days of the Board's Order, remove from its files any reference to the unlawful discharge of Lois Hampton, and within 3 days thereafter, notify her in writing that this has been done, and that her discharge will not be used against her as the basis of any future personnel actions, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her;

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order;

(f) Within 14 days after service by the Region, post at its facilities in Phoenix and Tucson, Arizona, copies of the attached notice marked "Appendix."[14] Copies of the notice, on

[14] 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

Continued

forms provided by the Regional Director for Region 28, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed either of the two facilities in Phoenix and Tucson, Arizona 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 October 12, 2010; and

(g) 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.

Dated at Washington, D.C., February 1, 2012.

Gregory Z. Meyerson
Administrative Law Judge

National Labor Relations Board."

APPENDI

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

You have the right to join with your fellow employees in protected concerted activities. These activities include discussing working conditions among yourselves, forming a union, and making common complaints about your wages, hours, and other terms and conditions of employment, including complaints to management regarding abusive behavior by supervisors.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT maintain or enforce in our "Agreement and Acknowledgement of Receipt of Employee Handbook" form, which form we require you to sign, a provision that contains within it the following language: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."

WE WILL NOT discharge you because you engaged in protected concerted activities, including by communicating with fellow employees concerning common complaints regarding your wages, hours, and terms and conditions of employment, which includes making complaints to management regarding abusive behavior by supervisors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL revise or revoke from our "Agreement and Acknowledgement of Receipt of Employee Handbook" form, which form we require you to sign, a provision that contains within it the following language: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way," and WE Will furnish you with written notice that the cited language has been rescinded, and furnish you with a revised document that does not contain that cited language.

WE WILL within 14 days of the Board's Order, offer Lois Hampton full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Lois Hampton whole for any loss of earnings, wages, commissions, bonuses, and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest, compounded on a daily basis.

WE WILL within 14 days from the date of the Board's Order, remove from our files any and all records of the discrimination against Lois Hampton, and WE WILL within 3 days thereafter, notify Lois Hampton in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against her or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her.

AMERICAN RED CROSS ARIZONA BLOOD SERVICES REGION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.

Banner Health System d/b/a Banner Estrella Medical Center *and* James A. Navarr . Case 28–CA–023438

July 30, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On October 31, 2011, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed cross-exceptions, a supporting brief, and an answering brief, and the Respondent filed an answering brief to the cross-exceptions.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

1. We agree with the judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by issuing a "coaching" to technician James Navarro on February 21, 2011,[3] for failing to follow the directions of a supervisor.[4] Navarro testified that prior to being disciplined, he expressed concerns to supervisors and coworkers regarding the manner in which he was being instructed to clean surgical instruments. Normal procedures could not be followed on the day in question because of a broken steam pipe and lack of hot water. Specifically, Navarro's concern was that the procedures that he was being directed to follow (including the use of hot water from a coffee machine) were not proper and could endanger patients. During the course of his shift on February 19, and during part of his shift the following day, Navarro refused to follow his supervisor's instructions, citing the concerns described above. Based on that refusal, the Respondent issued Navarro a coaching. The judge concluded that the coaching was not unlawful. The judge relied on his finding that the Respondent issued the coaching based on its belief that Navarro was insubordinate and not because of any protected concerted activity.

We find, pursuant to *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that the Acting General Counsel failed to establish that the Respondent had knowledge of Navarro's alleged protected concerted activity (speaking to supervisors and coworkers about his concern over the Respondent's impromptu sterilization procedures) at the time that it disciplined him with the coaching. See, e.g., *Ellison Media Co.,* 344 NLRB 1112, 1112 fn. 3, 1123 (2005) (dismissing alleged unlawful discharge where the General Counsel failed to establish employer knowledge of protected activity). As a result, we also agree with the judge's finding that the Acting General Counsel failed to establish that the Respondent disciplined Navarro for any protected concerted activity, rather than its stated reason of insubordination.[5]

2. The judge also found that the Respondent did not violate Section 8(a)(1) when, on February 24, it gave Navarro an annual performance review containing negative comments, based on complaints from his coworkers, in a "behaviors" category. After Navarro objected to the evaluation, it was revised and his rating in the "behav-

[1] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[2] The Acting General Counsel has excepted to the judge's failure to include in his recommended Order a provision that the notice to employees be posted on a corporatewide basis. We find merit in this exception. The record shows that the Respondent utilizes its confidentiality agreement at all of its facilities. We have consistently held that "where an employer's overbroad rule is maintained as companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369, 372 (D.C. Cir. 2007). Accordingly, we shall modify the recommended Order to provide that the notice be posted at all facilities where the Respondent utilizes its confidentiality agreement. Member Hayes would not require the Respondent to mail the Appendix to former employees of its closed facilities outside Phoenix. We shall also modify the recommended Order and notice to conform to our findings regarding the Respondent's prohibition of the discussion of ongoing employee investigations.

[3] All dates hereafter are in 2011, unless otherwise noted.

[4] The coaching was documented in writing on a form entitled, "Performance Recognition and Corrective Action Log" and was placed in Navarro's employment record. Several months later, in June, the Respondent notified Navarro that the coaching had been removed from his record.

[5] Member Griffin would dismiss the allegation on different grounds. In his view, the Respondent issued the coaching based on its belief that Navarro had engaged in insubordination by refusing to follow his supervisor's instructions, and not because of any protected activity. Thus, even assuming that the Acting General Counsel established that Navarro's protected activity was a motivating factor in the coaching, he would conclude that the Respondent has met its burden of proving that it would have taken the same action even in the absence of that protected activity. See *Wright Line*, supra. Like his colleagues, Member Griffin would find it unnecessary to determine whether Navarro was, in fact, insubordinate.

iors" category was changed to "fully meets expectations." The judge found that the evaluation was completed before Navarro engaged in any protected concerted activity and, therefore, could not have been an unlawful reprisal. We find no reason to reverse the judge's finding. In addition, because the revisions were favorable to Navarro, we find no merit to the Acting General Counsel's argument that the revised evaluation somehow violated Section 8(a)(1).[6]

3. As the judge found, human resources consultant JoAnn Odell routinely asked employees making a complaint not to discuss the matter with their coworkers while the Respondent's investigation was ongoing. The judge found that the Respondent's maintenance and application of this prohibition did not violate Section 8(a)(1). We disagree.

To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011) (no legitimate and substantial justification where employer routinely prohibited employees from discussing matters under investigation). In this case, the judge found that the Respondent's prohibition was justified by its concern with protecting the integrity of its investigations. Contrary to the judge, we find that the Respondent's generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights. Rather, in order to minimize the impact on Section 7 rights, it was the Respondent's burden "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up." Id. The Respondent's blanket approach clearly failed to meet those requirements. Accordingly, we find that the Respondent, by maintaining and applying a rule prohibiting employees from discussing ongoing investigations of employee misconduct, violated Section 8(a)(1) of the Act.

The dissent characterizes the Respondent's prohibition of the discussion of ongoing investigations as not an actual rule, but rather a mere suggestion to employees. The record evidence does not support that claim. The prohibition is included as one of six bullet points on the Respondent's standard Interview of Complainant Form under the heading "Introduction for all interviews." Odell testified that, although she does not give the instruction to every employee being investigated, she frequently does so, and she did in this case by instructing Navarro not to discuss the investigation. However characterized, Odell's statement, viewed in context, had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights. See, e.g., *Franklin Iron & Metal Corp.*, 315 NLRB 819, 820 (1994), enfd. 83 F.3d 156 (6th Cir. 1996) ("It makes no difference whether the employees were 'asked' not to discuss their wage rates or ordered not to do so . . . . [i]n the absence of any business justification for the rule, it was an unlawful restraint on rights protected by Section 7 of the Act and violated Section 8(a)(1).").[7] In addition, the dissent would not find a violation because Odell did not expressly threaten discipline for violation of the rule. The law, however, does not require that a rule contain a direct or specific threat of discipline in order to be found unlawful. See *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999) (supervisor's instruction to employees not to discuss their discipline found unlawful restraint of Section 7 rights, even though the instruction contained no explicit threat of a penalty).

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 3.

"3. The Respondent violated Section 8(a)(1) maintaining and applying a rule prohibiting employees from discussing ongoing investigations of employee misconduct."

ORDER

The National Labor Relations Board orders that the Respondent, Banner Health System d/b/a Banner Estrella Medical Center, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing the provision in its confidentiality agreement that contains the following language: "private employee information (such as salaries,

[6] Because we affirm the judge's finding that the Respondent completed the evaluation before Navarro engaged in any protected concerted activity, we find it unnecessary to pass on the Acting General Counsel's exception to the judge's refusal to admit ACG Exh. 11 ("Colleague Feedback Forms"). Even if admitted and credited, the documents would not change the result in this case, given the judge's conclusion that the evaluation could not have been influenced by any subsequent protected concerted activity.

[7] On its facts alone, *Praxair Distribution, Inc.*, 358 NLRB No. 7 (2012), cited by our dissenting colleague, is clearly distinguishable. There, the alleged unlawful rule prohibiting employees from discussing their concerted activities was based on nothing more than a supervisor's single, offhand denial of an employee's request to make a phone call, to "an unidentified person for an unspecified purpose," during an investigatory interview.

disciplinary action, etc.) that is not shared by the employee."

(b) Maintaining or enforcing the rule that employees may not discuss with each other ongoing investigations of employee misconduct.

(c) 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 action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at all of its facilities where it utilizes its confidentiality agreement, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 28, 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 intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[9] 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 employed by the Respondent at any time since November 7, 2010.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28 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.

Dated, Washington, D.C. July 30, 2012

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

Contrary to my colleagues, I would affirm the judge's dismissal of the allegation that the Respondent promulgated an unlawful work rule prohibiting employees from discussing matters related to an ongoing investigation. It is axiomatic that, to violate the Act, an employer's work rule must be an actual work rule with binding effect on employees. See *Praxair Distribution, Inc.*, 358 NLRB No. 7, slip op. 6 (2012), (employer's response to a "vague request . . . did not amount to a 'rule' of any kind" and therefore did not constitute an unlawful confidentiality rule). Here, as in *Praxair*, the Respondent did not promulgate any rule at all. It merely suggested that employees not discuss matters under investigation. I therefore respectfully dissent.

My colleagues cite *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 15 (2011), to support their view. But in that case, the respondent threatened employees with discipline if they discussed matters under investigation, and discharged an employee at least in part because he blind copied emails between himself and management to other employees. Id. at 14–15. Here, human resources officer JoAnn Odell did no such thing. She merely asked employee James Navarro not to discuss a matter under investigation with coworkers in order to protect the integrity of her investigation. She did not threaten him with discipline. In the judge's words, her

[8] 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."

[9] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

request was merely a "suggestion." In these circumstances, I cannot find that the Respondent promulgated any binding rule about employees discussing investigations.[1]

Dated, Washington, D.C. July 30, 2012

Brian E. Hayes, Member

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 or apply the provision in our confidentiality agreement that contains the following language "Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee."

WE WILL NOT maintain or apply a rule prohibiting employees from discussing ongoing investigations of employee misconduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

BANNER HEALTH SYSTEM D/B/A BANNER ESTRELLA MEDICAL CENTER

[1] Because I would find that there was no work rule at all, it is unnecessary to reach the issue of whether the Respondent met its burden of proving a business necessity for the rule.

William Mabry, III, Esq., for the General Counsel.
Mark Kisicki, Esq. and *Elizabeth Townsend, Esq. (Steptoe & Johnson)*, of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Phoenix, Arizona, on August 30–31. On April 7, 2011, James Navarro (Navarro) filed the charge alleging that Banner Health System d/b/a Banner Estrella Medical Center (Respondent or the Employer) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on June 30, 2011, against Respondent alleging that Respondent violated Section 8(a)(1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing. The complaint was amended on the second day of trial to add additional 8(a)(1) allegations.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent, an Arizona corporation, has been engaged in the operation of a hospital providing inpatient and outpatient medical care in Phoenix, Arizona. During the 12 months prior to the filing of the charge, Respondent received gross revenues in excess of $250,000. During the same period of time, Respondent purchased and received goods valued in excess of $5000 which originated outside of California. During the same period of time, Respondent purchased and received goods valued in excess of $50,000 from outside the State of Arizona. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Alleged Unfair Labor Practices

A. Background and Issues

Respondent operates a hospital located in Phoenix, Arizona, that provides inpatient and outpatient medical care. James Navarro has worked for Respondent as a sterile technician for about 3 years. The central processing sterile department (CPSD) employs 13 sterile processing technicians, operating 24 hours a day, 7 days a week, and has three shifts.

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Sterile processing technicians are responsible for the proper care and handling of all surgical instruments. These employees are also required to utilize equipment according to the manufacturer's recommendations and hospital policy and perform all functions according to established policies, procedures, regulatory and accreditation requirements, as well as applicable professional standards.

On Saturday, February 19, 2011, Navarro was working the day shift. Around 9 a.m. that morning, Navarro learned that there was a lack of hot water and steam pressure. Navarro spoke to an employee from Respondent's facilities department who advised him that the steampipe needed to be fixed, that there would not be any hot water, steam pressure, or heat.

Navarro then contacted House Supervisor Cecilia Dicob and informed her of the steampipe problem. Next, Navarro called Ken Fellenz, senior manager of the CPSD department. Navarro informed him that he would not be able to sterilize the surgical instruments due to the broken steampipe, that there were six operating surgeries scheduled for that day. He also informed Fellenz that there were labor and delivery instruments that were going to be used and that the surgery department had clean surgical instruments for surgeries that day.

Fellenz ordered Navarro to use the Sterrad machine to sterilize the labor and delivery instruments. The Sterrad machine is a low temperature sterilizer that uses hydrogen peroxide as the sterilant. The normal procedure is that the Autoclave, a large steam sterilizer is used for the labor and delivery instruments. The Autoclave could not be used that day because of the lack of steam. Navarro told Fellenz that he was unaware that the Sterrad machine could be used, as it was not the established procedure.

After speaking with Fellenz, Navarro began researching whether the Sterrad machine could be used to sterilize the labor and delivery instruments. Navarro found no documents supporting the use of the Sterrad machine. He then contacted Muriel Kremb, lead coordinator. Kremb told Navarro to use hot water from the coffee machine in the break room for the first step in the cleaning process of the labor and delivery instruments. Navarro stated that these procedures were not established protocol and that somebody could get sick. Navarro did not clean or sterilize the labor and delivery instruments that day.

That day, employee Ruth Hernandez called Navarro to inform him that she might be late that day. Navarro told Hernandez that she might not have to come in because there was no steam. Hernandez called Kremb and was told to report to work. When Hernandez arrived at work, Navarro expressed his concern about the procedures suggested by Fellenz and Kremb. Navarro stated that he could not find documentation to support the procedure recommended by Fellenz and Kremb.

On February 20, when Navarro arrived at work he found that all the instruments had been cleaned. Navarro discussed with employee Curtis Wilks his concerns about using hot water from the coffee machine.

On February 20, Navarro spoke to House Supervisor Dicob on two occasions. Navarro told Dicob that he wasn't trying to be insubordinate but that he did not feel comfortable using the methods directed by Fellenz and Kremb because it was not established procedure. Dicob answered that she was trying to find a solution to the steampipe issue. After speaking with Dicob, Navarro spoke to Nurse Mary Hedges. Navarro told Hedges of the procedures he was instructed to follow and asked Hedges if she had ever seen or heard anything about using the Sterrad machine or using hot water from the coffee machine. Hedges shared Navarro's concerns.

Around noon, Fellenz called Navarro and asked why Navarro had not used the Sterrad machine as instructed. Navarro stated that he was uncomfortable using that procedure. Fellenz stated that Navarro was refusing to follow instructions. Navarro stated that he was not refusing but was uncomfortable. Fellenz angrily stated that Navarro was not doing as instructed and that they would discuss the matter the following day.

On Monday, February 21, Navarro met with JoAnn Odell, human resources consultant. Navarro informed Odell that there had been no hot water available and that he was instructed by Fellenz and Kremb to use hot water from the coffee machine and the Sterrad machine. Navarro said that he was uncomfortable with this procedure and that he could find no documentation to support this procedure. Navarro expressed concern for his job.

On the morning of February 21, Fellenz wrote a memorandum concerning the weekend and his conversations with Navarro. Convinced that Navarro had been insubordinate Fellenz met with Joan McKisson , director of peri-operative services. Fellenz told McKisson that he wanted to put Navarro on corrective action for failing to sterilize instruments as instructed by Fellenz. Fellenz and McKisson met with Odell in her office. Odell advised against corrective action because there was no procedure in place to support cleaning and sterilization as suggested by Fellenz. The three agreed that Navarro would be given a nondisciplinary coaching instead.

Around 2 p.m., Navarro was called to McKisson's office. McKisson informed Navarro that Fellenz had accused him of refusing to follow his instructions. Navarro insisted that he had finally followed instructions. Nonetheless, Navarro was given a coaching. The coaching document states, "James refused to do as instructed by manager and lead tech which directly affected patient care." On June 2, Respondent issued a memorandum stating that the coaching was removed and would not be part of Navarro's employment record.

On February 24, Fellenz called Navarro into his office and gave him a yearly performance evaluation.[2] The performance review consists of two sections: essential functions and behaviors. On the essential functions section, Navarro's grade was fully meets expectations. However, on the behaviors section, Navarro's rating was not fully meeting expectations. Navarro objected to the comments in the behavior section. Fellenz credibly testified that he had filled out the behaviors section based on complaints made to him by employees who worked with Navarro. Employees Hernandez and Louis Garcia both testified that they had complained to Fellenz on many occasions about Navarro.

[2] The evaluation had been written prior to February 20.

Odell, Respondent's human resources consultant, spoke to Fellenz and told him that the evaluation was inconsistent since one half of the evaluation had Navarro not meeting expectations but on the overall evaluation fully meeting expectations. Fellenz indicated that he intended that Navarro overall met expectations. Fellenz then issued a revised annual performance evaluation. Fellenz revised four of the five categories in the behavior section. Fellenz then graded fully meets expectations in the behavior section and fully meets expectations in the overall rating.

During the hearing, General Counsel amended the complaint to allege that Respondent's confidentiality agreement and interview of complainant form violates Section 8(a)(1) of the Act.

The interview of complainant form is not given to employees. During interviews of employees making a complaint, Odell asks employees not to discuss the matter with their coworkers while the investigation is ongoing. I find that suggestion is for the purpose of protecting the integrity of the investigation. It is analogous to the sequestration rule so that employees give their own version of the facts and not what they heard another state. I find that Respondent has a legitimate business reason for making this suggestion. Accordingly, I find no violation.

Every employee hired by Respondent is required to sign a confidentiality agreement. The confidentially agreement states:

> I understand that I may hear, see and create information that is private and confidential. Examples of confidential information are;
>
> Patient information both medical and financial,
>
> Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee,
>
> Copyright computer programs, Business and strategic plans Contract terms, financial cost data and other internal documents.
>
> Keeping this kind of information private and confidential is so important that if I fail to do so, I understand that I could be subject to corrective action, including termination and possible legal action.

B. The Coaching and Evaluations

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Employees having no bargaining representative and no established procedure for presenting their grievances may take action to spotlight their complaint and obtain a remedy. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12–15 (1962). Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities.

The Act protects employees who engage in individual action which is "engaged in with the objective of initiating or inducing group action." *Mushroom Transportation Co. v. NLRB*, 330 F.3d 683, 685 (3d Cir. 1964); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969). Moreover, an employee need not first solicit other employees' views for his activity to be concerted. See *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (employee was engaged in concerted activity where, not having had a chance to meet with any employee beforehand, he made a comment in protest as a spontaneous reaction to the employer's announcement that no annual wage increase would be forthcoming). See also *Enterprise Products*, 264 NLRB 946, 949–950 (1982); *Cibao Meat Products*, 338 NLRB 934 (2003). In *Bell of Sioux City*, 333 NLRB 98, 105 (2001), the Board found protected concerted activity where an employee complained to fellow employee that she was treated unfairly. The Board found concerted activity as it involved a speaker and listeners. In addition, employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted. *El Gran Combo*, 284 NLRB 1115 (1987).

If the employer can show that the same action would have been taken against an employee in the absence of his or her protected activity, the employer rebuts the General Counsel's prima facie case. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The clear evidence indicates that Fellenz was angry that Navarro had not followed his instructions to use the Sterrad machine to sterilize the surgical instruments. He spoke to Navarro and angrily asked why the employee had not followed his instructions. Navarro stated that he was not refusing to follow the instructions but he did not follow the instructions. The first thing the next morning, Fellenz wrote a memorandum reciting his belief that Navarro had been insubordinate. He spoke with his supervisor, McKisson, and then Odell, the human resources consultant. It was decided to give Navarro a coaching. Accordingly, I find that Navarro was given the coaching not because of any protected concerted activity, but solely because Fellenz believed Navarro had engaged in insubordination.

I find that the performance review given to Navarro was not motivated by any protected concerted activity. First, the performance review was filled out prior to the concerted activity. Secondly, Fellenz credibly testified that he was influenced by complaints made by Navarro's coworkers. Two coworkers credibly testified that they had made numerous complaints to Fellenz concerning Navarro.

C. Independent Violation of Section 8(a)(1)

Central to the protections provided by Section 7 of the Act is the employees' right to communicate to coworkers about their wages, hours, and other terms and conditions of employment. An employer's rules prohibiting Section 7 activity are a violation of the Act, even if such rules have never been enforced. *Franklin Iron & Medal Corp.*, 316 NLRB 819, 820 (1994).

In *NLS Group*, 355 NLRB 1154 (2010), enfd. 65 F.3d 475 (1st Cir. 2011), the Board stated that if a rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule 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. In the instant case, Respondent's confidentiality agreement provides that private employee information (such as salaries, disciplinary action,

etc.) that is not shared by the employee is to be kept confidential. Further, keeping this kind of information private and confidential is so important that failure to do so, could subject an employee to corrective action, including termination and possible legal action.

In *Labinal, Inc.*, 340 NLRB 203, 209–210 (2003), the employer argued there was no violation because the rule merely prohibited employees from finding out about another employee's personal pay information and precluded disclosure of that information absent the employee's knowledge or permission. The Board noted,

> To prohibit one employee from discussing another employee's pay without the knowledge and permission of that employee muzzles employees who seek to engage in concerted activity for mutual aid or protection. By requiring that one employee get permission of another employee to discuss the latter's wages, would, as a practical matter, deny the former the use of information innocently obtained which is the very information he or she needs to discuss the wages with fellow employees before taking the matter to management. Id.

In the instant case, Respondent's confidentiality agreement prohibits employees from discussing other employees' salaries or disciplinary actions, unless such information was originally disclosed by the original employee. As such it requires an employee to get permission from another employee to discuss the latter's wages and discipline, and could reasonably be construed to prohibit Section 7 activity. Thus, under *Labinal,* supra, I find that the rule in Respondent's confidentiality agreement to violate Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section (2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act by including in its confidentiality agreement a prohibition against sharing private employee information such as salaries and discipline.
3. Respondent did not otherwise violate the Act as alleged in the complaint.
4. The above unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

Respondent, Banner Health System d/b/a Banner Estrella Medical Center, Phoenix, Arizona, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing the provision in is confidentiality agreement that contains the following language "Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee."

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

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

(a) Within 14 days after service by the Region, post at its facilities in Phoenix, Arizona, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since November 7, 2010. 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, or other electronic means, if the Respondent customarily communicates with its employees by such manner.

(b) 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 Respondent has taken to comply.

Dated, Washington, D.C. October 31, 2011

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

[3] 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.

WE WILL NOT maintain or enforce the provision in our confidentiality agreement that contains the following language "Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

BANNER HEALTH SYSTEM D/B/A BANNER ESTRELLA MEDICAL CENTER

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15- 04 March 18, 2015

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

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Report of the General Counsel Concerning Employer Rules

Attached is a report from the General Counsel concerning recent employer rule cases.

Attachment

cc: NLRBU
Release to the Public

Report of the General Counsel

During my term as General Counsel, I have endeavored to keep the labor-management bar fully aware of the activities of my Office. As part of this goal, I continue the practice of issuing periodic reports of cases raising significant legal or policy issues. This report presents recent case developments arising in the context of employee handbook rules. Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act. Moreover, the Office of the General Counsel continues to receive meritorious charges alleging unlawful handbook rules. I am publishing this report to offer guidance on my views of this evolving area of labor law, with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful.

Under the Board's decision in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity. The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example. Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights.

In our experience, the vast majority of violations are found under the first prong of the *Lutheran Heritage* test. The Board has issued a number of decisions interpreting whether "employees would reasonably construe" employer rules to prohibit Section 7 activity, finding various rules to be unlawful under that standard. I have had conversations with both labor- and management-side practitioners, who have asked for guidance regarding handbook rules that are deemed acceptable under this prong of the Board's test. Thus, I am issuing this report.

This report is divided into two parts. First, the report will compare rules we found unlawful with rules we found lawful and explain our reasoning. This section will focus on the types of rules that are frequently at issue before us, such as confidentiality rules, professionalism rules, anti-harassment rules, trademark rules, photography/recording rules, and media contact rules. Second, the report will discuss handbook rules from a recently settled unfair labor practice charge against Wendy's International LLC. The settlement was negotiated following our initial

determination that several of Wendy's handbook rules were facially unlawful. The report sets forth Wendy's rules that we initially found unlawful with an explanation, along with Wendy's modified rules, adopted pursuant to a informal, bilateral Board settlement agreement, which the Office of the General Counsel does not believe violate the Act.

I hope that this report, with its specific examples of lawful and unlawful handbook policies and rules, will be of assistance to labor law practitioners and human resource professionals.

Richard F. Griffin, Jr.
General Counsel

Part 1: Examples of Lawful and Unlawful Handbook Rules

A. Employer Handbook Rules Regarding Confidentiality

Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. Thus, an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment—such as wages, hours, or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act. Similarly, a confidentiality rule that broadly encompasses "employee" or "personnel" information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications. *See Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 n.3, 291–92 (1999).

In contrast, broad prohibitions on disclosing "confidential" information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information. *See Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999); *Super K-Mart*, 330 NLRB 263, 263 (1999). Furthermore, an otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity.

Unlawful Confidentiality Rules

We found the following rules to be unlawful because they restrict disclosure of employee information and therefore are unlawfully overbroad:

- **Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."**

In the above rule, in addition to the overbroad reference to "employee information," the blanket ban on discussing employee contact information, without regard for how employees obtain that information, is also facially unlawful.

- **"You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential**

information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."

Although this rule's restriction on disclosing information about "other associates" is not a blanket ban, it is nonetheless unlawfully overbroad because a reasonable employee would not understand how the employer determines what constitutes a "lawful Company policy."

- **"Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."**

While an employer may clearly ban disclosure of its own confidential information, a broad reference to "another's" information, without further clarification, as in the above rule, would reasonably be interpreted to include other *employees'* wages and other terms and conditions of employment.

We determined that the following confidentiality rules were facially unlawful, even though they did not explicitly reference terms and conditions of employment or employee information, because the rules contained broad restrictions and did not clarify, in express language or contextually, that they did not restrict Section 7 communications:

- **Prohibiting employees from "[d]isclosing . . . details about the [Employer]."**

- **"Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone outside of your immediate work group is strictly prohibited."**

- **"Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information. . . . Do not discuss work matters in public places."**

- **"[I]f something is not public information, you must not share it."**

Because the rule directly above bans discussion of all non-public information, we concluded that employees would reasonably understand it to encompass such non-public information as employee wages, benefits, and other terms and conditions of employment.

- **Confidential Information is: "All information in which its [sic] loss, undue use or unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members."**

Employees not only have a Section 7 right to protest their wages and working conditions, but also have a right to share information in support of those complaints. This rule would reasonably lead employees to believe that they cannot disclose that kind of information because it might adversely affect the employer's interest, image, or reputation.

Lawful Confidentiality Rules

We concluded that the following rules that prohibit disclosure of confidential information were facially lawful because: 1) they do not reference information regarding employees or employee terms and conditions of employment, 2) although they use the general term "confidential," they do not define it in an overbroad manner, and 3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications:

- **No unauthorized disclosure of "business 'secrets' or other confidential information."**

- **"Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."**

- **"Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."**

Finally, even when a confidentiality policy contains overly broad language, the rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7-protected activity. The following confidentiality rule, which we found lawful based on a contextual analysis, well illustrates this principle:

- **Prohibition on disclosure of all "information acquired in the course of one's work."**

This rule uses expansive language that, when read in isolation, would reasonably be read to define employee wages and benefits as confidential information. However, in that case, the rule was nested among rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws. Thus, we determined that employees would reasonably understand the information described as encompassing customer credit cards, contracts, and trade secrets, and not Section 7-protected activity.

B. Employer Handbook Rules Regarding Employee Conduct toward the Company and Supervisors

Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. *See Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014). Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited. *Id.* at 4. On the other hand, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful, because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties. In addition, rules prohibiting conduct that amounts to insubordination would also not be construed as limiting protected activities. *See Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (Feb. 28, 2014). Also, rules that employees would reasonably understand to prohibit insubordinate conduct have been found lawful.

Unlawful Rules Regulating Employee Conduct towards the Employer

We found the following rules unlawfully overbroad since employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general.

- **"[B]e respectful to the company, other employees, customers, partners, and competitors."**
- **Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."**
- **"Be respectful of others and the Company."**
- **No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management.**

While the following two rules ban "insubordination," they also ban conduct that does not rise to the level of insubordination, which reasonably would be understood

as including protected concerted activity. Accordingly, we found these rules to be unlawful.

- **"Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."**

- **"Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.**

In addition, employees' right to criticize an employer's labor policies and treatment of employees includes the right to do so in a public forum. *See Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014). Accordingly, we determined that the following rules were unlawfully overbroad because they reasonably would be read to require employees to refrain from criticizing the employer in public.

- **"Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."**

- **"[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."**

- **Do not make "[s]tatements "that damage the company or the company's reputation or that disrupt or damage the company's business relationships."**

- **"Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself."**

With regard to these examples, we recognize that the Act does not protect employee conduct aimed at disparaging an employer's product, as opposed to conduct critical of an employer's labor policies or working conditions. These rules, however, contained insufficient context or examples to indicate that they were aimed only at unprotected conduct.

Lawful Rules Regulating Employee Conduct towards the Employer

In contrast, when an employer's handbook simply requires employees to be respectful to customers, competitors, and the like, but does not mention the company or its management, employees reasonably would not believe that such a rule prohibits Section 7-protected criticism of the company. The following rules, which we have found lawful, are illustrative:

- **No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.**

- **"Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business."**

Similarly, rules requiring employees to cooperate with each other and the employer in the performance of their work also usually do not implicate Section 7 rights. *See Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 1 (Feb. 28, 2014). Thus, we found the following rule was lawful because employees would reasonably understand that it is stating the employer's legitimate expectation that employees work together in an atmosphere of civility, and that it is not prohibiting Section 7 activity:

- **"Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors."**

And we concluded that the following rule was lawful, because employees would reasonably interpret it to apply to employer investigations of workplace misconduct rather than investigations of unfair labor practices or preparations for arbitration, when read in context with other provisions:

- **"Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake."**

As previously discussed, the Board has made clear that it will not read rules in isolation. Even when a rule includes phrases or words that, alone, reasonably would be interpreted to ban protected criticism of the employer, if the context makes plain that only serious misconduct is banned, the rule will be found lawful. *See Tradesmen International*, 338 NLRB 460, 460–62 (2002). For instance, we found the following rule lawful based on a contextual analysis:

- **"Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.**

Although a ban on being "disrespectful" to management, by itself, would ordinarily be found to unlawfully chill Section 7 criticism of the employer, the term here is contained in a larger provision that is clearly focused on serious misconduct, like insubordination, threats, and assault. Viewed in that context, we concluded that employees would not reasonably believe this rule to ban protected criticism.

C. Employer Handbook Rules Regulating Conduct Towards Fellow Employees

In addition to employees' Section 7 rights to publicly discuss their terms and conditions of employment and to criticize their employer's labor policies, employees also have a right under the Act to argue and debate with each other about unions, management, and their terms and conditions of employment. These discussions can become contentious, but as the Supreme Court has noted, protected concerted speech will not lose its protection even if it includes "intemperate, abusive and inaccurate statements." *Linn v. United Plant Guards*, 383 U.S. 53 (1966). Thus, when an employer bans "negative" or "inappropriate" discussions among its employees, without further clarification, employees reasonably will read those rules to prohibit discussions and interactions that are protected under Section 7. *See Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 7 (Aug. 22, 2014); *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 1 (Apr. 1, 2014). For example, although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7-protected subjects.

Unlawful Employee-Employee Conduct Rules

We concluded that the following rules were unlawfully overbroad because employees would reasonably construe them to restrict protected discussions with their coworkers.

- **"[D]on't pick fights" online.**

We found the above rule unlawful because its broad and ambiguous language would reasonably be construed to encompass protected heated discussion among employees regarding unionization, the employer's labor policies, or the employer's treatment of employees.

- **Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."**

Because debate about unionization and other protected concerted activity is often contentious and controversial, employees would reasonably read a rule that bans "offensive," "derogatory," "insulting," or "embarrassing" comments as limiting their ability to honestly discuss such subjects. These terms also would reasonably be construed to limit protected criticism of supervisors and managers, since they are also "company employees."

- **"[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion."**

This rule was found unlawful because Section 7 protects communications about political matters, e.g., proposed right-to-work legislation. Its restriction on communications regarding controversial political matters, without clarifying context or examples, would be reasonably construed to cover these kinds of Section 7 communications. Indeed, discussion of unionization would also be chilled by such a rule because it can be an inflammatory topic similar to politics and religion.

- **Do not send "unwanted, offensive, or inappropriate" e-mails.**

The above rule is similarly vague and overbroad, in the absence of context or examples to clarify that it does not encompass Section 7 communications.

- **"Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail . . . ."**

We found the above rule unlawful because several of its terms are ambiguous as to their application to Section 7 activity—"embarrassing," "defamatory," and "otherwise . . . inappropriate." We further concluded that, viewed in context with such language, employees would reasonably construe even the term "intimidating" as covering Section 7 conduct.

Lawful Employee-Employee Conduct Rules

On the other hand, when an employer's professionalism rule simply requires employees to be respectful to customers or competitors, or directs employees not to engage in unprofessional conduct, and does not mention the company or its management, employees would not reasonably believe that such a rule prohibits Section 7-protected criticism of the company. Accordingly, we concluded that the following rules were lawful:

- **"Making inappropriate gestures, including visual staring."**

- **Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message."**

- **"[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors."**

- **No "harassment of employees, patients or facility visitors."**

- **No "use of racial slurs, derogatory comments, or insults."**

With respect to the last example, we recognized that a blanket ban on "derogatory comments," by itself, would reasonably be read to restrict protected criticism of the employer. However, because this rule was in a section of the handbook that dealt exclusively with unlawful harassment and discrimination, employees reasonably would read it in context as prohibiting those kinds of unprotected comments toward coworkers, rather than protected criticism of the employer.

D. Employer Handbook Rules Regarding Employee Interaction with Third Parties

Another right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment. Handbook rules that reasonably would be read to restrict such communications are unlawfully overbroad. *See Trump Marina Associates*, 354 NLRB 1027, 1027 n.2 (2009), *incorporated by reference*, 355 NLRB 585 (2010), *enforced mem.*, 435 F. App'x 1 (D.C. Cir. 2011). The most frequent offenders in this category are company media policies. While employers may lawfully control who makes official statements for the company, they must be careful to ensure that their rules would not reasonably be read to ban employees from speaking to the media or other third parties on their own (or other employees') behalf.

Unlawful Rules Regulating Third Party Communications

We found the following rules were unlawfully overbroad because employees reasonably would read them to ban protected communications with the media.

- **Employees are not "authorized to speak to any representatives of the print and/or electronic media about company matters" unless designated to do so by HR, and must refer all media inquiries to the company media hotline.**

We determined that the above rule was unlawful because employees would reasonably construe the phrase "company matters" to encompass employment concerns and labor relations, and there was no limiting language or other context in the rule to clarify that the rule applied only to those speaking as official company representatives.

- **"[A]ssociates are not authorized to answer questions from the news media . . . . When approached for information, you should refer the person to [the Employer's] Media Relations Department."**

- **"[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions."**

These two rules contain blanket restrictions on employees' responses to media inquiries. We therefore concluded that employees would reasonably understand that they apply to *all* media contacts, not only inquiries seeking the employers' official positions.

In addition, we found the following rule to be unlawfully overbroad because employees reasonably would read it to limit protected communications with government agencies.

- **"If you are contacted by any government agency you should contact the Law Department immediately for assistance."**

Although we recognize an employer's right to present its own position regarding the subject of a government inquiry, this rule contains a broader restriction. Employees would reasonably believe that they may not speak to a government agency without management approval, or even provide information in response to a Board investigation.

Lawful Rules Regulating Employee Communications with Outside Parties

In contrast, we found the following media contact rules to be lawful because employees reasonably would interpret them to mean that employees should not speak on behalf of the company, not that employees cannot speak to outsiders on their own (or other employees') behalf.

- **"The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons."**

We determined that this rule was lawful because it specifically referred to employee contact with the media regarding non-Section 7 related matters, such as crisis situations; sought to ensure a consistent company response or message regarding those matters; and was not a blanket prohibition against all contact with the media. Accordingly, we concluded that employees would not reasonably interpret this rule as interfering with Section 7 communications.

- **"Events may occur at our stores that will draw immediate attention from the news media. *It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry.* While reporters frequently shop as customers and may ask questions about a matter, good**

reporters identify themselves prior to asking questions. Every . . . employee is expected to adhere to the following media policy: . . . 2. Answer all media/reporter questions like this: 'I am not authorized to comment for [the Employer] (or I don't have the information you want). Let me have our public affairs office contact you.'"

We concluded that the prefatory language in this rule would cause employees to reasonably construe the rule as an attempt to control the company's message, rather than to restrict Section 7 communications to the media. Further, the required responses to media inquiries would be non-sequiturs in the context of a discussion about terms and conditions of employment or protected criticism of the company. Accordingly, we found that employees reasonably would not read this rule to restrict conversations with the news media about protected concerted activities.

E. Employer Handbook Rules Restricting Use of Company Logos, Copyrights, and Trademarks

We have also reviewed handbook rules that restrict employee use of company logos, copyrights, or trademarks. Though copyright holders have a clear interest in protecting their intellectual property, handbook rules cannot prohibit employees' fair protected use of that property. *See Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019–20 (1991), *enforced mem.*, 953 F.2d 638 (4th Cir. 1992). For instance, a company's name and logo will usually be protected by intellectual property laws, but employees have a right to use the name and logo on picket signs, leaflets, and other protest material. Employer proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity. Thus, a broad ban on such use without any clarification will generally be found unlawfully overbroad.

Unlawful Rules Banning Employee Use of Logos, Copyrights, or Trademarks

We found that the following rules were unlawful because they contain broad restrictions that employees would reasonably read to ban fair use of the employer's intellectual property in the course of protected concerted activity.

- **Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.**

- **Do not use "other people's property," such as trademarks, without permission in social media.**

- **"Use of [the Employer's] name, address or other information in your personal profile [is banned]. . . . In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."**

- **"Company logos and trademarks may not be used without written consent . . . ."**

Lawful Rules Protecting Employer Logos, Copyrights, and Trademarks

We found that the following rules were lawful. Unlike the prior examples, which broadly ban employee use of trademarked or copyrighted material, these rules simply require employees to respect such laws, permitting fair use.

- **"Respect all copyright and other intellectual property laws. For [the 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 [the Employer's] own copyrights, trademarks and brands."**

- **"DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on [Employer] logos, brand names, taglines, slogans, or other trademarks."**

F. Employer Handbook Rules Restricting Photography and Recording

Employees also have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. *See Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (Feb. 14, 2011), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *White Oak Manor*, 353 NLRB 795, 795 (2009), *incorporated by reference*, 355 NLRB 1280 (2010), *enforced mem.*, 452 F. App'x 374 (4th Cir. 2011). Thus, rules placing a total ban on such photography or recordings, or banning the use or possession of personal cameras or recording devices, are unlawfully overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time.

Unlawful Rules Banning Photography, Recordings, or Personal Electronic Devices

We found the following rules unlawfully overbroad because employees reasonably would interpret them to prohibit the use of personal equipment to engage in Section 7 activity while on breaks or other non-work time.

- **"Taking unauthorized pictures or video on company property" is prohibited.**

We concluded that employees would reasonably read this rule to prohibit all unauthorized employee use of a camera or video recorder, including attempts to document health and safety violations and other protected concerted activity.

- **"No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any [Employer] employee or [Employer] operation . . . ."**

We found this rule unlawful because employees would reasonably construe it to preclude, among other things, documentation of unfair labor practices, which is an essential part of the recognized right under Section 7 to utilize the Board's processes.

- **A total ban on use or possession of personal electronic equipment on Employer property.**

- **A prohibition on personal computers or data storage devices on employer property.**

We determined that the two above rules, which contain blanket restrictions on use or possession of recording devices, violated the Act for similar reasons. Although an employer has a legitimate interest in maintaining the confidentiality of business records, these rules were not narrowly tailored to address that concern.

- **Prohibition from wearing cell phones, making personal calls or viewing or sending texts "while on duty."**

This rule, which limits the restriction on personal recording devices to time "on duty," is nonetheless unlawful, because employees reasonably would understand "on duty" to include breaks and meals during their shifts, as opposed to their actual work time.

Lawful Rules Regulating Pictures and Recording Equipment

Rules regulating employee recording or photography will be found lawful if their scope is appropriately limited. For instance, in cases where a no-photography rule is instituted in response to a breach of patient privacy, where the employer has a well-understood, strong privacy interest, the Board has found that employees would not reasonably understand a no-photography rule to limit pictures for protected concerted purposes. *See Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 5 (Aug. 26, 2011), *enforced in relevant part*, 715 F.3d 928 (D.C. Cir. 2013). We also found the following rule lawful based on a contextual analysis:

- **No cameras are to be allowed in the store or parking lot without prior approval from the corporate office.**

This rule was embedded in a lawful media policy and immediately followed instructions on how to deal with reporters in the store. We determined that, in such a context, employees would read the rule to ban *news* cameras, not their own cameras.

G. Employer Handbook Rules Restricting Employees from Leaving Work

One of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike. Accordingly, rules that regulate when employees can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts. *See Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 2 (Sept. 24, 2014). If, however, such a rule makes no mention of "strikes," "walkouts," "disruptions," or the like, employees will reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity, and the rule will be found lawful. *See 2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011).

Unlawful Handbook Rules Relating to Restrictions on Leaving Work

We found the following rules were unlawful because they contain broad prohibitions on walking off the job, which reasonably would be read to include protected strikes and walkouts.

- **"Failure to report to your scheduled shift for more than three consecutive days without prior authorization or 'walking off the job' during a scheduled shift" is prohibited.**

- **"Walking off the job . . ." is prohibited.**

Lawful Handbook Rules Relating to Restrictions on Leaving Work

In contrast, the following handbook rule was considered lawful:

- **"Entering or leaving Company property without permission may result in discharge."**

We found this rule was lawful because, in the absence of terms like "work stoppage" or "walking off the job," a rule forbidding employees from leaving the employer's property during work time without permission will not reasonably be read to encompass strikes. However, the portion of the rule that requires employees to

obtain permission before *entering the property* was found unlawful because employers may not deny off-duty employees access to parking lots, gates, and other outside nonworking areas except where sufficiently justified by business reasons or pursuant to the kind of narrowly tailored rule approved in *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976).

- **"Walking off shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination."**

Although this rule includes the term "walking off shift," which usually would be considered an overbroad term that employees reasonably would understand to include strikes, we found this rule to be lawful in the context of the employees' health care responsibilities. Where employees are directly responsible for patient care, a broad "no walkout without permission" rule is reasonably read as ensuring that patients are not left without adequate care, not as a complete ban on strikes. *See Wilshire at Lakewood*, 343 NLRB 141, 144 (2004), *vacated in part*, 345 NLRB 1050 (2005), *enforcement denied on other grounds*, *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007). This rule was maintained by an employer that operated a care facility for people with dementia. Thus, we found that employees would reasonably read this rule as being designed to ensure continuity of care, not as a ban on protected job actions.

H. Employer Conflict-of-Interest Rules

Section 7 of the Act protects employees' right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. For instance, employees may protest in front of the company, organize a boycott, and solicit support for a union while on nonwork time. *See HTH Corp.*, 356 NLRB No. 182, slip op. at 2, 25 (June 14, 2011), *enforced*, 693 F.3d 1051 (9th Cir. 2012). If an employer's conflict-of-interest rule would reasonably be read to prohibit such activities, the rule will be found unlawful. However, where the rule includes examples or otherwise clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity. *See Tradesmen International*, 338 NLRB 460, 461–62 (2002).

Unlawful Conflict-of-Interest Rules

We found the following rule unlawful because it was phrased broadly and did not include any clarifying examples or context that would indicate that it did not apply to Section 7 activities:

- **Employees may not engage in "any action" that is "not in the best interest of [the Employer]."**

Lawful Conflict-of-Interest Rules

In contrast, we found the following rules lawful because they included context and examples that indicated that the rules were not meant to encompass protected concerted activity:

- **Do not "give, offer or promise, directly or indirectly, anything of value to any representative of an Outside Business," where "Outside Business" is defined as "any person, firm, corporation, or government agency that sells or provides a service to, purchases from, or competes with [the Employer]." Examples of violations include "holding an ownership or financial interest in an Outside Business" and "accepting gifts, money, or services from an Outside Business."**

We concluded that this rule is lawful because employees would reasonably understand that the rule is directed at protecting the employer from employee graft and preventing employees from engaging in a competing business, and that it does not apply to employee interactions with labor organizations or other Section 7 activity that the employer might oppose.

- **As an employee, "I will not engage in any activity that might create a conflict of interest for me or the company," where the conflict of interest policy devoted two pages to examples such as "avoid outside employment with a[n Employer] customer, supplier, or competitor, or having a significant financial interest with one of these entities."**

The above rule included multiple examples of conflicts of interest such that it would not be interpreted to restrict Section 7 activity.

- **Employees must refrain "from any activity or having any financial interest that is inconsistent with the Company's best interest" and also must refrain from "activities, investments or associations that compete with the Company, interferes with one's judgment concerning the Company's best interests, or exploits one's position with the Company for personal gains."**

We also found this rule to be lawful based on a contextual analysis. While its requirement that employees refrain from activities or associations that are inconsistent with the company's best interests could, in isolation, be interpreted to include employee participation in unions, the surrounding context and examples ensure that employees would not reasonably read it in that way. Indeed, the rule is in a section of the handbook that deals entirely with business ethics and includes requirements to act with "honesty, fairness and integrity"; comply with "all laws,

rules and regulations"; and provide "accurate, complete, fair, timely, and understandable" information in SEC filings.

Part 2: The Settlement with Wendy's International LLC

In 2014, we concluded that many of the employee handbook rules alleged in an unfair labor practice charge against Wendy's International, LLC were unlawfully overbroad under *Lutheran Heritage*'s first prong. Pursuant to an informal, bilateral Board settlement agreement, Wendy's modified its handbook rules. This section of the report presents the rules we found unlawfully overbroad, with brief discussions of our reasoning, followed by the replacement rules, which the Office of the General Counsel considers lawful, contained in the settlement agreement.

A. Wendy's Unlawful Handbook Rules

The pertinent provisions of Wendy's handbook and our conclusions are outlined below.

Handbook disclosure provision

No part of this handbook may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or information storage and retrieval system or otherwise, for any purpose without the express written permission of Wendy's International, Inc. The information contained in this handbook is considered proprietary and confidential information of Wendy's and its intended use is strictly limited to Wendy's and its employees. The disclosure of this handbook to unauthorized parties is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.

We concluded that this provision was unlawful because it prohibited disclosure of the Wendy's handbook, which contains employment policies, to third parties such as union representatives or the Board. Because employees have a Section 7 right to discuss their wages and other terms and conditions of employment with others, including co-workers, union representatives, and government agencies, such as the Board, a rule that precludes employees from sharing the employee handbook that contains many of their working conditions violates Section 8(a)(1).

Social Media Policy

Refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any

social media, without the advance approval of your supervisor, Human Resources and Communications Departments. Anything you say or post may be construed as representing the Company's opinion or point of view (when it does not), or it may reflect negatively on the Company. If you wish to make a complaint or report a complaint or troubling behavior, please follow the complaint procedure in the applicable Company policy (e.g., Speak Out).

Although employers have a legitimate interest in ensuring that employee communications are not construed as misrepresenting the employer's official position, we concluded that this rule did not merely prevent employees from speaking on behalf of, or in the name of, Wendy's. Instead, it generally prohibited an employee from commenting about the Company's business, policies, or employees without authorization, particularly when it might reflect negatively on the Company. Accordingly, we found that this part of the rule was overly broad. We also concluded that the rule's instruction that employees should follow the Company's internal complaint mechanism to "make a complaint or report a complaint" chilled employees' Section 7 right to communicate employment-related complaints to persons and entities other than Wendy's.

Respect copyrights and similar laws. Do not use any copyrighted or otherwise protected information or property without the owner's written consent.

We concluded that this rule was unlawfully overbroad because it broadly prohibited *any* employee use of copyrighted or "otherwise protected" information. Employees would reasonably construe that language to prohibit Section 7 communications involving, for example, reference to the copyrighted handbook or Company website for purposes of commentary or criticism, or use of the Wendy's trademark/name and another business's trademark/name in a wage comparison. We determined that such use does not implicate the interests that courts have identified as being protected by trademark and copyright laws.

[You may not p]ost photographs taken at Company events or on Company premises without the advance consent of your supervisor, Human Resources and Communications Departments.
[You may not p]ost photographs of Company employees without their advance consent. Do not attribute or disseminate comments or statements purportedly made by employees or others without their explicit permission.

We concluded that these rules, which included no examples of unprotected conduct or other language to clarify and restrict their scope, would chill employees

from engaging in Section 7 activities, such as posting a photo of employees carrying a picket sign in front of a restaurant, documenting a health or safety concern, or discussing or making complaints about statements made by Wendy's or fellow employees.

[You may not u]se the Company's (or any of its affiliated entities) logos, marks or other protected information or property without the Legal Department's express written authorization.

As discussed above, Wendy's had no legitimate basis to prohibit the use of its logo or trademarks in this manner, which would reasonably be construed to restrict a variety of Section 7-protected uses of the Wendy's logo and trademarks. Therefore, we found this rule unlawfully overbroad.

[You may not e]mail, post, comment or blog anonymously. You may think it is anonymous, but it is most likely traceable to you and the Company.

Requiring employees to publicly self-identify in order to participate in protected activity imposes an unwarranted burden on Section 7 rights. Thus, we found this rule banning anonymous comments unlawfully overbroad.

[You may not m]ake false or misleading representations about your credentials or your work.

We found this rule unlawful, because its language clearly encompassed communications relating to working conditions, which do not lose their protection if they are false or misleading as opposed to "maliciously false" (i.e., made with knowledge of falsity or reckless disregard for the truth). A broad rule banning merely false or misleading representations about work can have a chilling effect by causing employees to become hesitant to voice their views and complaints concerning working conditions for fear that later they may be disciplined because someone may determine that those were false or misleading statements.

[You may not c]reate a blog or online group related to your job without the advance approval of the Legal and Communications.

We determined that this no-blogging rule was unlawfully overbroad because employees have a Section 7 right to discuss their terms and conditions of employment with their co-workers and/or the public, including on blogs or online groups, and it is well-settled that such pre-authorization requirements chill Section 7 activity.

Do Not Disparage:
Be thoughtful and respectful in all your communications and dealings with others, including email and social media. Do not harass, threaten, libel, malign, defame, or disparage fellow professionals, employees, clients, competitors or anyone else. Do not make personal insults, use obscenities or engage in any conduct that would be unacceptable in a professional environment.

We found this rule unlawful because its second and third sentences contained broad, sweeping prohibitions against "malign[ing], defam[ing], or disparag[ing]" that, in context, would reasonably be read to go beyond unprotected defamation and encompass concerted communications protesting or criticizing Wendy's treatment of employees, among other Section 7 activities. And, there was nothing in the rule or elsewhere in the handbook that would reasonably assure employees that Section 7 communications were excluded from the rule's broad reach.

Do Not Retaliate:
If you discover negative statements, emails or posts about you or the Company, do not respond. First seek help from the Legal and Communications Departments, who will guide any response.

We concluded that employees would reasonably read this rule as requiring them to seek permission before engaging in Section 7 activity because "negative statements about . . . the Company" would reasonably be construed as encompassing Section 7 activity. For example, employees would reasonably read the rule to require that they obtain permission from Wendy's before responding to a co-worker's complaint about working conditions or a protest of unfair labor practices. We therefore found this rule overly broad.

Conflict-of-Interest Provision

Because you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere—or appear to interfere—with our ability to make sound business decisions on behalf of Wendy's.

We determined that the Conflict-of-Interest provision was unlawfully overbroad because its requirement that employees avoid "any conflict between your personal interests and those of the Company" would reasonably be read to encompass Section 7 activity, such as union organizing activity, demanding higher

wages, or engaging in boycotts or public demonstrations related to a labor dispute. Unlike rules that provide specific examples of what constitutes a conflict of interest, nothing in this rule confined its scope to legitimate business concerns or clarified that it was not intended to apply to Section 7 activity.

Moreover, we concluded that the Conflict-of-Interest provision was even more likely to chill Section 7 activity when read together with the handbook's third-party representation provision, located about six pages later, which communicated that unions are not beneficial or in the interest of Wendy's: **[b]ecause Wendy's desires to maintain open and direct communications with all of our employees, we do not believe that third party/union involvement in our relationship would benefit our employees or Wendy's.**

Company Confidential Information Provision

During the course of your employment, you may become aware of confidential information about Wendy's business. You must not disclose any confidential information relating to Wendy's business to anyone outside of the Company. Your employee PIN and other personal information should be kept confidential. Please don't share this information with any other employee.

We concluded that the confidentiality provision was facially unlawful because it referenced employees' "personal information," which the Board has found would reasonably be read to encompass discussion of wages, hours, and terms and conditions of employment.

Employee Conduct

The Employee Conduct section of the handbook contained approximately two pages listing examples of "misconduct" and "gross misconduct," which could lead to disciplinary action, up to and including discharge, in the sole discretion of Wendy's. The list included the following:

Soliciting, collecting funds, distributing literature on Company premises without proper approvals or outside the guidelines established in the "No Solicitation/No Distribution" Policy.

The blanket prohibition against soliciting, collecting funds, or distributing literature without proper approvals was unlawfully overbroad because employees have a Section 7 right to solicit on non-work time and distribute literature in non-work areas.

Walking off the job without authorization.

We found that this rule was unlawfully overbroad because employees would reasonably construe it to prohibit Section 7 activity such as a concerted walkout or other strike activity. As discussed in Part 1 of this report, the Board has drawn a fairly bright line regarding how employees would reasonably construe rules about employees leaving work. Rules that contain phrases such as "walking off the job," as here, reasonably would be read to forbid protected strike actions and walkouts.

Threatening, intimidating, foul or inappropriate language.

We found this prohibition to be unlawful because rules that forbid the vague phrase "inappropriate language," without examples or context, would reasonably be construed to prohibit protected communications about or criticism of management, labor policies, or working conditions.

False accusations against the Company and/or against another employee or customer.

We found this rule unlawful because an accusation against an employer does not lose the protection of Section 7 merely because it is false, as opposed to being recklessly or knowingly false. As previously discussed, a rule banning merely false statements can have a chilling effect on protected concerted communications, for instance, because employees reasonably would fear that contradictory information provided by the employer would result in discipline.

No Distribution/No Solicitation Provision

[I]t is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation during employees' working time. "Working time" is the time an employee is engaged, or should be engaged, in performing his/her work tasks for Wendy's. These guidelines also apply to solicitation and/or distribution by electronic means.

We concluded that this rule was unlawful because it restricted distribution by electronic means in work areas. While an employer may restrict distribution of literature in paper form in work areas, it has no legitimate business justification to restrict employees from distributing literature electronically, such as sending an email with a "flyer" attached, while the employees are in work areas during non-working time. Unlike distribution of paper literature, which can create a production hazard even when it occurs on nonworking time, electronic distribution does not

produce litter and only impinges on the employer's management interests if it occurs on working time.

Restaurant Telephone; Cell Phone; Camera Phone/Recording Devices Provision

Due to the potential for issues such as invasion of privacy, sexual harassment, and loss of productivity, no Crew Member may operate a camera phone on Company property or while performing work for the Company. The use of tape recorders, Dictaphones, or other types of voice recording devices anywhere on Company property, including to record conversations or activities of other employees or management, or while performing work for the Company, is also strictly prohibited, unless the device was provided to you by the Company and is used solely for legitimate business purposes.

We concluded that this rule, which prohibited employee use of a camera or video recorder "on Company property" at any time, precluded Section 7 activities, such as employees documenting health and safety violations, collective action, or the potential violation of employee rights under the Act. Wendy's had no business justification for such a broad prohibition. Its concerns about privacy, sexual harassment, and loss of productivity did not justify a rule that prohibited all use of a camera phone or audio recording device anywhere on the company's property at any time.

B. Wendy's Lawful Handbook Rules Pursuant to Settlement Agreement

Handbook Disclosure Provision

This Crew Orientation Handbook . . . is the property of Wendy's International LLC. No part of this handbook may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or information storage and retrieval system or otherwise, for any business/commercial venture without the express written permission of Wendy's International, LLC. The information contained in this handbook is strictly limited to use by Wendy's and its employees. The disclosure of this handbook to competitors is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.

Social Media Provision

- Do not comment on trade secrets and proprietary Company information (business, financial and marketing strategies) without the advance approval of your supervisor, Human Resources and Communications Departments.

- Do not make negative comments about our customers in any social media.

- Use of social media on Company equipment during working time is permitted, if your use is for legitimate, preapproved Company business. Please discuss the nature of your anticipated business use and the content of your message with your supervisor and Human Resources. Obtain their approval prior to such use.

- Respect copyright, trademark and similar laws and use such protected information in compliance with applicable legal standards.

Restrictions:

YOU MAY NOT do any of the following:

- Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.

- Use the Company's (or any of its affiliated entities) logos, marks or other protected information or property for any business/commercial venture without the Legal Department's express written authorization.

- Make knowingly false representations about your credentials or your work.

- Create a blog or online group related to Wendy's (not including blogs or discussions involving wages, benefits, or other terms and conditions of employment, or protected concerted activity) without the advance approval of the Legal and Communications Departments. If a blog or online group is approved, it must contain a disclaimer approved by the Legal Department.

Do Not Violate the Law and Related Company Policies:

Be thoughtful in all your communications and dealings with others, including email and social media. Never harass (as defined by our anti-harassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else. In general, it is always wise to remember that what you say in social media can often be seen by anyone. Accordingly, harassing comments, obscenities or similar conduct that would violate Company policies is discouraged in general and is never allowed while using Wendy's equipment or during your working time.

Discipline:
All employees are expected to know and follow this policy. Nothing in this policy is, however, intended to prevent employees from engaging in concerted activity protected by law. If you have any questions regarding this policy, please ask your supervisor and Human Resources before acting. Any violations of this policy are grounds for disciplinary action, up to and including immediate termination of employment.

Conflict of Interest Provision

Because you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere – or appear to interfere – with your ability to make sound business decisions on behalf of Wendy's. There are some common relationships or circumstances that can create, or give the appearance of, a conflict of interest. The situations generally involve gifts and business or financial dealings or investments. Gifts, favors, tickets, entertainment and other such inducements may be attempts to "purchase" favorable treatment. Accepting such inducements could raise doubts about an employee's ability to make independent business judgments and the Company's commitment to treating people fairly. In addition, a conflict of interest exists when employees have a financial or ownership interest in a business or financial venture that may be at variance with the interests of Wendy's. Likewise, when an employee engages in business transactions that benefit family members, it may give an appearance of impropriety.

Company Confidential Information Provision

During the course of your employment, you may become aware of trade secrets and similarly protected proprietary and confidential information

about Wendy's business (e.g. recipes, preparation techniques, marketing plans and strategies, financial records). You must not disclose any such information to anyone outside of the Company. Your employee PIN and other similar personal identification information should be kept confidential. Please don't share this information with any other employee.

Employee Conduct Provision

- Soliciting, collecting funds, distributing literature on Company premises outside the guidelines established in the "No Solicitation/No Distribution" Policy.

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

- Threatening, harassing (as defined by our harassment/discrimination policy), intimidating, profane, obscene or similar inappropriate language in violation of Company policy.

- Making knowingly false accusations against the Company and/or against another employee, customer or vendor.

No Distribution/No Solicitation Provision

Providing the most ideal work environment possible is very important to Wendy's. We hope you feel very comfortable and at ease when you're here at work. Therefore, to protect you and our customers from unnecessary interruptions and annoyances, it is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation and distribution of literature during employees' working time. "Working Time" is the time an employee is engaged or should be engaged in performing his/her work tasks for Wendy's. These guidelines also apply to solicitation by electronic means. Solicitation or distribution of any kind by non-employees on Company premises is prohibited at all times. Nothing in this section prohibits employees from discussing terms and conditions of employment.

Restaurant Telephone/ Cell Phone/Camera Phone/Recording Devices Provision

Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in

activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.