The College of Labor and Employment Lawyers
5th Circuit Regional Meeting
April 1, 2017
Omni Riverfront Hotel
701 Convention Center Boulevard, New Orleans

1.) <u>Trade Secrets (DTSA)</u>

- Long a wish of the content community. Passed 87 to 0. Signed into law May 11, 2016.
- State versions of UTSA patchwork of variations.
- Massachusetts and NY have yet to enact UTSA
- Top features:
  a.) Federal Jurisdiction
  b.) Broader prohibited activity
  c.) Broader damages
  d.) *Ex parte* seizure order opportunity
  e.) Whistle-blower (immunity/affirmative defense)
  f.) Clear rejection of inevitable disclosure doctrine
  g.) Limitation on scope of injunction (no "preventing a person from entering into an employment relationship")
- Compare DTSA to UTSA (Spreadsheet for Main Operative Provisions)
- DTSA PJI
  a.) Process
  b.) Structure of PJI
  c.) Publication schedule.
- Discuss *Unum Group v. Loftus,* 2016 WL 7115967 (12/6/2016)

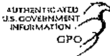
2.) <u>Trademarks</u>

- Purposes of trademark law is to protect company investment in brand identity and to provide consumer protection in the form of confidence in the purported source of goods.
- NLRB has become increasingly active in condemning company employee handbook provisions and work rules that purport to inhibit non-malicious employee speech or to impair NLRA Section 7 activity. (NLRB has also been dismissive of disclaimers.)
- NLRB General Counsel Guidance
- *Chipotle* decision

3.) <u>Copyrights</u>

- Trolls and work rules/policies
- Two types of Copyright Assertion Entities (Trolls): (Bottom Feeders, and Pros)
- Bottom-feeders
- Describe BSA approach
- Note: "Wrong guy" and Acquisition Due Diligence
- Sample policy language (could help on damages)
- No substitute for management focus

TRADE SECRETS (DTSA)



S. 1890

One Hundred Fourteenth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the fourth day of January, two thousand and sixteen

An Act

To amend chapter 90 of title 18, United States Code, to provide Federal jurisdiction for the theft of trade secrets, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Defend Trade Secrets Act of 2016".

SEC. 2. FEDERAL JURISDICTION FOR THEFT OF TRADE SECRETS.

(a) IN GENERAL.—Section 1836 of title 18, United States Code, is amended by striking subsection (b) and inserting the following:

"(b) PRIVATE CIVIL ACTIONS.—

"(1) IN GENERAL.—An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.

"(2) CIVIL SEIZURE.—

"(A) IN GENERAL.—

"(i) APPLICATION.—Based on an affidavit or verified complaint satisfying the requirements of this paragraph, the court may, upon ex parte application but only in extraordinary circumstances, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.

"(ii) REQUIREMENTS FOR ISSUING ORDER.—The court may not grant an application under clause (i) unless the court finds that it clearly appears from specific facts that—

"(I) an order issued pursuant to Rule 65 of the Federal Rules of Civil Procedure or another form of equitable relief would be inadequate to achieve the purpose of this paragraph because the party to which the order would be issued would evade, avoid, or otherwise not comply with such an order;

"(II) an immediate and irreparable injury will occur if such seizure is not ordered;

"(III) the harm to the applicant of denying the application outweighs the harm to the legitimate interests of the person against whom seizure would be ordered of granting the application and

substantially outweighs the harm to any third parties who may be harmed by such seizure;

"(IV) the applicant is likely to succeed in showing that—

"(aa) the information is a trade secret; and

"(bb) the person against whom seizure would be ordered—

"(AA) misappropriated the trade secret of the applicant by improper means; or

"(BB) conspired to use improper means to misappropriate the trade secret of the applicant;

"(V) the person against whom seizure would be ordered has actual possession of—

"(aa) the trade secret; and

"(bb) any property to be seized;

"(VI) the application describes with reasonable particularity the matter to be seized and, to the extent reasonable under the circumstances, identifies the location where the matter is to be seized;

"(VII) the person against whom seizure would be ordered, or persons acting in concert with such person, would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice to such person; and

"(VIII) the applicant has not publicized the requested seizure.

"(B) ELEMENTS OF ORDER.—If an order is issued under subparagraph (A), it shall—

"(i) set forth findings of fact and conclusions of law required for the order;

"(ii) provide for the narrowest seizure of property necessary to achieve the purpose of this paragraph and direct that the seizure be conducted in a manner that minimizes any interruption of the business operations of third parties and, to the extent possible, does not interrupt the legitimate business operations of the person accused of misappropriating the trade secret;

"(iii)(I) be accompanied by an order protecting the seized property from disclosure by prohibiting access by the applicant or the person against whom the order is directed, and prohibiting any copies, in whole or in part, of the seized property, to prevent undue damage to the party against whom the order has issued or others, until such parties have an opportunity to be heard in court; and

"(II) provide that if access is granted by the court to the applicant or the person against whom the order is directed, the access shall be consistent with subparagraph (D);

"(iv) provide guidance to the law enforcement officials executing the seizure that clearly delineates the scope of the authority of the officials, including—

"(I) the hours during which the seizure may be executed; and

"(II) whether force may be used to access locked areas;

"(v) set a date for a hearing described in subparagraph (F) at the earliest possible time, and not later than 7 days after the order has issued, unless the party against whom the order is directed and others harmed by the order consent to another date for the hearing, except that a party against whom the order has issued or any person harmed by the order may move the court at any time to dissolve or modify the order after giving notice to the applicant who obtained the order; and

"(vi) require the person obtaining the order to provide the security determined adequate by the court for the payment of the damages that any person may be entitled to recover as a result of a wrongful or excessive seizure or wrongful or excessive attempted seizure under this paragraph.

"(C) PROTECTION FROM PUBLICITY.—The court shall take appropriate action to protect the person against whom an order under this paragraph is directed from publicity, by or at the behest of the person obtaining the order, about such order and any seizure under such order.

"(D) MATERIALS IN CUSTODY OF COURT.—

"(i) IN GENERAL.—Any materials seized under this paragraph shall be taken into the custody of the court. The court shall secure the seized material from physical and electronic access during the seizure and while in the custody of the court.

"(ii) STORAGE MEDIUM.—If the seized material includes a storage medium, or if the seized material is stored on a storage medium, the court shall prohibit the medium from being connected to a network or the Internet without the consent of both parties, until the hearing required under subparagraph (B)(v) and described in subparagraph (F).

"(iii) PROTECTION OF CONFIDENTIALITY.—The court shall take appropriate measures to protect the confidentiality of seized materials that are unrelated to the trade secret information ordered seized pursuant to this paragraph unless the person against whom the order is entered consents to disclosure of the material.

"(iv) APPOINTMENT OF SPECIAL MASTER.—The court may appoint a special master to locate and isolate all misappropriated trade secret information and to facilitate the return of unrelated property and data to the person from whom the property was seized. The special master appointed by the court shall agree to be bound by a non-disclosure agreement approved by the court.

"(E) SERVICE OF ORDER.—The court shall order that service of a copy of the order under this paragraph, and the submissions of the applicant to obtain the order, shall be made by a Federal law enforcement officer who, upon

making service, shall carry out the seizure under the order. The court may allow State or local law enforcement officials to participate, but may not permit the applicant or any agent of the applicant to participate in the seizure. At the request of law enforcement officials, the court may allow a technical expert who is unaffiliated with the applicant and who is bound by a court-approved non-disclosure agreement to participate in the seizure if the court determines that the participation of the expert will aid the efficient execution of and minimize the burden of the seizure.

"(F) SEIZURE HEARING.—

"(i) DATE.—A court that issues a seizure order shall hold a hearing on the date set by the court under subparagraph (B)(v).

"(ii) BURDEN OF PROOF.—At a hearing held under this subparagraph, the party who obtained the order under subparagraph (A) shall have the burden to prove the facts supporting the findings of fact and conclusions of law necessary to support the order. If the party fails to meet that burden, the seizure order shall be dissolved or modified appropriately.

"(iii) DISSOLUTION OR MODIFICATION OF ORDER.—A party against whom the order has been issued or any person harmed by the order may move the court at any time to dissolve or modify the order after giving notice to the party who obtained the order.

"(iv) DISCOVERY TIME LIMITS.—The court may make such orders modifying the time limits for discovery under the Federal Rules of Civil Procedure as may be necessary to prevent the frustration of the purposes of a hearing under this subparagraph.

"(G) ACTION FOR DAMAGE CAUSED BY WRONGFUL SEIZURE.—A person who suffers damage by reason of a wrongful or excessive seizure under this paragraph has a cause of action against the applicant for the order under which such seizure was made, and shall be entitled to the same relief as is provided under section 34(d)(11) of the Trademark Act of 1946 (15 U.S.C. 1116(d)(11)). The security posted with the court under subparagraph (B)(vi) shall not limit the recovery of third parties for damages.

"(H) MOTION FOR ENCRYPTION.—A party or a person who claims to have an interest in the subject matter seized may make a motion at any time, which may be heard ex parte, to encrypt any material seized or to be seized under this paragraph that is stored on a storage medium. The motion shall include, when possible, the desired encryption method.

"(3) REMEDIES.—In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may—

"(A) grant an injunction—

"(i) to prevent any actual or threatened misappropriation described in paragraph (1) on such terms as the court deems reasonable, provided the order does not—

"(I) prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows; or

"(II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business;

"(ii) if determined appropriate by the court, requiring affirmative actions to be taken to protect the trade secret; and

"(iii) in exceptional circumstances that render an injunction inequitable, that conditions future use of the trade secret upon payment of a reasonable royalty for no longer than the period of time for which such use could have been prohibited;

"(B) award—

"(i)(I) damages for actual loss caused by the misappropriation of the trade secret; and

"(II) damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss; or

"(ii) in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret;

"(C) if the trade secret is willfully and maliciously misappropriated, award exemplary damages in an amount not more than 2 times the amount of the damages awarded under subparagraph (B); and

"(D) if a claim of the misappropriation is made in bad faith, which may be established by circumstantial evidence, a motion to terminate an injunction is made or opposed in bad faith, or the trade secret was willfully and maliciously misappropriated, award reasonable attorney's fees to the prevailing party.

"(c) JURISDICTION.—The district courts of the United States shall have original jurisdiction of civil actions brought under this section.

"(d) PERIOD OF LIMITATIONS.—A civil action under subsection (b) may not be commenced later than 3 years after the date on which the misappropriation with respect to which the action would relate is discovered or by the exercise of reasonable diligence should have been discovered. For purposes of this subsection, a continuing misappropriation constitutes a single claim of misappropriation.".

(b) DEFINITIONS.—Section 1839 of title 18, United States Code, is amended—

(1) in paragraph (3)—

(A) in subparagraph (B), by striking "the public" and inserting "another person who can obtain economic value from the disclosure or use of the information"; and

(B) by striking "and" at the end;

(2) in paragraph (4), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following:

"(5) the term 'misappropriation' means—

"(A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

"(B) disclosure or use of a trade secret of another without express or implied consent by a person who—

"(i) used improper means to acquire knowledge of the trade secret;

"(ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—

"(I) derived from or through a person who had used improper means to acquire the trade secret;

"(II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or

"(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or

"(iii) before a material change of the position of the person, knew or had reason to know that—

"(I) the trade secret was a trade secret; and

"(II) knowledge of the trade secret had been acquired by accident or mistake;

"(6) the term 'improper means'—

"(A) includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means; and

"(B) does not include reverse engineering, independent derivation, or any other lawful means of acquisition; and

"(7) the term 'Trademark Act of 1946' means the Act entitled 'An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes, approved July 5, 1946 (15 U.S.C. 1051 et seq.) (commonly referred to as the "Trademark Act of 1946" or the "Lanham Act")'.".

(c) EXCEPTIONS TO PROHIBITION.—Section 1833 of title 18, United States Code, is amended, in the matter preceding paragraph (1), by inserting "or create a private right of action for" after "prohibit".

(d) CONFORMING AMENDMENTS.—

(1) The section heading for section 1836 of title 18, United States Code, is amended to read as follows:

"§ 1836. Civil proceedings".

(2) The table of sections for chapter 90 of title 18, United States Code, is amended by striking the item relating to section 1836 and inserting the following:

"1836. Civil proceedings.".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to any misappropriation of a trade secret (as defined in section 1839 of title 18, United States Code, as

amended by this section) for which any act occurs on or after the date of the enactment of this Act.

(f) RULE OF CONSTRUCTION.—Nothing in the amendments made by this section shall be construed to modify the rule of construction under section 1838 of title 18, United States Code, or to preempt any other provision of law.

(g) APPLICABILITY TO OTHER LAWS.—This section and the amendments made by this section shall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress.

SEC. 3. TRADE SECRET THEFT ENFORCEMENT.

(a) IN GENERAL.—Chapter 90 of title 18, United States Code, is amended—

(1) in section 1832(b), by striking "$5,000,000" and inserting "the greater of $5,000,000 or 3 times the value of the stolen trade secret to the organization, including expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided"; and

(2) in section 1835—

(A) by striking "In any prosecution" and inserting the following:

"(a) IN GENERAL.—In any prosecution"; and

(B) by adding at the end the following:

"(b) RIGHTS OF TRADE SECRET OWNERS.—The court may not authorize or direct the disclosure of any information the owner asserts to be a trade secret unless the court allows the owner the opportunity to file a submission under seal that describes the interest of the owner in keeping the information confidential. No submission under seal made under this subsection may be used in a prosecution under this chapter for any purpose other than those set forth in this section, or otherwise required by law. The provision of information relating to a trade secret to the United States or the court in connection with a prosecution under this chapter shall not constitute a waiver of trade secret protection, and the disclosure of information relating to a trade secret in connection with a prosecution under this chapter shall not constitute a waiver of trade secret protection unless the trade secret owner expressly consents to such waiver.".

(b) RICO PREDICATE OFFENSES.—Section 1961(1) of title 18, United States Code, is amended by inserting "sections 1831 and 1832 (relating to economic espionage and theft of trade secrets)," before "section 1951".

SEC. 4. REPORT ON THEFT OF TRADE SECRETS OCCURRING ABROAD.

(a) DEFINITIONS.—In this section:

(1) DIRECTOR.—The term "Director" means the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

(2) FOREIGN INSTRUMENTALITY, ETC.—The terms "foreign instrumentality", "foreign agent", and "trade secret" have the meanings given those terms in section 1839 of title 18, United States Code.

(3) STATE.—The term "State" includes the District of Columbia and any commonwealth, territory, or possession of the United States.

(4) UNITED STATES COMPANY.—The term "United States company" means an organization organized under the laws of the United States or a State or political subdivision thereof.

(b) REPORTS.—Not later than 1 year after the date of enactment of this Act, and biannually thereafter, the Attorney General, in consultation with the Intellectual Property Enforcement Coordinator, the Director, and the heads of other appropriate agencies, shall submit to the Committees on the Judiciary of the House of Representatives and the Senate, and make publicly available on the Web site of the Department of Justice and disseminate to the public through such other means as the Attorney General may identify, a report on the following:

(1) The scope and breadth of the theft of the trade secrets of United States companies occurring outside of the United States.

(2) The extent to which theft of trade secrets occurring outside of the United States is sponsored by foreign governments, foreign instrumentalities, or foreign agents.

(3) The threat posed by theft of trade secrets occurring outside of the United States.

(4) The ability and limitations of trade secret owners to prevent the misappropriation of trade secrets outside of the United States, to enforce any judgment against foreign entities for theft of trade secrets, and to prevent imports based on theft of trade secrets overseas.

(5) A breakdown of the trade secret protections afforded United States companies by each country that is a trading partner of the United States and enforcement efforts available and undertaken in each such country, including a list identifying specific countries where trade secret theft, laws, or enforcement is a significant problem for United States companies.

(6) Instances of the Federal Government working with foreign countries to investigate, arrest, and prosecute entities and individuals involved in the theft of trade secrets outside of the United States.

(7) Specific progress made under trade agreements and treaties, including any new remedies enacted by foreign countries, to protect against theft of trade secrets of United States companies outside of the United States.

(8) Recommendations of legislative and executive branch actions that may be undertaken to—

(A) reduce the threat of and economic impact caused by the theft of the trade secrets of United States companies occurring outside of the United States;

(B) educate United States companies regarding the threats to their trade secrets when taken outside of the United States;

(C) provide assistance to United States companies to reduce the risk of loss of their trade secrets when taken outside of the United States; and

(D) provide a mechanism for United States companies to confidentially or anonymously report the theft of trade secrets occurring outside of the United States.

SEC. 5. SENSE OF CONGRESS.

It is the sense of Congress that—

(1) trade secret theft occurs in the United States and around the world;

(2) trade secret theft, wherever it occurs, harms the companies that own the trade secrets and the employees of the companies;

(3) chapter 90 of title 18, United States Code (commonly known as the "Economic Espionage Act of 1996"), applies broadly to protect trade secrets from theft; and

(4) it is important when seizing information to balance the need to prevent or remedy misappropriation with the need to avoid interrupting the—

(A) business of third parties; and

(B) legitimate interests of the party accused of wrongdoing.

SEC. 6. BEST PRACTICES.

(a) IN GENERAL.—Not later than 2 years after the date of enactment of this Act, the Federal Judicial Center, using existing resources, shall develop recommended best practices for—

(1) the seizure of information and media storing the information; and

(2) the securing of the information and media once seized.

(b) UPDATES.—The Federal Judicial Center shall update the recommended best practices developed under subsection (a) from time to time.

(c) CONGRESSIONAL SUBMISSIONS.—The Federal Judicial Center shall provide a copy of the recommendations developed under subsection (a), and any updates made under subsection (b), to the—

(1) Committee on the Judiciary of the Senate; and

(2) Committee on the Judiciary of the House of Representatives.

SEC. 7. IMMUNITY FROM LIABILITY FOR CONFIDENTIAL DISCLOSURE OF A TRADE SECRET TO THE GOVERNMENT OR IN A COURT FILING.

(a) AMENDMENT.—Section 1833 of title 18, United States Code, is amended—

(1) by striking "This chapter" and inserting "(a) IN GENERAL.—This chapter";

(2) in subsection (a)(2), as designated by paragraph (1), by striking "the reporting of a suspected violation of law to any governmental entity of the United States, a State, or a political subdivision of a State, if such entity has lawful authority with respect to that violation" and inserting "the disclosure of a trade secret in accordance with subsection (b)"; and

(3) by adding at the end the following:

"(b) IMMUNITY FROM LIABILITY FOR CONFIDENTIAL DISCLOSURE OF A TRADE SECRET TO THE GOVERNMENT OR IN A COURT FILING.—

"(1) IMMUNITY.—An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that—

"(A) is made—

"(i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and

"(ii) solely for the purpose of reporting or investigating a suspected violation of law; or

"(B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

"(2) USE OF TRADE SECRET INFORMATION IN ANTI-RETALIATION LAWSUIT.—An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual—

"(A) files any document containing the trade secret under seal; and

"(B) does not disclose the trade secret, except pursuant to court order.

"(3) NOTICE.—

"(A) IN GENERAL.—An employer shall provide notice of the immunity set forth in this subsection in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.

"(B) POLICY DOCUMENT.—An employer shall be considered to be in compliance with the notice requirement in subparagraph (A) if the employer provides a cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of law.

"(C) NON-COMPLIANCE.—If an employer does not comply with the notice requirement in subparagraph (A), the employer may not be awarded exemplary damages or attorney fees under subparagraph (C) or (D) of section 1836(b)(3) in an action against an employee to whom notice was not provided.

"(D) APPLICABILITY.—This paragraph shall apply to contracts and agreements that are entered into or updated after the date of enactment of this subsection.

"(4) EMPLOYEE DEFINED.—For purposes of this subsection, the term 'employee' includes any individual performing work as a contractor or consultant for an employer.

"(5) RULE OF CONSTRUCTION.—Except as expressly provided for under this subsection, nothing in this subsection shall be construed to authorize, or limit liability for, an act that is otherwise prohibited by law, such as the unlawful access of material by unauthorized means.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 1838 of title 18, United States Code, is amended by striking "This

chapter" and inserting "Except as provided in section 1833(b), this chapter".

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

DTSA/UTSA COMPARISON

SCOPE	
DTSA	**UTSA**
(3) *the term "trade secret" means all forms of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, or photographically, or in writing if*~~—~~ (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, ~~the public~~ **<u>another person who can obtain economic value from the disclosure or use of the information</u>**; ~~and~~ (4) the term "owner", with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed~~.~~;	**UTSA (§ 1(4))** "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

MISAPPROPRIATION	
DTSA	**UTSA**
(5) the term 'misappropriation' means— (A) **acquisition** of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (B) **disclosure or use** of a trade secret of another without express or implied consent by a person who— (i) used improper means to acquire knowledge of the trade secret; (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was— (I) derived from or through a person who had used improper means to acquire the trade secret; (II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or (iii) before a material change of the person, knew or had reason to know that— (I) the trade secret was a trade secret; and (II) knowledge of the trade secret had been acquired by accident or mistake; (6) the **term 'improper' means—** (A) includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or **espionage** through electronic or other means; and (B) does not include reverse engineering, independent derivation, or any other lawful means of acquisition; and	**UTSA (§ 1(2))** "Misappropriation" means" (i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (ii) disclosure or use of a trade secret of another without express or implied consent by a person who (A) used improper means to acquire knowledge of the trade secret; or (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (i) derived from or through a person who had utilized improper means to acquire it; (ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (C) before a material change of his [or her] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. **UTSA (§ 1(1))** "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

DEFENSES	
DTSA	**UTSA**
(d) PERIOD OF LIMITATIONS.—A civil action under subsection (b) may not be commenced later **than 3 years** after the date on which the misappropriation with respect to which the action would relate is discovered or by the exercise of reasonable diligence should have been discovered. For purposes of this subsection, a continuing misappropriation constitutes a single claim of misappropriation.	**UTSA (§ 6)** An action for misappropriation must be brought within 3 years after the misappropriation is discovered or by the exercise or reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

REMEDIES	
DTSA	**UTSA**
(3) REMEDIES.—In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may— (A) grant an injunction— (i) to prevent any actual or threatened misappropriation described in paragraph (1) on such terms as the court deems reasonable, provided the order does not— (I) prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows; or (II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business; (ii) if determined appropriate by the court, requiring affirmative actions to be taken to protect the trade secret; and (iii) in exceptional circumstances that render an injunction inequitable, that conditions future use of the trade secret upon payment of a reasonable royalty for no longer than the period of time which such use could have been prohibited; (B) award— (i) (I) damages for actual loss caused by the misappropriation of the trade secret; and (II) damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss; or (ii) in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for **a reasonable royalty** for the misappropriator's unauthorized disclosure or use of the trade secret; (C) if the trade secret is willingly and maliciously misappropriated, aware exemplary damages in an amount not more than **2 times** the amount of the damages awarded under subparagraph (B); and (D) if a claim of the misappropriation is made in bad faith, which may be established by circumstantial evidence, a motion to terminate an injunction is made or opposed in bad faith, or the trade secret was willfully and maliciously misappropriated, award reasonable attorney's fees to the prevailing party.	**UTSA (§§ 3 & 4)** [§ 3] (a) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for the actual loss caused by misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret. [§4] If (i) a claim of misappropriation is made in bad faith, (ii) a motion to terminate an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party. **UTSA (§ 2)** (a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation. (b) If the court determines that it would be unreasonable to prohibit future use in exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change or position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

MISCELLANEOUS	
DTSA	**UTSA**
(b) IMMUNITY FROM LIABILITY FOR CONFIDENTIAL DISCLOSUR OF A TRADE SECRET TO THE GOVERNMENT OR IN A COURT FILING.— (1) IMMUNITY.—An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that— (A) is made— (i) in confidence to a Federal, State, or local government official, either directly or indirectly; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. (2) USE OF TRADE SECRET INFORMATION IN ANTI-RETALIATION LAWSUIT. —An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual— (A) files any document containing the trade secret under seal; and (B) does not disclose the trade secret, except pursuant to court order. (3) NOTICE.— **(A) IN GENERAL.—An employer shall provide notice of the immunity set forth in this subsection in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.** (B) POLICY DOCUMENT.—An employer shall be considered to be in compliance with the notice requirement in subparagraph (A) if the employer provides a cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of law. **(C) NON-COMPLIANCE.-- If an employer does not comply with the notice requirement in subparagraph (A), the employer may not be awarded exemplary damages or attorney fees under subparagraph (C) or (D) of section 1836(b)(3) in an action against an employee to whom notice was not provided.** (D) APPLICABILITY.—This paragraph shall apply to contracts and agreements that are entered into or updated after the date of enactment of this subsection. (4) EMPLOYEE DEFINED.—For purposes of this	

subsection, the term 'employee' includes any individual performing work as a contractor or consultant for an employer.	
(2) CIVIL SEIZURE.— (A) IN GENERAL.— (i) APPLICATION.—Based on an affidavit or verified complaint satisfying the requirements of this paragraph, the court may, upon ex parte application but only in extraordinary circumstances, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action. (ii) REQUIREMENTS FOR ISSUING ORDER.— (1) an order issues pursuant to Rule 65 of the Federal Rules of Civil Procedure or another form of equitable relief would be adequate to achieve the purpose of this paragraph because the party to which the order would be issued would evade, avoid such an order.	
(G) ACTION FOR DAMAGE CAUSED BY WRONGFUL SEIZURE.—A person who suffers damage by reason of a wrongful or excessive seizure under this paragraph has a cause of action against the applicant for the order under which such seizure was made, and shall be entitled to the same relief as is provided under section 34(d)(11) of the Trademark Act of 1946 (15U.S.C. 1116(d)(11)). The security posted with the court under subparagraph (B)(vi) shall not limit the recovery of third parties for damages.	

FINAL DRAFT

11/07/2016

INTRODUCTION

CHARGE # 10:1 INTRODUCTORY CHARGE

JURY CHARGE

[*Name of Plaintiff*] claims that [*Name of Defendant*] misappropriated a trade secret belonging to [*Name of Plaintiff*].

To establish this claim, [*Name of Plaintiff*] must prove:

A. [*Name of Plaintiff*] owns a valid trade secret;

B. That trade secret relates to a product or service used in, or intended for use in, interstate or foreign commerce, that [*Name of Plaintiff*] calls [*Name of Trade Secret(s)*]; and

C. [*Name of Defendant*] misappropriated that trade secret.

I will begin by explaining what it means (1) to constitute a trade secret; (2) to own a trade secret; (3) that the trade secret relates to a product or service used in, or intended for use in, interstate or foreign commerce; and (4) for a person to misappropriate a trade secret.

SPECIAL INTERROGATORIES TO THE JURORS

Not applicable to this introductory charge.

ANNOTATIONS AND COMMENTS

1.) Private Civil Actions - In General

18 U.S.C. § 1836(b)(1).

DEFINITIONS

CHARGE # 10:2.1 <u>OWNER</u>

JURY CHARGE

[*Name of Plaintiff*] claims that [*he/she/it*] owns the [*Name of Trade Secret*]. To prove that [*Name of Plaintiff*] owns the [*Name of Trade Secret*], [*he/she/it*] must prove that [*Name of Trade Secret*] is [*his/her/its*] property.

<u>SPECIAL INTERROGATORIES TO THE JURORS</u>

Do you find that [*Name of Trade Secret*] is [*Name of Plaintiff's*] property?

Yes _______

No ________

<u>ANNOTATIONS</u>

1.) Private Civil Actions - In General

18 U.S.C. § 1836(b)(1).

2.) The Defend Trade Secrets Act of 2016 defines "owner" as "the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed." 18 U.S.C. § 1839(4). The court will need to give an appropriate instruction if the plaintiff claims a right to the trade secret other than through legal title.

CHARGE # 10:2.2 <u>TRADE SECRET</u>

JURY CHARGE

[*Name of Plaintiff*] claims that [*Name of Trade Secret*] is a trade secret.

A trade secret may take many forms, including all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing.

In order to qualify as a trade secret, [*Name of Plaintiff*] must prove each of the following elements:

A. [*Name of Trade Secret*] is not generally known to another person who can obtain economic value from the disclosure or use of the information;

B. Another person cannot readily discover [*Name of Trade Secret*] through proper means;

C. [*Name of Trade Secret*] derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information; and

D. [*Name of the Plaintiff*] has taken reasonable steps to keep [*Name of Trade Secret*] secret.

SPECIAL INTERROGATORIES TO THE JURORS

Do you find that [*Name of Trade Secret*] is not generally known to another person who can obtain economic value from the disclosure or use of the information?

Yes _______

No ________

Do you find that [*Name of Trade Secret*] is not readily discoverable through proper means?

Yes _______

No ________

Do you find that [*Name of Trade Secret*] has derives independent economic value actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information?

Yes _______

No ________

Do you find that [*Name of Plaintiff*] has taken reasonable steps to keep [*Name of Trade Secret*] secret?

Yes _______

No ________

If your answer to each of these questions is "yes," you have found there is a protectable trade secret. Go the next jury charge.

ANNOTATION

1.) Definitions Section of Title 18, Part 1, Chapter 90 of the United States Code

18 U.S.C. § 1839(3).

Section 4 of the DTSA states that "trade secret ha[s] the meaning[ ] given . . . in section 1839 of title 18, United States Code."

2.) Uniform Trade Secrets Act Section 1. Definitions and Comment

The legislative history provides that the "definition of a trade secret [is not] meaningfully different from the scope of that definition as understood by courts in states that have adopted the [Uniform Trade Secrets Act]." S. Rep. No. 114-220, at 10 (2016).

3.) The legislative history notes that a trade secret consists of three parts: "(1) information that is non-public; (2) the reasonable measures taken to protect that information; and (3) the fact that the information derives independent economic value from not being publicly known." H.R. Rep No. 114-259, at 2 (2016).

CHARGE # 10:2.3 <u>INTERSTATE OR FOREIGN COMMERCE</u>

JURY CHARGE

[*Name of Plaintiff*] claims that the [*Name of Trade Secret*] relates to a product or service used in, or intended for use in, interstate or foreign commerce.

Use or intended use of the product or service in interstate commerce simply means that that product or service involves travel, trade, transportation, or communication between a place in one state and a place in another state.

Use of the product or service in foreign commerce means that that product or service involves travel, trade, transportation, or communication between a place in the United States and a place outside of the United States.

SPECIAL INTERROGATORIES TO THE JURORS

Do you find that [*Name of Trade Secret*] relates to a product or service used in, or intended for use in, interstate or foreign commerce?

Yes _______

No ________

ANNOTATIONS

1.) Private Civil Actions - In General

18 U.S.C. § 1836(b)(1).

2.) The legislative history notes that the "jurisdictional nexus to interstate or foreign commerce is identical to the existing language required for Federal jurisdiction over the criminal theft of a trade secret under § 1832(a)." S.R. Rep. No. 114-220 at 5 (2016).

INFRINGEMENT

CHARGE # 10:3.1 MISAPPROPRIATION – ELEMENTS

CONSENT & ACQUISITION

[*Name of Plaintiff*] claims that [*Name of Defendant*] acquired, disclosed or used the [*Name of Trade Secret*] without the right to do so. For a trade secret claim, this is called "misappropriation."

If you find that [*Name of Plaintiff*]'s [*Name of Trade Secret*] satisfies the requirements to be a Trade Secret, your next task is to determine if there has been a "misappropriation" by [*Name of Defendant*] of the [*Name of Trade Secret*].

For [*Name of Plaintiff*] to prove that [*Name of Defendant*] misappropriated [*Name of Trade Secret*], [*Name of Plaintiff*] must prove the following:

1. Acquired, used or disclosed without consent: [*Name of Defendant*] acquired, disclosed or used the [*Name of Trade Secret*] without [*Name of Defendant's*] express or implied consent; and

2. Improper Means:

a) [*Name of Defendant*] used or disclosed the [*Name of Trade Secret*] by using improper means to acquire the [*Name of Trade Secret*]; or

b) [*Name of Defendant*] knew or should have known that [*Name of Trade Secret*]:

(i) was derived from or through a third person who used improper means to acquire the trade secret, or

(ii) was acquired under circumstances given rise to a duty to maintain the secrecy of [*Name of Trade Secret*] or limit the use of [*Name of Trade Secret*], or

(iii) it was derived from or through a third person who was under a duty to maintain the secrecy of or limit use of [*Name of Trade Secret*].

3. Examples of "Improper Means": When determining whether or not [*Name of Defendant*] used "improper means" to acquire or disclose the [*Name of Trade Secret*] you are to consider as "improper means" acquiring a Trade Secret to be any one of the below actions by [*Name of Defendant*]:

a) theft

b) bribery

c) misrepresentation

d) breach or inducement of a breach of duty to maintain secrecy, or

e) espionage through electronic or other means.

4. Separate Acts of Misappropriation: Each act of acquiring, disclosing, or using the [*Name of Trade Secret*] may constitute a separate act of misappropriation.

SPECIAL INTERROGATORIES TO THE JURORS

1. Acquired, Used or Disclosed Without Consent: Do you find that [*Name of Defendant*] acquired, used or disclosed [*Name of Trade Secret*] without express or implied consent?

Yes _______

No ________

If your answer is "yes," go to the series of questions for No. 2.

If your answer is "no," your judgment should be for [*Name of Defendant*] on the trade secret misappropriation claim for [*Name of Trade Secret*].

2. Improper Means:

(a) Do you find that [Defendant] acquired the [*Name of Trade Secret*] and knew or should have known that the [*Name of Trade Secret*] was acquired by improper means? or

(b) Do you find that [Defendant] knew or should have known the [*Name of Trade Secret*] was derived from or through a third person who used improper means to acquire the [*Name of Trade Secret*]?

(c) Do you find that [Defendant] knew or should have known [he/she/it] had a duty to maintain the secrecy of the trade secret or limit use of the [*Name of Trade Secret*]?

(d) Do you find that [Defendant] knew or should have known the [*Name of Trade Secret*] was derived from or through a third person who had a duty to maintain the secrecy of the [*Name of Trade Secret*] or limit use of the [*Name of Trade Secret*]?

(e) Do you find that [Defendant] knew or should have known, before a material change of position, that the [*Name of Trade Secret*] was a trade secret and was acquired as a result of an accident or mistake of another?

If your answer to any of these questions is "yes," mark "yes," and go to the next jury charge. If your answer is "no" your judgment is for the [*Name of Defendant*] on misappropriation of [*Name of Trade Secret*].

Yes _______

No ________

Annotation

Definition of "Misappropriation": 18 U.S.C. § 1839.

Definition of "Improper Means": 18 U.S.C. § 1839(6).

It is not an excuse to use or disclose a Trade Secret if before the Defendant had a material change of position, the Defendant knew or should have known that the alleged Trade Secret:

(i) was a trade secret, and

(ii) it was acquired as a result of an accident or mistake of another.

18 U.S.C. §1839 (5) (B)(iii)

CHARGE # 10:3.2 MISAPPROPRIATION: CONSENT

In order for [*Name of Plaintiff*] to prove that [*Name of Defendant*] misappropriated [*Name of Trade Secret*], [*Name of Plaintiff*] must prove that the disclosure or use of [*Name of Trade Secret*] was without consent. Consent can be either express or implied.

a) Express consent is consent that is clearly and unmistakably stated.

b) Implied consent is consent that is inferred from one's conduct rather than from one's direct expression.

<u>Special Interrogatories To The Jurors</u>

Do you find that [*Name of Plaintiff*] gave express or implied consent to [*Name of Defendant*] to use or disclose [*Name of Trade Secret*]?

Yes _______

No ________

If your answer is no, go to the next jury charge.

If your answer is yes, your verdict is for [*Name of Defendant*] on the claim of misappropriation as to [*Name of Trade Secret*].

Annotations and Comments

18 U.S.C. § 1839 (5)

DEFENSES

CHARGE # 10:4.1 AFFIRMATIVE DEFENSES – STATUTE OF LIMITATIONS – THREE YEAR LIMIT

JURY CHARGE

[*Name of defendant*] claims that [*name of plaintiff*]'s lawsuit was not filed within the time set by law. To succeed on this defense [*name of defendant*] must prove that the claimed misappropriation of [*name of plaintiff*]'s trade secret[*s*] occurred before [*insert date three years before date of filing*]. The law considers a continuing misappropriation as a single misappropriation, therefore, you should determine whether the claimed misappropriation is a single misappropriation that began before or after [insert date three years before date of filing].

However, the lawsuit was still filed by [*name of plaintiff*] on time if [*name of plaintiff*] proves that before [*insert date three years before date of filing*], [*name of plaintiff*] did not discover, nor with reasonable diligence should have discovered the claimed misappropriation of [*Name of plaintiff*]'s trade secret[*s*].

Special Interrogatories to the Jurors

1) Did [*name of plaintiff*] know, or by the exercise of reasonable diligence should have discovered, before [*insert date three years before date of filing*] that the claimed misappropriation of [*name of plaintiff*]'s trade secret[*s*] occurred?

Yes _______

No _______

Annotations and Comments

1) 18 U.S.C § 1836(d)

CHARGE # 10:4.2 AFFIRMATIVE DEFENSES – LAWFUL MEANS OF ACQUISITION

JURY CHARGE

Discovery of a trade secret by lawful methods is permitted under the law. [*Name of defendant*] did not use improper means to obtain [*name of plaintiff*]'s trade secret[*s*] if [*name of defendant*] proves that the trade secret[*s*] [*was/were*] lawfully acquired by [*name of defendant*] at the time of the alleged misappropriation. Lawful acquisition by [*name of defendant*] may include reverse engineering, independent derivation, or other lawful means, which I will now explain in some detail.

a) Reverse engineering can be a lawful acquisition of a trade secret. [*Name of defendant*] has the right to disassemble and scrutinize products that are available on the marketplace and obtained through that marketplace. The process of starting with a lawfully obtained product and then working backward to figure out how the product was developed or manufactured, or to determine the ingredients or make-up of that product, is called "reverse engineering." If [*name of defendant*] acquired the information by reverse engineering a lawfully obtained product, then there was no misappropriation.

b) Independent derivation also can be a lawful acquisition of a trade secret. [*Name of defendant*] has the right to independently obtain, discover, develop, or compile [*name of plaintiff*]'s trade secret[*s*]. For example, information can be lawfully acquired if [*name of defendant*] derived [*name of trade secret*] from publicly available sources.

Special Interrogatories to the Jurors

1) Did [*name of defendant*] lawfully acquire [*name of plaintiff*]'s trade secret by reverse engineering, independent derivation, or in some other lawful way?

Yes _______

No ________

If your answer is 'Yes,' then your verdict is for [*Name of Defendant*] on the claim of misappropriation of [*Name of Trade Secret*]. If your answer is 'No,' then go to the next jury charge.

Annotations

1) 18 U.S.C §1839(6)(B) (Improper means "does not include reverse engineering, independent derivation, or any other lawful means of acquisition.")

DAMAGES

CHARGE # 10:5.1 <u>COMPENSATORY DAMAGES</u>

JURY CHARGE

[*Name of Plaintiff's*] claim is for misappropriation of trade secrets.

If [*Name of Plaintiff*] has not proved this claim, your verdict must be for [*Name of Defendant*] on this claim, and you do not consider damages.

If [*Name of Plaintiff*] has proved this claim (and [*name of defendant*] has not proved an affirmative defense), you must then decide the issue of damages.

To the extent that it is not duplicative (that is, double counting), you may award:

A. [*Name of Plaintiff's*] actual damages suffered as a result of [*Name of Defendant's*] misappropriation of [*Name of Trade Secret*]; and

B. [*Name of Defendant's*] unjust enrichment conferred by or attributable to the misappropriation of [*Name of Trade Secret*], even if that amount is more than the damages suffered by [*Name of Plaintiff*].

C. Also, you the Jury may, instead of awarding actual damages or damages based on [*Name of Defendant's*] unjust enrichment, make an award of a reasonable royalty for [*Name of Plaintiff's*] unauthorized disclosure or use of [*Name of Trade Secret*].

<u>SPECIAL INTERROGATORIES TO THE JURORS</u>

1. Actual Damages and Unjust Enrichment:

What, if anything, do you the Jury award in actual damages suffered by [*Name of Plaintiff*] as a result of [*Name of Defendant's*] misappropriation of [*Name of Trade Secret*]?

$________________

What, if anything, do you the Jury award [*Name of Plaintiff*] for unjust enrichment conferred by or attributable to [*Name of Defendant's*] misappropriation of [*Name of Trade Secret*]?

$\$$________________

2. Reasonable Royalty:

Instead of awarding damages to [*Name of Plaintiff*] for actual damages or unjust enrichment, you may award a reasonable royalty to [*Name of Plaintiff*] for [*Name of Defendant's*] unauthorized disclosure or use of [*Name of Trade Secret*]. What, if anything, do you the Jury award [*Name of Plaintiff*] as a reasonable royalty against [*Name of Defendant*]?

$\$$________________

<u>ANNOTATIONS AND CORRESPONDENCE</u>

1.) Actual Damages

18 U.S.C. § 1836(b)(3)(B)(i)(I-II).

The damages language in the DTSA is drawn directly from § 3 of the Uniform Trade Secrets Act. *See* S. REP. NO. 114-220, at 9 (2016); H.R. REP. NO. 114-529, at 13 (2016).

2.) Reasonable Royalty

18 U.S.C. § 1836(b)(3)(B)(ii).

The legislation history suggests that the remedy of a reasonable royalty is a remedy of last resort. *See* S. REP. NO. 114-220, at n.17 (2016); H.R. REP. NO. 114-529, at n.13 (2016).

CHARGE # 10:5.2 EXEMPLARY DAMAGES

JURY CHARGE

If you find that [*Name of Defendant*] has engaged in willful and malicious misappropriation of the trade secret, you may award "exemplary" damages, that is, damages meant to make an example of [*Name of Defendant*], in an amount not more than two (2) times the amount awarded for actual damages, unjust enrichment, and/or for a reasonable royalty.

SPECIAL INTERROGATORIES TO THE JURORS

Do you find that [*Name of Defendant*] willfully and maliciously misappropriated [*Name of Plaintiff's*] [*Name of Trade Secret*]?

Yes _______

No ________

If your answer to this question is "yes", proceed to the next question.

How much, in addition to the damages you have already awarded, do you award as exemplary damages against [*Name of Defendant*]?

$__________________

ANNOTATION

18 USC § 1836(b)(3)(C).

The exemplary damages language in the DTSA is similar to § 3(b) from § 3 of the Uniform Trade Secrets Act. *See* S. REP. NO. 114-220, at 9 (2016); H.R. REP. NO. 114-529, at 13 (2016).

Exemplary damages (and attorney fees) are only available if the employer has provided appropriate notice under 18 U.S.C. §1833(b)(3)(C).

2016 WL 7115967
Only the Westlaw citation is currently available.
United States District Court,
D. Massachusetts.

Unum Group, Plaintiff,
v.
Timothy P. Loftus, Defendant.

CIVIL ACTION NO. 4:16–CV–40154–TSH
|
Signed 12/06/2016

Synopsis
Background: Former employer brought action against former employee for conversion and misappropriation of trade secrets in violation of the Defend Trade Secrets Act of 2016 (DTSA) and the Massachusetts Trade Secrets Act, asserting that employee removed numerous company documents from employer's facility without authorization and refused to return them. Employer filed motion for injunctive relief against employee, and employee filed motion to dismiss.

Holdings: The District Court, Hillman, J., held that:

[1] employee's affirmative defense that he handed former employer's documents over to former employee's attorney to pursue legal action against former employer for alleged unlawful activities could not be adjudicated at motion-to-dismiss stage;

[2] employer seeking preliminary injunction had substantial likelihood of success on merits of conversion claim;

[3] employer would likely suffer irreparable harm in absence of preliminary injunction;

[4] balance of hardships favored preliminary injunction; and

[5] public interest supported grant of preliminary injunction.

Employee's motion denied, and employer's motion granted.

West Headnotes (9)

[1] **Federal Civil Procedure** ⇨ Fact issues

Former employee's affirmative defense that he handed former employer's documents over to former employee's attorney to pursue legal action against former employer for alleged unlawful activities could not be adjudicated at motion-to-dismiss stage in action alleging misappropriation of trade secrets in violation of Defend Trade Secrets Act of 2016 (DTSA) and Massachusetts Trade Secrets Act; there had been no discovery to determine significance of documents taken or their contents, and it was not ascertainable from complaint which documents had been taken, what information they contained, and whether former employee used, was using, or planned to

use those documents for any purpose other than investigating potential violation of law. 18 U.S.C.A. § 1833(b); Mass. Gen. Laws Ann. ch. 93, § 42A; F.R.C.P 12(b)(6).

Cases that cite this headnote

[2] **Federal Civil Procedure** ⇐ Affirmative Defenses, Raising by Motion to Dismiss

As a general rule, a properly raised affirmative defense can be adjudicated on a motion to dismiss so long as (1) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (2) those facts suffice to establish the affirmative defense with certitude.

Cases that cite this headnote

[3] **Injunction** ⇐ Grounds in general;multiple factors

The district court weighs four factors in determining whether to grant a preliminary injunction: (1) the likelihood of success on the merits, (2) the potential for irreparable harm if the injunction is denied, (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues, and (4) the effect, if any, of the court's ruling on the public interest; the sine qua non of this four-part inquiry is likelihood of success on the merits.

Cases that cite this headnote

[4] **Conversion and Civil Theft** ⇐ In general;nature and elements

To prevail on a claim for conversion under Massachusetts law, a plaintiff must show that (1) the defendant intentionally and wrongfully exercised control or dominion over the personal property, (2) the plaintiff had an ownership or possessory interest in the property at the time of the alleged conversion, (3) the plaintiff was damaged by the defendant's conduct, and (4) if the defendant legitimately acquired possession of the property under a good-faith claim of right, the plaintiff's demand for its return was refused.

Cases that cite this headnote

[5] **Injunction** ⇐ Disclosure or use of trade secrets or confidential information

Former employer seeking preliminary injunction prohibiting former employee from copying documents removed from employer's facility and compelling employee to return of all employer's documents, trade secrets, and confidential information in his possession had substantial likelihood of success on merits of conversion claim under Massachusetts law; employee was seen on surveillance videos removing multiple file boxes, shopping bags, and briefcases full of documents from employer's facility after hours without authorization, and employee had refused to return documents. Mass. Gen. Laws Ann. ch. 93, § 42A.

Cases that cite this headnote

[6] **Federal Courts** ⇐ Effect of dismissal or other elimination of federal claims

In a federal-question case, the termination of the foundational federal claim does not divest the district court of power to exercise supplemental jurisdiction but, rather, sets the stage for an exercise of the court's informed discretion. 28 U.S.C.A. §§ 1331, 1367.

Cases that cite this headnote

[7] **Injunction** Disclosure or use of trade secrets or confidential information

Former employer would likely suffer irreparable harm in absence of preliminary injunction prohibiting employee from copying documents removed from employer's facility and compelling employee to return of all employer's documents, trade secrets, and confidential information in his possession, in conversion action under Massachusetts law; documents contained unknown number of trade secrets and potentially unquantified amounts of private health information of employer's customers. Mass. Gen. Laws Ann. ch. 93, § 42A.

Cases that cite this headnote

[8] **Injunction** Disclosure or use of trade secrets or confidential information

Balance of hardships favored preliminary injunction prohibiting former employee from copying documents removed from former employer's facility and compelling former employee to return of all former employer's documents, trade secrets, and confidential information in his possession in conversion action under Massachusetts law; former employer had substantial business risk in that it was unable to assure any customers or employees that former employer's information was secure because it had possible uncontained breach of confidential information, and former employee could request the documents during discovery if he proceeded with a lawsuit against former employer. Mass. Gen. Laws Ann. ch. 93, § 42A.

Cases that cite this headnote

[9] **Injunction** Disclosure or use of trade secrets or confidential information

Public interest supported grant of preliminary injunction prohibiting former employee from copying documents removed from employer's facility and compelling former employee to return of all former employer's documents, trade secrets, and confidential information in his possession in conversion action under Massachusetts law; confidential health information should not be held hostage to an unfiled lawsuit, and former employer's customers who were not yet on notice that their health information could have been compromised would have been well served by former employer's efforts to contain information breach. Mass. Gen. Laws Ann. ch. 93, § 42A.

Cases that cite this headnote

Attorneys and Law Firms

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Roy A. Bourgeois, Samuel J. Miller, Bourgeoiswhite, LLP, Worcester, MA, for Defendant.

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS AND FOR COSTS AND FEES (Docket No. 10) and PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF (Docket No. 4)

HILLMAN, D.J.

Plaintiff Unum Group brings this action against a former employee, Timothy Loftus, after Loftus removed numerous company documents from Unum's facility without authorization, and refused to return them. Unum asserts claims for misappropriation of trade secrets in violation of the Defend Trade Secrets Act of 2016 ("DTSA"), 18 U.S.C. § 1836(b)(1) (Count I) and the Massachusetts Trade Secrets Act (Count II), and for conversion (Count III). Unum filed the present

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motion for injunctive relief seeking to i) enjoin Loftus from copying the documents, ii) compel Loftus and his counsel to return all of the documents and any of Unum's other trade secret or confidential information in his possession, and iii) enjoin Loftus from receiving a mirrored copy of the hard drive of his company laptop [1] until Unum has removed or redacted files containing trade secrets or confidential information. Loftus opposes the preliminary injunction on the grounds that his actions are exempted under § 1836(b) of the DTSA, which provides immunity under any federal and state trade secret laws to individuals who disclose trade secrets in confidence to an attorney, "solely for the purpose of reporting or investigating a suspected violation of law." [2] Loftus also moves to dismiss the complaint for the same reason, and argues that dismissal of the DTSA claim, which provides the basis for this court's subject matter jurisdiction under 28 U.S.C. § 1331, extinguishes the court's supplemental jurisdiction over the remaining state law conversion claim under 28 U.S.C. § 1367. For the reasons detailed below, Loftus's motion to dismiss the complaint (Docket No. 10) is ***denied***, and Unum's motion for a preliminary injunction (Docket No. 4) is ***granted.***

1 On September 29, 2016, Loftus removed a company laptop from the Unum facility, but returned the laptop to Unum on October 24, 2016, after both parties executed an agreement stating its contents would be preserved.

2 The suspected violation of law Loftus is reporting or investigating remains unclear. Loftus has indicated that he is contemplating a whistleblower action, as well as claims for retaliation and wrongful termination.

Background

Plaintiff Unum Group is a provider of financial protection benefits, including disability benefits, life insurance, and accident coverage. Loftus began his employment with Unum in 1985, and, in 2004, was promoted to Director of Individual Disability Insurance ("IDI") Benefits. Within that role, Loftus had access to confidential information regarding Unum's employees and customers, including customer health information, and various trade secrets related to Unum's business. Unum maintains numerous practices to protect the security of its trade secrets and client and employee confidential information, including confidentiality agreements and policies, employee training, and data encryption. Loftus executed numerous confidentiality agreements throughout his tenure at Unum.

On September 21, 2016, Loftus was interviewed by Unum's in-house counsel as part of an internal investigation into claims practices. The following Sunday afternoon, September 25th, Loftus entered Unum's Worcester facility, and was captured on surveillance video leaving the building with two boxes and a briefcase. On Tuesday, September 27th, after leaving work in the afternoon, Loftus was seen on video returning to Unum's offices around 7:45pm, and exiting the building an hour later with a shopping bag full of documents.

***2** An Unum officer investigating Loftus's removal of documents telephoned Loftus on Thursday morning, September 29th, but Loftus refused to respond to questions regarding the printing and removal of documents from Unum's office. Shortly thereafter, Loftus was seen leaving Unum's office with his company laptop and a shopping bag which appeared to be full. Less than an hour after his departure, Unum "Employee Relations" representatives called Loftus and asked him to return the laptop, and he agreed to do so that day. At 3pm on the same day, counsel for Loftus notified Unum that the laptop would be returned the same day, however, the laptop was not returned.

Unum made numerous requests to Loftus's attorney throughout October for the return of the laptop and documents. While the company laptop was returned to Unum on October 24, 2016, the documents Loftus removed from the Unum office have not been returned. In addition, counsel for Loftus has made copies of the documents in counsel's possession. Unum maintains that it is highly likely that the documents removed by Loftus contain confidential customer and employee information, and or trade secrets, including protected health information, and that Unum may now be required by law to notify all individuals whose private health information was contained in the documents of an unauthorized disclosure. [3]

3 Both the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and Mass. Gen. Laws ch. 93H mandate notification to individuals whose personal information has been disclosed to an unauthorized person or used for an unauthorized purpose.

Discussion

A. Loftus's Motion to Dismiss the Complaint

[1] Loftus asks this court to dismiss Unum's federal and state law claims for trade secret misappropriation on the grounds that he turned over the documents he removed from Unum to his attorney to report and investigate a violation of law, and is therefore immune from any liability for trade secret misappropriation pursuant to 18 U.S.C. § 1833(b). Section 1833(b) shields individuals from liability under any federal or state trade secret law for disclosure of a trade secret made "in confidence ... to an attorney ... solely for the purpose of reporting or investigating a suspected violation of law."

[2] "As a general rule, a properly raised affirmative defense can be adjudicated on a motion to dismiss so long as (i) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (ii) those facts suffice to establish the affirmative defense with certitude." *Rodi v. Southern New England School of Law*, 389 F.3d 5, 12 (1st Cir. 2004).

Loftus does not deny that the documents he removed contain trade secrets. While Loftus contends that he is entitled to immunity under the DTSA because he handed Unum's documents over to his attorney to pursue legal action against Unum for alleged unlawful activities, the record lacks facts to support or reject his affirmative defense at this stage of litigation. There has been no discovery to determine the significance of the documents taken or their contents, and Loftus has not filed any potential lawsuit that could be supported by information in those documents. Further, it is not ascertainable from the complaint whether Loftus turned over *all* of Unum's documents to his attorney, which documents he took and what information they contained, or whether he used, is using, or plans to use, those documents for any purpose other than investigating a potential violation of law. Taking all facts in the complaint as true, and making all reasonable inferences in favor of Unum, the court finds the complaint states a plausible claim for trade secret misappropriation and declines to dismiss Counts I and II.

***3** Loftus seeks dismissal of the claim for conversion on the grounds that disposal of the federal trade secret misappropriation claim that forms the basis for this court's jurisdiction renders dismissal of the state law claim appropriate. However, as the trade secret misappropriation claims have survived dismissal, this argument fails. Accordingly, the motion to dismiss the complaint is denied.

B. Unum's Motion for Preliminary Injunction

[3] The court weighs four factors in determining whether to grant a preliminary injunction: "(1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest." *Charlesbank Equity Fund II, Ltd. P'ship v. Blinds To Go, Inc.*, 370 F.3d 151, 158 (1st Cir. 2004). "The sine qua non of this four-part inquiry is likelihood of success on the merits." *New Comm Wireless Services, Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002).

[4] To prevail on a claim for conversion under Massachusetts law, a "plaintiff must show that (1) the defendant intentionally and wrongfully exercised control or dominion over the personal property; (2) the plaintiff had an ownership

or possessory interest in the property at the time of the alleged conversion; (3) the plaintiff was damaged by the defendant's conduct; and (4) if the defendant legitimately acquired possession of the property under a good-faith claim of right, the plaintiff's demand for its return was refused." *U.S. v. Peabody Const. Co., Inc.*, 392 F.Supp.2d 36 (D. Mass 2005) (citing *Evergreen Marine Corp. v. Six Consignments of Frozen Scallops*, 4 F.3d 90, 95 (1st Cir. 1993)).

[5] **[6]** Unum alleges that Loftus was seen on surveillance videos removing multiple file boxes, shopping bags and briefcases full of documents from their facility after hours without authorization, and has refused to return them. Further, the defendant conceded at the hearing on the preliminary injunction on November 30, 2016 that Unum has stated a colorable claim for conversion, and argues only that the court lacks supplemental jurisdiction over the state law claims if the federal trade secret misappropriate claim that forms the basis of this court's jurisdiction is dismissed.[4] However, the court has declined to dismiss the federal claim, as discussed above, and finds Unum is likely to succeed on the merits of its conversion claim. The court will not address the likelihood of success on the merits of the claims for trade secret misappropriation that have already survived dismissal under 12(b)(6), because the court finds Unum's conversion claim alone is sufficient to warrant the injunction Unum seeks.

4 The defendant is mistaken. "In a federal-question case, the termination of the foundational federal claim does not divest the district court of power to exercise supplemental jurisdiction but, rather, sets the stage for an exercise of the court's informed discretion." *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256–57 (1st Cir. 1996).

[7] **[8]** **[9]** Regarding the remaining factors to be considered in deciding a motion for preliminary injunction, all weigh in favor of Unum. There is no question regarding the potential for irreparable harm if the injunction is denied; the documents contain an unknown number of trade secrets and potentially unquantified amounts of private health information that could cause irreparable damage to Unum's business if released. In addition, there is minimal hardship to Loftus in requiring the documents be returned, as he can request them during discovery if he proceeds with a lawsuit against Unum.[5] The hardship to the plaintiff is readily apparent. Unum has a substantial business risk in that it is unable to assure any customers or employees that its information is secure because it has a possible uncontained breach of confidential information. Unum's interest in recovering its documents also has a substantial overlap with the public interest. Confidential health information should not be held hostage to an unfiled lawsuit, and Unum's customers who are not yet on notice that their health information could have been compromised will be well served by Unum's efforts to contain this information breach.

5 Obviously, the discoverability of these documents remains an open question to be decided on the facts of whatever collateral action is filed.

***4** This court recognizes the substantial public interest in facilitating whistleblower actions, however, no whistleblower suit has been filed. Unum does not know what Loftus took or what he is going to do with it. Loftus's self-help discovery and threat of potential action in the future are not mitigated by the existence of an actual lawsuit.

Conclusion

For the reasons set forth above, Defendant's motion to dismiss and for costs and fees (Docket No. 10) is ***denied***, and Plaintiff's motion for preliminary injunction (Docket No. 4) is ***granted.***

1. The Defendant, his attorney, or anyone acting on his behalf is ordered to deliver any documents taken from Unum, whether in paper or electronic form, or any computer peripherals taken from Unum, to the court on or before the close of business on December 7, 2016.

2. The Defendant and his counsel are ordered to destroy all copies of any documents taken from the plaintiff and ordered not to make additional copies. The Defendant is further ordered not to deliver any of the above referenced documents to any third party without the express permission of this court.

3. The Plaintiff is ordered to make a mirror image of the computer hard drive and flash drive. Plaintiff is further ordered to make copies of any documents on the laptop or flash drive and deliver them to the court on/before close of business December 7, 2016. The contents shall be included in the index referenced in paragraph 4.

4. The parties are ordered to meet and to confer on or before January 13, 2017, and prepare an index of the documents that have been delivered to the court. This index shall, for the time being, be filed under seal.

5. The Defendant, and counsel for the Defendant, shall file an affidavit signed under the pains and penalties of perjury, setting forth whether the original or any copies of the documents referenced above have been given to any third party, and if so, the circumstances under which said documents were given.

Once the index of documents referenced in paragraph 4 has been prepared and filed with the court, the plaintiff may move to have the above referenced documents returned to their custody.

SO ORDERED.

All Citations

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TRADEMARKS

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.

<u>Lawful Rules Regulating Employee Conduct towards the Employer</u>

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.

<u>Lawful Employee-Employee Conduct Rules</u>

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.

<u>Lawful Rules Regulating Employee Communications with Outside Parties</u>

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.

<u>No Distribution/No Solicitation Provision</u>

[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.

<u>Do Not Violate the Law and Related Company Policies</u>:

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.

364 NLRB No. 72 (N.L.R.B.), 207 L.R.R.M. (BNA) 1777, 2016-17 NLRB Dec. P 16209, 2016 WL 4419756

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

CHIPOTLE SERVICES LLC D/B/A CHIPOTLE MEXICAN GRILL
AND
PENNSYLVANIA WORKERS ORGANIZING COMMITTEE,
A PROJECT OF THE FAST FOOD WORKERS COMMITTEE

Cases 04-CA-147314 and 04-CA-149551
August 18, 2016

SUMMARY

The Board affirmed the Administrative Law Judge's conclusions that the Respondent violated Section 8(a)(1) by: (1) maintaining a rule entitled -Social Media Code of Conduct- that prohibits employees from posting i ncomplete, confidential, or inaccurate information and making disparagi ng, false, or misleading statements; (2) prohibiting an employee from c irculating a petition regarding the Respondent's adherence to its break policy; (3) discharging an employee because he engaged in protected, c oncerted activity by circulating a petition concerning the Respondent's nonadherence to its break policy; (4) maintaining a rule entitled -Sol icitation Policy- that prohibits employee solicitation during nonworkin g time in working areas if the solicitation could be within the visual or hearing range of customers; (5) maintaining a rule entitled -Chipotl e's Confidential Information- that unlawfully limits the use of the Res pondent's name; (6) maintaining a rule entitled -Ethical Communications - that directs employees to avoid exaggeration, guesswork, and derogato ry characterizations of people and their motives; and (7) maintaining a rule entitled -Political/Religious Activity and C ontributions- that prohibits employees from discussing politics and fro m using the Respondent's name for political purposes. A Board panel ma jority consisting of Members Hirozawa and McFerran reversed the judge's finding that the Respondent violated Section 8(a)(1) by directing an e mployee to delete certain tweets from his Twitter account, finding that the employee's underlying actions were not concerted based on the reco rd. Chairman Pearce would have affirmed those findings for the reasons stated by the judge, except for the judge's finding that the employee' s tweet regarding the price of guacamole constituted protected, concert ed activity, as this tweet appears unrelated to employees' terms and co nditions of employment, and thus was not for the purpose of mutual aid or protection.
Charges filed by Pennsylvania Workers Organizing Committee, a project o f the Fast Food Workers Committee. Administrative Law Judge Susan A. F lynn issued her decision on March 14, 2016. Chairman Pearce and Member s Hirozawa and McFerran participated.

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

***1** On March 14, 2016, Administrative Law Judge Susan A. Flynn issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

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

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The Board has considered the decision and the record in light of the exceptions [1] and briefs and has decided to affirm the judge's rulings, findings, [2] and conclusions except as modified herein, [3] to modify the remedy, [4] and to adopt the recommended Order as modified and set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, Chipotle Services LLC d/b/a Chipotle Mexican Grill, Havertown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from circulating petitions regarding the company's adherence to its break policy or any other terms and conditions of employment.

(b) Discharging employees because they engage in protected, concerted activity by circulating a petition concerning the Respondent's nonadherence to its break policy or any other terms and conditions of employment.

(c) Maintaining a rule entitled "Social Media Code of Conduct" that prohibits employees from posting incomplete, confidential, or inaccurate information and making disparaging, false, or misleading statements.

(d) Maintaining a rule entitled "Solicitation Policy" that prohibits employee solicitation during nonworking time in working areas if the solicitation would be within visual or hearing range of customers.

(e) Maintaining a rule entitled "Chipotle's Confidential Information" that unlawfully limits the use of the Respondent's name.

(f) Maintaining a rule entitled "Ethical Communications" that directs employees to avoid exaggeration, guesswork, and derogatory characterizations of people and their motives.

(g) Maintaining a rule entitled "Political/Religious Activity and Contributions" that prohibits employees from discussing politics and from using the Respondent's name for political purposes.

(h) 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) Rescind the rules as set forth in paragraphs 1(c) through 1(g) of this Order, above.

(b) Furnish all employees with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

***2** (c) Within 14 days from the date of this Order, offer James Kennedy 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.

(d) Make James Kennedy 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 the decision.

(e) Compensate James Kennedy for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of James Kennedy, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(g) 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.

(h) Within 14 days after service by the Region: (1) post at its facility in Havertown, Pennsylvania, copies of the attached notice marked "Appendix A;" (2) post at its facilities in Union Springfield #1275, Oak Park #316, Pipers Alley #1401, Sante Fe Springs #1812, Thompson Peak #357, Corpus Christie #2343, Potomac Yard #2217, Westbrook #1749, and Wilson #1278, copies of the attached notice marked "Appendix B;" and (3) post at its remaining facilities nationwide, copies of the attached notice marked "Appendix C."[5] Copies of each notice, on forms provided by the Regional Director for Region 4, 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, the 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent any time since January 29, 2015.

***3** (i) Within 21 days after service by the Region, file with the Regional Director for Region 4 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. August 18, 2016

Mark Gaston Pearce
Chairman
Kent Y. Hirozawa
Member
Lauren McFerran
Member

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

*4 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 prohibit you from circulating petitions regarding our nonadherence to our break policy or any other terms or conditions of employment.

WE WILL NOT discharge or otherwise discriminate against you for circulating a petition challenging our break policy or engaging in other protected concerted activity.

WE WILL NOT maintain a rule entitled "Social Media Code of Conduct" that prohibits you from posting incomplete, confidential, or inaccurate information and making disparaging, false, or misleading statements.

WE WILL NOT maintain a rule entitled "Solicitation Policy" that prohibits employee solicitation during nonworking time in working areas if the solicitation would be within visual or hearing range of customers.

WE WILL NOT maintain a rule entitled "Chipotle's Confidential Information" that unlawfully limits the use of our name.

WE WILL NOT maintain a rule entitled "Ethical Communications" that directs you to avoid exaggeration, guesswork, and derogatory characterizations of people and their motives.

WE WILL NOT maintain a rule entitled "Political/Religious Activity and Contributions" that prohibits you from discussing politics and from using our name for political purposes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful rules described above.

WE WILL furnish you with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions;

or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provision.

WE WILL, within 14 days from the date of the Board's Order, offer James Kennedy 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 James Kennedy whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate James Kennedy for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

*5 WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of James Kennedy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CHIPOTLE SERVICES, LLC

The Board's decision can be found at www.nlrb.gov/case/04-CA-147314 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., 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 a rule entitled "Social Media Code of Conduct" that prohibits you from posting incomplete, confidential, or inaccurate information and making disparaging, false, or misleading statements.

WE WILL NOT maintain a rule entitled "Solicitation Policy" that prohibits employee solicitation during nonworking time in working areas if the solicitation would be within visual or hearing range of customers.

WE WILL NOT maintain a rule entitled "Chipotle's Confidential Information" that unlawfully limits the use of our name.

WE WILL NOT maintain a rule entitled "Ethical Communications" that directs you to avoid exaggeration, guesswork, and derogatory characterizations of people and their motives.

WE WILL NOT maintain a rule entitled "Political/Religious Activity and Contributions" that prohibits you from discussing politics and from using our name for political purposes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful rules described above.

WE WILL furnish you with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provision.

CHIPOTLE SERVICE, LLC

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APPENDIX C

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

***6** 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 rule entitled "Solicitation Policy" that prohibits employee solicitation during nonworking time in working areas if the solicitation would be within visual or hearing range of customers.

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WE WILL rescind the unlawful rules described above.

WE WILL furnish you with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provision.

CHIPOTLE SERVICE, LLC

The Board's decision can be found at www.nlrb.gov/case/04-CA-147314 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

David Rodriguez, Esq., for the General Counsel.
Kathleen J. Mowry and *Steven E. Fine, Esqs. (Messner Reeves LLP)*, for the Respondent.
Michael J. Healey, Esq. (Healey and Hornack, PC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge.

This case was tried in Philadelphia, Pennsylvania, on August 31, 2015. The Union filed the first charge on March 2, 2015,[1] and the amended charge on April 30. The Union filed the second charge on April 6, 2015, and the amended charge on July 14. The General Counsel issued the complaint in the first case on May 29, 2015, and the complaint in the second case on July 21, 2015. On July 21, an Order was issued consolidating the cases for hearing.

The complaints allege that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it maintained an unlawful social media code of conduct; directed an employee to delete certain tweets he had posted on his Twitter account; prohibited that employee from engaging in protected concerted activity; prohibited that employee from circulating a petition among coworkers regarding the Respondent's denial of breaks; terminated that employee's employment for protected concerted activity; and maintained in its handbook four unlawful work rules.

At trial, I denied the Respondent's motion for summary judgment regarding the social media code of conduct allegation. The Respondent asserts that the social media policy issued to an employee on January 29, 2015, was an outdated policy that had been replaced on January 1, 2014. The General Counsel does not dispute that. Nor does the General Counsel

contend that the current social media policy is unlawful in any respect. The Respondent argues that the allegation concerning issuance of the outdated social media code of conduct is moot: the old policy was erroneously given to a Havertown employee on January 29, 2015; he, as well as all other employees, had been issued the new policy either on its effective date or upon their hire; and, to find a violation of the Act based on a policy that is no longer in effect does not effectuate the purpose of the Act, but would serve only to punish Respondent with no benefit to the public interest. I denied the motion since, although the allegation pertains to an outdated policy provision, that policy provision was in fact issued to an employee and it remained to be seen whether that policy played any role in the actions taken against that employee.

I granted the General Counsel's motion to amend the complaint regarding the social media code of conduct. The allegation initially pertained only to issuance of the outdated policy to one employee in Havertown on January 29, 2015. The amendment charges that the Respondent has maintained that outdated social media code of conduct by issuing it to employees at five locations across the country, including Havertown, since October 16, 2014.

Additionally, the parties agreed that it was not necessary to present testimony as to the four handbook work rules at issue, since the allegation pertains to maintenance, not enforcement, of those rules.

On the entire record, [2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

*7 The Respondent, a limited liability company, operates a chain of casual restaurants throughout the country, including one in Havertown, Pennsylvania. During the 12-month period ending April 30, 2015, the Respondent received gross revenues in excess of $500,000 and purchased and received at that facility goods valued in excess of $5000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Chipotle operates casual restaurants nationwide. At the relevant time, Shannon Kyllo was the Respondent's national social media strategist and Thomas Clark was patch manager or area/regional manager for the region including the Havertown restaurant. Jennifer Cruz was general manager of the Havertown restaurant, and Melanys Santos was the assistant manager/apprentice.

James Kennedy was a crew member at the Havertown restaurant, responsible for food preparation, serving food to customers, washing dishes, and restocking supplies. He was hired in August 2014.

Social Media Policy

One of Kyllo's responsibilities was to review social media postings by employees for violations of company policy. On January 28, 2015, she saw tweets posted by Kennedy regarding the working conditions of Chipotle's employees. One of Kennedy's tweets included a news article concerning hourly workers having to work on snow days when certain

other workers were off and public transportation was shut down. (GC Exh. 7.) His tweet addressed Chris Arnold, the communications director for Chipotle, stating: "Snow day for 'top performers' Chris Arnold?" (GC Exh. 3.) In the other tweets, Kennedy replied to tweets posted by customers. In response to a customer who tweeted "Free chipotle is the best thanks," Kennedy tweeted "nothing is free, only cheap #labor. Crew members only make $8.50hr how much is that steak bowl really?" Then, replying to a tweet posted by another customer about guacamole, Kennedy wrote "it's extra not like #Qdoba, enjoy the extra $2" (referring to the fact that, unlike the restaurant chain Qdoba, Chipotle charges extra for guacamole).

Kyllo emailed Clark, forwarding the tweets, and requested that he ask Kennedy to delete the tweets, and discuss the social media code of conduct with him. (GC Exh. 3.) Attached to that email was a copy of the company's social media policy. (GC Exh. 4.)

The next day, January 29, 2015, Cruz approached Kennedy in the kitchen and said she wanted to talk to him in the dining room. They went out and sat with Clark. Clark asked Kennedy whether he had a Twitter account and whether McMac was his Twitter name; Kennedy replied yes. Clark showed Kennedy copies of the tweets and asked whether he had posted them. Kennedy said he had. Clark then passed over to Kennedy a copy of the social media policy and asked whether Kennedy was familiar with it. Kennedy pushed it aside and said he was. Clark asked Kennedy whether he would delete the tweets at issue, and Kennedy agreed to do so. Later that same day, Kennedy did remove the tweets, and then texted Santos to advise her that he had.

The social media policy that Clark handed to Kennedy read as follows:

Social Media Code of Conduct

We are dedicated to our Food With Integrity mission and take pride in our commitment to using ingredients that are sustainably grown and naturally raised. One way to share our mission is through social networking sites, blogs, and other online outlets (social media). Chipotle's social media team is solely responsible for the company's social media activity. You may not speak or write on Chipotle's behalf.

Social media is also a quick way for you to connect with friends and share information and personal opinions. If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information. To avoid this, our Social Media Code of Conduct applies to you. Chipotle will take all steps to stop unlawful and unethical acts and behavior and may take disciplinary action, up to and including termination, against you if you violate this code or any other company policy, including Chipotle's Code of Conduct.

Outside the workplace and on your own personal time when you are not working, you may participate in social media linked to your personal email address (not your Chipotle email address) and publish personal opinions and comments online. Do be courteous and protect yourself and your privacy. What you publish online is easy to find and will exist for a long time. Think before posting.

Your social media activities are outside the course and scope of your employment with Chipotle. This means that you may not use Chipotle's computers, telephones and equipment for social media when you are working. You may not make any statements about Chipotle's business results, financial condition, or any other matters that are confidential. You must keep confidential information confidential and you may not share it online or anywhere else. For the safety of our employees and property, you may not post online pictures or video of any non-public area of our restaurants. You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors. You alone are personally responsible for your online activity.

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Please do report any complaints or concerns you have about Chipotle's business by talking with your supervisor or contacting Chipotle Confidential any time at 1-866-755-4449 or www.chipotleconfidential.com.

This code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws, or other privacy rights.

(GC Exh. 4.)

The above Social Media Policy that Clark handed to Kennedy was an outdated policy that officially was no longer in effect. It had been provided to Clark by Kyllo in her email. The current policy, effective January 1, 2014, is in the Crew Handbook at p 20. (GC Exh. 2.)

Termination of Employee Kennedy

Chipotle's policy provides that employees are provided breaks in accordance with applicable state law. (GC Exh. 4, p. 23.) Kennedy testified that employees at the Havertown restaurant had two types of breaks: food breaks and rest breaks. An employee is entitled to a 30-minute food break if s/he works over 5 hours. An employee is also entitled to a 10-minute rest break if s/he works 3½ hours, and two such rest breaks if s/he works over 6 hours. Kennedy was concerned that management did not permit all employees to take all their breaks. He felt that the breaks were "hit or miss," that some people took them and others did not. He testified that he never saw anyone sit down for a 10-minute rest break. He sought advice from a labor organizer at McDonald's that he met on Twitter. She suggested that he write a letter to management explaining the problem and setting forth his proposed solution. As a result, on February 14, Kennedy drafted a petition for employees to sign, in the form of a letter addressed to Havertown Chipotle.

We the undersigned crew members of Chipotle Mexican Grill, Havertown are aware of the company policy on breaks:

An employee must take one uninterrupted 30-minute meal break if he or she works over five hours and two breaks if he or she works over 10 hours. If an employee works three and one-half hours or more, managers must provide him or her a 10-minute rest break and if the employee works more than six hours, the manager must provide two 10-minute rest breaks.

We have all been denied breaks by management (at least once) due to "not getting our work done" on time. This is an unacceptable excuse for prohibiting crew members from taking their allotted break. Working an eight hour shift without a meal break or rest break is exhausting. It reduces productivity and increases the stress level in an already fast-paced work environment. In order to be the "top performers" that Chipotle encourages us to be, we need the breaks to which we are entitled.

We want to work with management to create a more positive workplace. We hope this allows us to start a genuine dialogue without fear of reprisal.

(GC Exh. 5.)

Kennedy talked to other employees, soliciting their signatures on the petition. In the early mornings, some employees would wait next door, at Panera Bread, until a manager arrived to let them into Chipotle, to prepare the restaurant for opening. On the morning of February 15, Kennedy took that opportunity to talk to other employees who waited at Panera, and obtained two or three signatures. He was off on February 16. Then, on February 17, he talked to employees in the grill area at Chipotle about signing the petition. The discussion occurred before the restaurant opened for business, and took approximately 2 minutes. He obtained four or five signatures that day.

Cruz testified that she observed Kennedy talking to an employee in the food prep area and handing him a piece of paper. She said that later, that individual and another employee approached her and asked her about the letter that Kennedy was circulating, expressing confusion. Cruz said they thought they might be in trouble for not taking their breaks at a particular time, and Cruz told them not to worry.

Later, when Kennedy was working on the serving line, Cruz asked to talk to him in the office, and he complied. She told him she had noticed him passing around a sheet of paper to employees, and asked him what it was about. Kennedy asked if she would like to see it, and gave her a copy with no signatures on it. Cruz again asked him what it was about, and he explained that employees were not all getting their breaks. She pointed out that he had just taken a food break. She asked if she had ever told him he couldn't take his break, and he said no. She further stated that some employees occasionally opt not to take their breaks in order to complete tasks and take their breaks at the end of the day, and that she cannot compel them to take breaks. Cruz told Kennedy that if everyone were to take a break, all the work must be done first. She thought he was asking her to fire employees who did not take their breaks because they were low performers and could not timely complete their duties. Kennedy tried to explain that was not his position, and that the right to take a break was based on the hours worked, not on job performance. Cruz told Kennedy to stop circulating the petition. Kennedy refused, saying he would continue to circulate the petition, and that she would have to fire him to get him to stop. Cruz told him "Okay, just leave;" he said okay and left the office. Kennedy collected his belongings, said "goodbye" or "nice working with you" to other employees, and left the restaurant.

The meeting occurred in the office, which is located at the back of the restaurant. The room is fairly small. Therefore, during their exchange, Cruz and Kennedy were seated facing each other, and in close proximity, a couple of feet apart. The door to the office was left ajar. In their testimony, Cruz and Kennedy agreed that Kennedy raised his voice to her. She said he pointed his finger at her and leaned in toward her, while he said he waved his arm holding the petition and leaned toward her. I credit Kennedy's testimony on this point, as well as in general with regard to the meeting, as Kennedy's version of the discussion makes more sense than Cruz'. Cruz testified that she felt intimidated by Kennedy and was fearful that he might hurt her, for several reasons. First, Kennedy is much taller than she. Second, she was aware that he had PTSD as a result of his military service in Iraq. And third, she felt he had demonstrated that he may be prone to violence based on certain behavior at work. For example, when breaking down boxes for the recycling bin, he punched them with his fists. (He said it was fun, and relieved stress.) Cruz recalled an instance when she forgot to put the lid on the blender so liquid splattered, and Kennedy was irritated about the mess, saying he would clean it up. (He does not recall that incident, but another similar one in which neither Cruz nor he was involved.) Cruz testified that on another occasion, she asked Kennedy to assist her in replacing a fluorescent light bulb and he refused because he was on break. (He does not recall that, either.) It is undisputed that Cruz was shaking by the end of the discussion; she testified it was because she was frightened while Kennedy thought she was emotional due to their disagreement.

Before her discussion with Kennedy and just before Assistant Manager Santos left the restaurant on break, Cruz had told Santos that she planned to talk to Kennedy about the petition. When Santos returned to the restaurant, she walked past the office and saw the two still talking but she could not hear what either was saying. She testified that although the door was closed, she could see them, seated, through the small window in the door from a few feet away.

Cruz testified that, when she told Kennedy to leave, she only wanted him to leave the office, not the restaurant, and that she did not fire him. In fact, when she heard him saying goodbye to coworkers, she wondered what he was doing. Further, if she had intended to fire him, she would have called Melanys Santos in as a witness. However, upon reflection, she decided that she could not tolerate his attitude and no longer felt safe working with him. Cruz testified that when she did decide to fire Kennedy, it was not because of the petition or because he discussed it with employees while they were on duty, but because of his demeanor during their conversation. After Kennedy left, Cruz briefly talked to Santos about their discussion. Cruz then called Clark to explain what had happened. He asked what she wanted to do, and she said she did not feel safe working with Kennedy and would let him go. The following day, Kennedy was not scheduled to work, but Cruz thought he might come in to discuss the situation. She intended to tell him he was fired if he did come

to the restaurant. He did not come in, so she put the termination through on the computer. Cruz testified that there are limited options to select from as reasons for termination in the computer program, and she chose insubordination in order to reflect that he was fired rather than quit.

Kennedy testified that, on the drive home, he wondered whether Cruz had indeed fired him or only intended him to take the rest of the day off to calm down. He recalled that Cruz had once sent another employee home for the day after she had an altercation with a kitchen supervisor, and had not fired her. Kennedy was not scheduled to work the next day, February 18, but returned to work the following day, February 19. However, Cruz was not working that day. Upon his arrival, Kennedy asked kitchen supervisor Sieh whether he was fired. Sieh called Cruz at home and asked whether Kennedy still had his job. Cruz told her that Kennedy should go home, as he was already off the books. Sieh then told Kennedy he had been fired.

Handbook Rules

The Respondent has a Crew Handbook that advises employees of its work rules. (GC Exh. 2.) Employees are not issued written copies of the handbook, but have access to the handbook online, via the "work day" program. That program is an internal website where employees can access various types of company information and documents such as the crew handbook and employees' schedules.

At issue are the following handbook provisions:
Solicitation Policy

. . . Employees are not to solicit or be solicited during their working time anywhere on company property, nor are they to solicit during non-working time in working areas if the solicitation would be within visual or hearing range of our customers. . .

Chipotle's Confidential Information

. . . The improper use of Chipotle's name, trademarks, or other intellectual property is prohibited. . .

Ethical Communications

As an aspect of good judgment and adherence to this policy, it is always appropriate to raise questions and issues, even if they are difficult. Likewise, avoid exaggeration, colorful language, guesswork, and derogatory characterizations of people and their motives. Whether in your everyday work conversations, in your exchange of e-mail, or otherwise, your communications should be thoughtful and ethical. Think before you speak and write. Be clear and objective.

Political/Religious Activity and Contributions

While any political or religious affiliation you may have is up to you, any activity in those areas needs to remain outside of the work environment. It is said that to avoid arguments, one should never discuss politics or religion in public--and in this case at work. . .

. . . It is strictly prohibited to use Chipotle's name, funds, assets, or property for political or religious purposes or endorsement, whether directly or indirectly.

(GC Exh. 2, p. 19, 34, and 35.)

III. DISCUSSION AND ANALYSIS

A. Did the Respondent maintain an unlawful social media policy?

When evaluating whether a work rule violates Section 8(a)(1), the National Labor Relations Board (the Board) has held that:

[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. . . . If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Lutheran Heritage Village-Livonia, 343 NLRB 646, 646-647 (2004); see *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd mem., 203 F.3d 52 (D.C. Cir. 1999).

The two challenged sections of the Respondent's social media policy are:

> "If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information."
>
> "You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors."

When evaluating the appropriateness of rules, the Board balances the legitimate interests of the employer against the Section 7 rights of employees. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). When work rules are overly broad or ambiguous, they may reasonably read by employees to prohibit lawful Section 7 activity, and may serve to chill employees in the exercise of their Section 7 rights. Ambiguous rules are construed against the employer. *Lafayette Park Hotel*, above.

Neither of the challenged provisions explicitly prohibits Section 7 activity. However, as explained below, employees would reasonably construe portions of these provisions to restrict the exercise of their Section 7 rights, and certain of these prohibitions have been found by the Board to be unlawful. Further, the rule was applied to restrict Kennedy's exercise of Section 7 rights.

An employer may not prohibit employee postings that are merely false or misleading. Rather, in order to lose the Act's protection, more than a false or misleading statement by the employee is required; it must be shown that the employee had a malicious motive. *Lafayette Park Hotel*, above (rule prohibiting making false, vicious, profane, or malicious statements toward or concerning the hotel or any employee was a violation); *Cincinnati Suburban Press, Inc.*, 289 NLRB 966, 975 (1988) (statements are protected absent a showing of reckless disregard for the truth or maliciousness); *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978) (false and inaccurate statements that are not malicious are protected); *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250 (2007). Statements are made with malicious motive if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. See, e.g., *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006); *Sprint/United Management Co.*, 339 NLRB 1012, 1018 (2003).

This analysis applies to the policy prohibitions against false, misleading, inaccurate, and incomplete statements. Therefore, those prohibitions are unlawful.

The prohibition against disclosing confidential information is also problematic. The policy does not define confidential, even when it is discussed two paragraphs down. While the Respondent certainly has a valid interest in protecting private company information, and it is inappropriate to engage in speculation or presumptions of interference with employees' rights, the undefined word "confidential" is vague and subject to interpretation, which could easily lead employees to construe it as restricting their Section 7 rights. See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292 (1999); *Lafayette Park Hotel*, above.

"Disparaging" is a synonym for derogatory. The prohibition against disparaging statements could easily encompass statements protected by Section 7, and the Board has found rules prohibiting derogatory statements to be unlawful. See *Southern Maryland Hospital Center*, 293 NLRB 1209, 122 (1989), enfd. in rel. part, 916 F.2d 932 (4th Cir. 1990) (unlawful rule against "derogatory attacks"). Similarly, in *Costco Wholesale Corp.*,[3] the Board determined that a rule prohibiting statements "that damage the Company, defame any individual or damage any person's reputation" was overbroad and violated the Act. Thus, disparaging statements would reasonably be construed to include matters protected by Section 7.

The policy prohibits harassing or discriminatory statements. These are legal terms and are not defined anywhere in the policy. The Board found prohibitions against verbal abuse, abusive or profane language, or harassment to be lawful in *Lutheran Heritage*, above. The mere fact that the rule could be read to address Section 7 activity does not make it illegal. See *Lutheran Heritage* at 647 ("we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way"). Similarly, in *Palms Hotel and Casino*,[4] the Board found lawful a rule that prohibits employees from engaging in conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing or interfering with other employees. "Nor are the rule's terms so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace. . . . We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it." Id at 1368. Following this rationale, I find that the prohibitions against harassing or discriminatory statements do not violate the Act.

Finally, the social media policy concluded with a disclaimer, stating that "This code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws, or any other privacy rights." That sentence does not serve to cure the unlawfulness of the foregoing provisions. See *Allied Mechanical*, above, at 1084.

Thus, I find that the prohibitions against spreading incomplete, confidential, or inaccurate information and those against making disparaging, false, or misleading statements violate Section 8(a)(1). However, I find that the prohibitions against harassing or discriminatory statements are lawful.

Although it is undisputed that the Respondent had replaced this policy with a new one in the 2014 crew handbook, the old policy was the one that formed the basis for Kyllo requesting Clark to meet with Kennedy, it was the policy given to Kennedy at that meeting, and it was the basis for Clark's request that Kennedy remove his tweets. It was sent to Clark by Kyllo, who was the company's social media strategist. Further, Kyllo referenced the old policy in similar emails that she sent to managers for several other restaurants across the country. (CP Exh. 2-9.) In those emails, Kyllo also asked those managers to address employees' Twitter or Instagram postings with them, as violative of the social media policy. It can only be concluded, then, that this policy was indeed maintained by the Respondent.

The Respondent argues that it is purely punitive to find a violation based on an outdated policy that is no longer in use. That might be true if it were not for the fact that the Respondent did, in fact, use the outdated policy as the reason for corrective action involving nine employees, including Kennedy, nationwide between October 16, 2014, and February

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13, 2015. It is immaterial whether those employees' postings constitute protected concerted activity or whether their postings would violate the current policy; the question is simply whether the policy was maintained. The fact that Kyllo erroneously relied on the old policy does not relieve the Respondent of responsibility for her actions and the actions of managers in reliance on her guidance.

Therefore, I find that the Respondent violated Section 8(a)(1) when it maintained the old social media policy provisions prohibiting spreading incomplete, confidential, or inaccurate information and those provisions prohibiting making disparaging, false, or misleading statements, but did not violate the Act with respect to the prohibitions against harassing or discriminatory statements.

B. Did the Respondent violate the Act by directing an employee to delete tweets and not engage in protected concerted activity in the future?

Section 7 protects employees' right to engage in concerted activities for the purpose of mutual aid or protection. The two prongs--whether the activity was concerted and whether it was for mutual aid or protection--are analyzed separately, and objectively. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3.

Employee communications to the public that are part of and related to an ongoing labor dispute are protected by the Act. See, e.g., *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979); *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980); *Valley Hospital Medical Center Inc.*, 351 NLRB 1250, 1252 (2007). Employees do not lose the protection of the Act when they seek to improve terms and conditions of employment through channels outside the immediate employee-employer relationship.

Kennedy's tweets did not pertain to any current dispute between Chipotle's employees and its management, nor did Kennedy consult or discuss with other employees any intention to post these tweets.

Kennedy's tweets concerned wages and working conditions--employees' pay rates and being required to work on snow days. Wages and working conditions are matters protected by the Act. The issues raised in Kennedy's tweets are not purely individual concerns, pertaining only to Kennedy. He was not seeking a pay raise for himself,[5] or requesting that he be excused from work when it snows heavily. Receiving low hourly wages and being required to report to work despite heavy snow are issues common to many of Chipotle's hourly workers nationwide, and certainly to those at the Havertown restaurant.

The fact that Kennedy did not consult with coworkers before posting these tweets does not make them individual concerns. It is not necessary that two or more individuals act together in order for the activity to be concerted. In *Meyers II*,[6] the Board stated that concerted activities include individual activity 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." In *Fresh & Easy*, above, the Board engaged in an extensive discussion of what constitutes concerted activity, and noted that it is not necessary that coworkers agree about the complaint or its objective. *Fresh & Easy* at 4. Kennedy's tweet concerning snow days was directed to Chipotle's communications director but visible to others; Kennedy's other two tweets were in response to customer postings, and likewise visible to others. All these postings had the purpose of educating the public and creating sympathy and support for hourly workers in general and Chipotle's workers in specific. They did not pertain to wholly personal issues relevant only to Kennedy but were truly group complaints. I conclude that Kennedy's postings constitute protected concerted activity.

Also in *Fresh & Easy*, above, the Board discussed the breadth of "mutual aid or protection" in light of the Supreme Court's decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). In *Eastex*, one section of a union newsletter criticized a presidential veto of an increase in the Federal minimum wage and urged employees to register to vote to "defeat our enemies and elect our friends." There was no current wage dispute between the employees and their employer, and in

fact those employees were paid more than the minimum wage. Rather, the union was acting on behalf of the employer's employees in the future and other employees generally. 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." *Fresh & Easy* at 3, citing *Eastex*. The Court noted that although the union's newsletter article did not pertain to a matter that related directly to a dispute between the employees and the employer, it was reasonably related to the employees' jobs or their status or condition as employees, and therefore "for mutual aid or protection." The Court held that portion of the newsletter to be protected even though petitioner's employees were paid more than the vetoed minimum wage, citing the Board's language that, as the "minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum," and that the petitioner's employees' concern "for the plight of other employees might gain support for them at some future time when they might have a dispute with their employer." *Eastex* at 570. "(T)he analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees." *Fresh & Easy*, above at 3. Applying this rationale, I find that Kennedy's postings were for the purpose of mutual aid or protection.

The Respondent asserts that Kennedy's tweets, especially the one regarding Chipotle's $2 charge for guacamole, violate the new social media policy (that policy is not at issue in this case) in that one tweet promotes a competitor (Qdoba) and that all of Kennedy's tweets disparage Chipotle's products and business. I disagree. The tweets are simple statements of fact and do not attack the quality of Chipotle's food. See, e.g, *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979).

Having determined that Kennedy's tweets satisfy both prongs of the analysis-- they were protected concerted activity and were for the purpose of mutual aid or protection--I further find that the Respondent's request that Kennedy delete those tweets was unlawful, although no discipline was imposed on him. While Clark asked Kennedy to remove the tweets and did not direct him to do so, under the circumstances, it amounts to an order from a higher level manager, and the Respondent does not contend otherwise.

I find, therefore, that the Respondent violated Section 8(a)(1) when Clark asked Kennedy to delete his tweets.

I now turn to the question of whether the Respondent violated the Act by prohibiting Kennedy from engaging in protected concerted activity. No evidence was presented that Clark explicitly told Kennedy not to post similar tweets in the future. However, by handing Kennedy the social media policy and asking Kennedy to delete those specific tweets, Clark implicitly directed him not to post similar content in the future. Since I have found that the tweets are protected concerted activity, I conclude that Clark's action implicitly prohibited Kennedy from posting similar tweets in the future and thus prohibited him from engaging in protected concerted activity.

I find, therefore, that Clark's implicit direction not to post tweets concerning wages or working conditions constitutes a violation of Section 8(a)(1).

C. Did the Respondent violate the Act by directing an employee to stop circulating a petition among coworkers?

Section 7 guarantees employees the right to engage in protected concerted activities. The petition that Kennedy drafted objected to employees being denied certain of their breaks. He did not draft it on his own behalf, but on behalf of all employees at Chipotle's Havertown restaurant, as Kennedy had observed that employees were not taking all the breaks to which they were entitled. He circulated it among other employees, seeking their signatures in support of opening a dialogue with management to change the situation. He did, in fact, obtain the signatures of approximately 6-8 employees.

The copy of the petition that Kennedy gave Cruz to read was a clean copy, with no signatures. Cruz told Kennedy to stop circulating the petition, period. She did not direct Kennedy to stop circulating the petition while employees were working, or otherwise propose restrictions on circulating the petition. Whether employees were working or not was

apparently of no concern to her. Rather, she testified that her concern was that two employees who talked to her about the petition said they were confused by and worried about its contents. That is not a valid basis to prohibit Kennedy from engaging in protected concerted activity.

I find, therefore, that the Respondent violated Section 8(a)(1) when Cruz directed Kennedy to stop circulating the petition.

D. Did the Respondent violate the Act by terminating an employee's employment?

When an employee is disciplined or discharged for conduct that occurs while engaging in concerted activity, it must be determined whether the otherwise protected conduct is sufficiently egregious to remove it from the protection of the Act. The Board applies the *Atlantic Steel* analysis to these situations. The four factors considered are: (1) the place of the discussion; (2) the subject matter of the discussion: (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1979).

When weighing these factors, the Board has found some impulsive behavior protected, especially if the conduct was provoked by an unfair labor practice. The Board has found an employee to have forfeited the protection of the Act only in cases where the behavior is "truly insubordinate or disruptive of the work process." Further, "unpleasantries" in the course of otherwise protected concerted activity do not remove the Act's protection. *Timekeeping Systems*, 323 NLRB 244, 248-49 (1997). Protected speech remains protected "unless found to be so violent or of such serious character as to render the employee unfit for further service." *Timekeeping* quoting *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976).

See also *Stanford Hotel*, 344 NLRB 558, 558-559 (2005) (the discussion occurred in a secluded room, the discussion concerned the employee's assertion of a fundamental right under the Act, and the employer provoked the employee by unlawfully threatening to discharge him). In *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), remanded in relevant part 664 F.3d 286, the Board explained that "the Act allows some latitude for impulsive conduct by employees in the course of protected concerted activity, but, at the same time, recognizes that employers have a legitimate need to maintain order."

Kennedy engaged in protected concerted activity when he drafted and circulated a petition among employees, challenging the Respondent's denial of breaks to which employees were entitled. Although the Respondent argues that Kennedy's activity was not protected because he solicited coworker support while they were working and in the work area, I do not agree. First, Kennedy had solicited employees at Panera Bread before they were working. Second, the employees at Havertown routinely discussed non work-related topics while they worked. Further, the discussion Cruz observed, of Kennedy talking to two coworkers, occurred while they were working but Kennedy was on break, before the restaurant opened, and took only approximately 2 minutes. No evidence was presented that it interfered in any way with their work. It would be expected that Cruz would have intervened and directed them to return to their duties had it been otherwise. More importantly, Kennedy was engaged in protected concerted activity when he was in the meeting with Cruz. She asked him to come to the office to talk about the petition, and she asked him questions about the contents of the petition. He responded and tried to explain the nature of the problem. Cruz attempted to narrow the denial of breaks problem to Kennedy, but he explained that it wasn't about him but about all employees who were denied any of the breaks to which they were entitled.

Cruz was aware of Kennedy's activity, and called him into the office to discuss his circulation of the petition. The office was in the back of the restaurant, apart from the work and dining areas. Cruz asked Kennedy about the contents of the petition, and they disagreed about how breaks were handled. Kennedy raised his voice in that discussion. Finally, Cruz told Kennedy to stop circulating the petition. He refused, telling her she would have to fire him to get him to stop. Cruz then told him to "get out." Kennedy assumed that he had been fired and left the premises. He later thought Cruz

only meant for him to leave for the rest of the day. However, when he returned to the restaurant for his next scheduled shift, he was told he had been fired.

Cruz testified that she did not fire Kennedy in that meeting, but did make the decision to fire him shortly thereafter and officially did so the next day. She inputted the reason for the termination into the company's computer program as ""insubordination," as she testified she felt that "was the correct thing."

I believe Cruz when she said she did not intend to fire Kennedy in their meeting. Rather, I believe she intended to tell him to stop circulating the petition, and she expected he would agree, as he had when Clark asked him to remove his tweets a few weeks earlier. She was taken aback when Kennedy objected to her order. Kennedy testified that he had raised his voice when he felt Cruz did not understand the problem about breaks, and she was misdefining his concern. However, in her testimony, Cruz stated that she became concerned when Kennedy said she would have to fire him to get him to stop circulating the petition. She testified that it was at that point that she felt a switch flipped in Kennedy, and she "was like whoa." (Tr. at 78-79.) This belies her asserted justification for the firing, and supports the General Counsel's position that Kennedy was fired due to his protected activity.

Santos testified that, after Kennedy left the office and she went in to talk to Cruz, Cruz said she had tried to talk to him about the petition. She told Santos she was firing Kennedy "because of his reaction." Based on Cruz' testimony as to when she became concerned about Kennedy's behavior, I can only conclude that "his reaction" refers to Kennedy telling her he was going to continue to circulate the petition unless she fired him. Santos further testified that, when she saw the two talking in the office a few feet away from her, she could not hear what either one was saying. Therefore, while Kennedy admittedly raised his voice, he could not have been shouting.

Cruz testified that although she inputted "insubordination" as the reason for the termination, the real reason was that she feared Kennedy would become violent. That purported fear was based on Kennedy raising his voice, pointing his finger and leaning toward her in the meeting, combined with three prior incidents, and her knowledge that Kennedy was diagnosed with posttraumatic stress disorder (PTSD). [7] I find that Cruz' purported fear of Kennedy was neither justified nor true, and was fabricated after the fact. Cruz gave three examples of Kennedy's behavior during his roughly 6 month employment that was symptomatic of PTSD and supported her fear. First, he punched boxes when breaking them down for recycling. The second time he was "mad" and said he would clean up the mess created when Cruz forgot to put the lid on a blender before turning it on. The third was when he declined to help her replace a light bulb while he was on break. How these are in any way demonstrative of PTSD symptoms, much less justification for Cruz' fear of violence by Kennedy, escapes me entirely. If it weren't such blatant disability discrimination, Cruz' testimony would be laughable. Cruz was surprised that Kennedy argued with her and surprised that he raised his voice. While I have credited Kennedy's testimony that he did not point at her but waved his hand around, he admitted that he leaned toward her, and he agreed that he raised his voice. Whether Kennedy pointed his finger at her or waved his hand around with the petition in it, neither is indicative of potential violence. Raising his voice, likewise, does not indicate that an assault was likely. Kennedy having a strong reaction is not surprising under the circumstances, and his behavior hardly rises to such a level of egregiousness that he forfeits the protection of the Act. He did not threaten Cruz, nor curse at her, nor engage in other serious misconduct, but argued with her about the problem with breaks, at her instigation. Cruz probably was upset by Kennedy's response; she was a relatively new manager and not accustomed to employees disagreeing with her or challenging her. However, Kennedy's conduct was fairly mild under the circumstances, and no reasonable person could possibly construe it as potentially violent or rendering him unsafe or unfit for further service.

The Respondent's reliance on this defense is, frankly, ludicrous. Insubordination was, in fact, the reason for the termination, and that insubordination was Kennedy's refusal to comply with Cruz' order that he cease circulating the petition. That was his last statement before Cruz told him to leave.

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Cruz testified that "we only got the insubordination option is only when you do it, when the manager is doing the firing." Her meaning is unclear. If she was trying to say that insubordination is the only basis for termination in the computer program, I do not believe it. There are a multitude of reasons an employee can be fired, such as poor performance, theft, assault, undependability, among others. It would make no sense whatsoever for the computer program to contain insubordination as the only reason a Chipotle employee could be fired.

In sum, I find that the Respondent terminated Kennedy's employment due to his refusal to cease engaging in protected concerted activity. I further find that, applying *Atlantic Steel*, Kennedy's behavior during his discussion with Cruz was not so egregious as to lose the protection of the Act.

I find, therefore, that the Respondent violated Section 8(a)(1) when it terminated Kennedy's employment.

E. Did the Respondent violate the Act by maintaining certain work rules in its employee handbook?

An employer's work rule violates Section 8(a)(1) when the rule reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd mem., 203 F.3d 52 (D.C. Cir. 1999). The rule must be read reasonably, not in isolation but in context, and it must not be presumed to interfere with employees' rights. Determination of the legality of a work rule requires a balancing of competing interests: the right of employees to engage in protected activity against the right of employers to maintain discipline in the workplace. Id at 825, 827; *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004). Further, vague or ambiguous rules may chill employees in the legitimate exercise of their Section 7 rights, and are construed against the employer. *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132, 2 (2012); *Norris/O'Bannon, Dover Resources Co.*, 307 NLRB 1236, 1245 (1992); *Paceco*, 237 NLRB 399, 399 fn. 8 (1978).

Where the rules are likely to have a chilling effect on employees' Section 7 rights, mere maintenance of the rules may be an unfair labor practice even absent evidence of enforcement. *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970), enfd. 450 F.2d 942 (5th Cir. 1971).

The challenged portions of the Respondent's Code of Conduct do not explicitly restrict Section 7 activities, nor were they promulgated in response to union activity, nor have they been applied to restrict Section 7 activities. Thus, the issue at hand is whether employees would reasonably construe these sections of the Code of Conduct to prohibit Section 7 activity.

Solicitation Policy

The portion of the policy at issue reads "...Employees are not to solicit or be solicited during their working time anywhere on company property, nor are they to solicit during nonworking time in working areas if the solicitation would be within visual or hearing range of our customers . . ." (GC Exh. 2, p. 19.)

This work rule is overbroad. The Board permits solicitation in work areas during nonworking hours, except in special circumstances. *Food Services of America, Inc.*, 360 NLRB No. 123, slip. op at 5 (2014). In *Sam's Club*, 349 NLRB 1007 (2007), the Board noted that, in a retail business, it is appropriate to prohibit solicitation only on the sales floor where solicitation would interfere with sales and disrupt business. The Board did not approve any restriction merely because customers could see or hear the solicitation. As pointed out by the General Counsel, the Respondent's prohibition against solicitation if it "would be within visual or hearing range of our customers" extends to any working area where customers may see the employees, and this may include restrooms, the parking lot (where trash bins are located), and other inside areas such as the food prep and dishwashing sections, due to the layout of the restaurant. It also includes the dining room, where employees may sit to take breaks. Solicitation in those areas would have no impact on customers' purchasing of or eating food.

I find that maintenance of the rule prohibiting solicitation in work areas during nonworking hours violates Section 8(a)(1) of the Act.

Chipotle's Confidential Information

The section at issue reads ". . . The improper use of Chipotle's name, trademarks, or other intellectual property is prohibited. . ." (GC Exh. 2, p. 34.)

Section 32 of the Lanham Act, 15 U.S.C. § 1114(a), imposes liability for trademark infringement on any person who, without the consent of the owner of the trademark, uses it for any number of enumerated commercial purposes. An employer may protect its proprietary interest, including its trademarks and logo.

General Counsel cites *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1020 (1991) (rule unlawful that prohibits employees from wearing uniforms bearing company logo or trademarks while engaged in union activity during nonworking time) to support his position regarding the logo. However, the Board subsequently distinguished that case in *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). There, the Board upheld an administrative law judge's dismissal of an allegation that a rule prohibiting wearing hotel uniforms off company premises constituted an excessive impediment to union activity. In *Pepsi Cola*, the rule had been promulgated in response to a union organizing campaign, in violation of *Lutheran Heritage Village-Livonia*.

The Respondent's rule does not define what constitutes "improper use" of the Respondent's name or trademarks. Most of the section pertains to confidentiality and does not explain in what respect use of the Respondent's name or trademarks may be confidential. Nor does it explain any uses of the Respondent's name or logo that are permissible. On its face, then, it chills employees from using the Respondent's name and logo. Although employees who use the logo and trademark while engaged in Section 7 activities are using them in a noncommercial manner, I do not find that prohibiting such use is an unreasonable restriction on Section 7 activity. However, barring employees from using the company name is altogether different. It is often necessary for employees to identify their employer when they are engaged in Section 7 activities and the Respondent presented no evidence to support the need for such a restriction.

Since I find that employees would reasonably interpret any nonwork-related use of Respondent's name to be improper, I conclude that this portion of the rule violates Section 8(a)(1).

Ethical Communications

The entire section reads:

As an aspect of good judgment and adherence to this policy, it is always appropriate to raise questions and issues, even if they are difficult. Likewise, avoid exaggeration, colorful language, guesswork, and derogatory characterizations of people and their motives. Whether in your everyday work conversations, in your exchange of e-mail, or otherwise, your communications should be thoughtful and ethical. Think before you speak and write. Be clear and objective.

(GC Exh. 2, p. 35.)

The General Counsel contends that the sentence beginning "Likewise, avoid exaggeration. . ." violates the Act.

As discussed earlier in this decision, an employer may not prohibit employee statements that are merely false or misleading. Rather, in order to lose the Act's protection, it must be shown that the employee had a malicious motive.

"Colorful language" is undefined in the rule but, generally speaking, is language considered to be vulgar, rude, or offensive. In general, work rules that prohibit employees from using offensive, demeaning, abusive, or other similar language in the workplace are not facially invalid under Section 8(a)(1), as employers have a legitimate interest in establishing a "civil and decent work place," free from racial, sexual, and other harassment that can subject them to legal liability under State or Federal law. *Lutheran Heritage Village*, above at 647, citing *Adtranz ABB Daimler-Benz v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), denying enf. in pertinent part to 331 NLRB 291 (2000). The Board found prohibitions against verbal abuse, abusive or profane language, or harassment to be lawful in *Lutheran Heritage*, above, stating that the mere fact that the rule could be read to address Section 7 activity does not make it illegal. See *Lutheran Heritage* at 647 ("we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way"). Therefore, I find this portion of the rule does not violate the Act.

"Derogatory characterizations of people and their motives" covers everyone, and would apply to supervisors and managers. In fact, the reference to """"motivation" is highly suggestive of supervisors and managers, although it may apply to other coworkers as well. That prohibition would reasonably be construed by employees to bar them from discussing supervisory and managerial decisions, thereby chilling them from engaging in protected activities.

"Exaggeration" can be applied to a statement simply because one disagrees with it. "Guesswork" can easily prohibit any discussion about the basis for managerial decisions. The prohibitions in this rule against exaggeration and guesswork would, therefore, reasonably be construed by employees to bar them from discussing complaints about their supervisors and their working conditions, thereby chilling them from engaging in protected activities. These prohibitions are similar to many rules that have been found by the Board to be unlawful, absent a showing of malice on the part of the employee.

Therefore, I find that the portions of this rule prohibiting exaggeration, guesswork, and derogatory characterizations of people and their motives violate Section 8(a)(1).

Political/Religious Activity and Contributions

The portion of the policy at issue reads:
While any political or religious affiliation you may have is up to you, any activity in those areas needs to remain outside of the work environment. It is said that to avoid arguments, one should never discuss politics or religion in public--and in this case at work . . .

. . . It is strictly prohibited to use Chipotle's name, funds, assets, or property for political or religious purposes or endorsement, whether directly or indirectly.

(GC Exh. 2, p. 35.)

General Counsel does not challenge the portions of this rule pertaining to religious activity, but only those pertaining to political activity.

The exercise of Section 7 rights often involves political activity. In *Eastex*,[8] one section of a union newsletter criticized a presidential veto of an increase in the Federal minimum wage and urged employees to register to vote to "defeat our enemies and elect our friends." The Court upheld the Board's ruling that the employer unlawfully prevented its employees from distributing the newsletter.

The Respondent's prohibition on discussing politics in the workplace would prevent employees from engaging in a wide variety of protected activities, including discussing obvious topics such as legislation aimed at improving employees'

working conditions, candidates' positions on work-related matters, increasing the Federal minimum wage, right to work legislation, and the benefits of unionization, to name a few.

I find that the Respondent's prohibition against discussing politics in the workplace violates Section 8(a)(1).
While the Respondent certainly has an interest in protecting its name from being used improperly or even fraudulently in the political arena, the blanket prohibition against using the Chipotle name for political purposes is too restrictive The General Counsel notes that employees who participate, for example, in the "Fight for 15" movement that lobbies for legislation increasing the minimum wage to $15 per hour, could reasonably interpret this rule to prohibit them from carrying signs identifying their employer as Chipotle. Employees often need to identify their employer while they are engaged in Section 7 activities and the Respondent presented no evidence to support the need for such a restriction.

I find that the prohibition against any use of the Chipotle name for political purposes violates Section 8(a)(1).

CONCLUSIONS 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 social media code of conduct with prohibitions against posting incomplete, confidential, or inaccurate information and prohibitions against making disparaging, false, or misleading statements, the Respondent has violated Section 8(a)(1) of the Act.

3. By directing an employee to delete certain tweets and not engage in similar protected concerted activity in future, the Respondent has violated Section 8(a)(1) of the Act.

4. By prohibiting an employee from circulating among coworkers a petition challenging the Respondent's break policy, the Respondent has violated Section 8(a)(1) of the Act.

5. By terminating James Kennedy's employment for his protected concerted activity in circulating a petition challenging the Respondent's break policy, the Respondent has violated Section 8(a)(1) of the Act.

6. By maintaining overbroad work rules in the crew handbook regarding solicitation, confidential information, ethical communications, and political activities, the Respondent has violated Section 8(a)(1) of the Act.

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

8. The Respondent has not otherwise violated the Act.

REMEDY

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

The Respondent, having discriminatorily discharged James Kennedy, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

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The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Kennedy for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated. *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014).

The General Counsel has requested that, in addition to ordering the Respondent to post notice at the Havertown restaurant covering all issues (Appendix A), I order the Respondent to post notice nationwide regarding maintenance of the old social media code of conduct as well as the unlawful work rules in the current crew handbook. No evidence was presented that the old social media policy was issued nationwide. Rather, the evidence presented supports only that the old policy was issued to employees at eight or nine facilities other than Havertown. Therefore, I will order the Respondent to post a notice regarding the social media policy at those additional restaurant locations only: Union Springfield #1275, Oak Park #316, Pipers Alley #1401, Santa Fe Springs #1812, Thompson Peak #357, Corpus Christie #2343, Potomac Yard #2217, Westbrook #1749, and Wilton #1278 (Appendix B). Appendix C is to be issued to the remaining restaurants nationwide, and covers the four unlawful work rules in the current crew handbook.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Chipotle Mexican Grill, Havertown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing employees to delete social media postings regarding employees' wages or other terms or conditions of employment;

(b) Prohibiting employees from posting on social media regarding employees' wages or other terms or conditions of employment;

(c) Prohibiting employees from circulating petitions regarding the company's adherence to its break policy or any other terms or conditions of employment;

(d) Discharging employees because they engage in protected concerted activity by circulating a petition concerning Respondent's nonadherence to its break policy or any other terms or conditions of employment;

(e) Maintaining a work rule entitled "Social Media Code of Conduct" that unlawfully limits employees' rights to engage in Section 7 activity;

(f) Maintaining a work rule entitled "Solicitation Policy" that unlawfully limits employees' rights to engage in Section 7 activity;

(g) Maintaining a work rule entitled "Chipotle's Confidential Information" that unlawfully limits employees' rights to engage in Section 7 activity;

(h) Maintaining a work rule entitled "Ethical Communications" that unlawfully limits employees' right to engage in Section 7 activity;

(i) Maintaining a work rule entitled "Political/Religious Activity and Contributions" that unlawfully limits employees' rights to engage in Section 7 activity; and

(j) 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) Rescind the work rule entitled "Social Media Code of Conduct" that unlawfully limits employees' rights to engage in Section 7 activity.

(b) Rescind the work rule entitled "Solicitation Policy" that unlawfully limits employees' rights to engage in Section 7 activity.

(c)) Rescind the work rule entitled "Chipotle's Confidential Information" that unlawfully limits employees' rights to engage in Section 7 activity.

(d) Rescind the work rule entitled "Ethical Communications" that unlawfully limits employees' rights to engage in Section 7 activity.

(e) Rescind the work rule entitled "Political/Religious Activity and Contributions" that unlawfully limits employees' rights to engage in Section 7 activity.

(f) Within 14 days from the date of the Board's Order, offer James Kennedy 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.

(g) Make James Kennedy 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 the decision.

(h) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of James Kennedy, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(i) Compensate James Kennedy for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated.

(j) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(k) 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.

(l) Within 14 days after service by the Region, post at its facility in Havertown, Pennsylvania, copies of the attached notice marked "Appendix A;" post at its facilities in Union Springfield #1275, Oak Park #316, Pipers Alley #1401, Santa Fe Springs #1812, Thompson Peak #357, Corpus Christie #2343, Potomac Yard #2217, Westbrook #1749, and Wilton #1278, copies of the attached notice marked "Appendix B;" and post at its remaining facilities nationwide copies of the attached notice marked "Appendix C." [10] Copies of each notice, on forms provided by the Regional Director for Region 4, 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, the 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 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 January 29, 2015.

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

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

Dated, Washington, D.C. March 14, 2016

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

***8** 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 work rules which employees would reasonably construe to discourage them from engaging in protected concerted activity.

WE WILL NOT direct you to delete social media postings regarding your wages or other terms or conditions of employment.

WE WILL NOT prohibit you from posting on social media regarding your wages or other terms or conditions of employment.

WE WILL NOT prohibit you from circulating petitions regarding the company's nonadherence to its break policy or any other terms or conditions of employment.

WE WILL NOT discharge or otherwise discriminate against you for circulating a petition challenging the Respondent's break policy or engaging in other protected concerted activity.

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

WE WILL rescind the work rule entitled "Social Media Code of Conduct" that provides "If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information." and "You may not make disparaging, false, misleading. . . statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors."

WE WILL rescind the work rule entitled "Solicitation Policy" that provides """". . . Employees are not to solicit. . . non-working time in working areas if the solicitation would be within visual or hearing range of our customers. . ."

WE WILL rescind the work rule entitled "Chipotle's Confidential Information" that provides ". . . The improper use of Chipotle's name. . . . is prohibited. . .

WE WILL rescind the work rule entitled "Ethical Communications" that provides """". . . ., avoid exaggeration. . . guesswork, and derogatory characterizations of people and their motives."

WE WILL rescind the work rule entitled "Political/Religious Activity and Contributions" that provides "While any political or religious affiliation you may have is up to you, any activity in those areas needs to remain outside of the work environment. It is said that to avoid arguments, one should never discuss politics or religion in public-and in this case at work. . ." . . . and ". . . It is strictly prohibited to use Chipotle's name . . . for political . . . purposes or endorsement, whether directly or indirectly."

*9 WE WILL, within 14 days from the date of this Order, offer James Kennedy 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 James Kennedy whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate James Kennedy for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of James Kennedy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CHIPOTLE SERVICES, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-147314 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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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 work rules which employees would reasonably construe to discourage them from engaging in protected concerted activity.

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

WE WILL rescind the work rule entitled "Social Media Code of Conduct" that provides "If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information." and "You may not make disparaging, false, misleading...statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors."

WE WILL rescind the work rule entitled "Solicitation Policy" that provides """". . . Employees are not to solicit...during nonworking time in working areas if the solicitation would be within visual or hearing range of our customers. . ."

WE WILL rescind the work rule entitled "Chipotle's Confidential Information" that provides ". . . The improper use of Chipotle's name. . . . is prohibited. . ."

***10** WE WILL rescind the work rule entitled "Ethical Communications" that provides ". . . Likewise, avoid exaggeration, . . . guesswork, and derogatory characterizations of people and their motives."

WE WILL rescind the work rule entitled "Political/Religious Activity and Contributions" that provides "While any political or religious affiliation you may have is up to you, any activity in those areas needs to remain outside of the work environment. It is said that to avoid arguments, one should never discuss politics or religion in public-and in this case at work. . ." . . . and ". . . It is strictly prohibited to use Chipotle's name...for political... purposes or endorsement, whether directly or indirectly."

CHIPTOLE SERVICES, LLC

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The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-147314 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX C

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

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Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

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WE WILL NOT maintain work rules which employees would reasonably construe to discourage them from engaging in protected concerted activity.

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

WE WILL rescind the work rule entitled "Solicitation Policy" that provides """". . . Employees are not to solicit...during nonworking time in working areas if the solicitation would be within visual or hearing range of our customers. . ."

WE WILL rescind the work rule entitled "Chipotle's Confidential Information" that provides ". . . The improper use of Chipotle's name. . . . is prohibited. . ."

WE WILL rescind the work rule entitled "Ethical Communications" that provides """". . . Likewise, avoid exaggeration, . . . guesswork, and derogatory characterizations of people and their motives."

WE WILL rescind the work rule entitled "Political/Religious Activity and Contributions" that provides "While any political or religious affiliation you may have is up to you, any activity in those areas needs to remain outside of the work environment. It is said that to avoid arguments, one should never discuss politics or religion in public-and in this case at work. . ." . . . and ". . . It is strictly prohibited to use Chipotle's name. . . for political. . . purposes or endorsement, whether directly or indirectly."

CHIPTOLE SERVICES, LLC

***11** The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-147314 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Footnotes

1 No exceptions were filed to the judge's findings that the Respondent did not violate Sec. 8(a)(1) of the Act by maintaining: (1) a provision in the rule entitled "Social Media Code of Conduct" that prohibits employees from posting harassing or discriminatory statements; (2) a provision in the rule entitled ""Chipotle's Confidential Information" that prohibits the improper use of the Respondent's trademarks or other intellectual property; or (3) a provision in the rule entitled "Ethical Communications" that directs employees to avoid colorful language.

2 The Respondent has 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 findings.

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

3 We affirm the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining a "Social Media Code of Conduct" that prohibits employees from posting incomplete, confidential, or inaccurate information and making disparaging, false, or misleading statements. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004). However, we do not rely on *Costco Wholesale Corp.*, 358 NLRB 1100 (2012), cited by the judge. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). One Board member, who is not a member of the panel in this case, has expressed disagreement with the *Lutheran Heritage* ""reasonably construe" standard. See, e.g., *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7-24 (Member Miscimarra, concurring in part and dissenting in part).

We reverse the judge's findings that the Respondent violated Sec. 8(a)(1) by directing employee James Kennedy to delete certain tweets from his Twitter account. On this record, we do not find that Kennedy's underlying actions were concerted. Chairman Pearce would affirm those findings for the reasons stated by the judge, except for the judge's finding that Kennedy's tweet regarding the price of guacamole constituted protected, concerted activity, as this tweet appears unrelated to employees' terms and conditions of employment, and thus was not for the purpose of mutual aid or protection.

We affirm the judge's conclusion that the Respondent violated Sec. 8(a)(1) by discharging Kennedy. We agree with the judge that Kennedy engaged in protected, concerted activity by circulating a petition regarding the Respondent's failure to abide by its own break policy and in explaining employees' concerns about this issue during a meeting with Manager Jennifer Cruz, and that Cruz unlawfully discharged Kennedy when he refused her directive to stop circulating the petition. We further agree with the judge that, under *Atlantic Steel Co.*, 245 NLRB 814 (1979), Kennedy did not lose the Act's protection based on his conduct at this meeting, and we find that each of the *Atlantic Steel Co.* factors favors employee protection. (1) The place of the discussion was Cruz' office, which is located in the back of the restaurant away from employees and customers; (2) The subject of the discussion was Kennedy's petition regarding the Respondent's break policy; (3) Kennedy's behavior during the meeting was not egregious, as he did not shout, threaten or even curse at Cruz; instead he merely raised his voice, leaned toward Cruz while both were seated, and waved the petition; and (4) Kennedy's behavior in the meeting was provoked by the Respondent's 8(a)(1) violation--Cruz' order that Kennedy stop circulating the petition. However, in affirming the judge, we do not rely on the judge's statements that the Respondent's defense was "frankly, ludicrous" or that Cruz demonstrated "blatant disability discrimination."

Finally, in adopting the judge's finding that the Respondent's solicitation rule violates Sec. 8(a)(1), we observe that the rule, which prohibits employee solicitation during nonwork time in work areas "within the visual or hearing range of customers," is overbroad: it is not limited to customer/selling areas, and necessarily includes areas where customers have no right to be physically present but may enjoy some visual or aural access. See *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987); *Maestro Café Associates*, 270 NLRB 106, 106 fn.2 (1984); *Marriott Corp.*, 223 NLRB 978, 978 (1976). Furthermore, any ambiguity regarding the rule's scope must be construed against the Respondent. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). We do not rely on the judge's finding that the rule is overbroad because it encompasses the dining room.

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4 We grant the General Counsel's exception to the judge's failure to include the standard remedy for the Respondent's unlawful handbook rules. We shall modify the judge's recommended remedy by ordering the Respondent to furnish all employees with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.
In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy.
We shall modify the judge's recommended Order and substitute new notices to reflect both remedial changes and to conform to the Board's standard remedial language.

5 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."

1 All dates are in 2015 unless otherwise indicated.

2 There are a few obvious typographical errors in the transcript. On p. 20, line 16, "snow" should be inserted between "on" and "days." On p.30, "she was she" should read "where was she." On p. 38, line 13 should read "mitigation" rather than "litigation." On p. 60, line 17 should read "Never," and line 31 """"Why didn't you . . .".

3 358 NLRB 1100 (2012).

4 344 NLRB 1363 (2005).

5 He testified that he had already been given a raise.

6 *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).

7 I note that a "history of inappropriate behavior" constitutes a proper ground for discharge. *Consolidated Biscuit Co.*, 346 NLRB 1175, 1181 (2006). No such pattern has been established here. Kennedy had no prior discipline. Cruz gave Kennedy an outstanding performance appraisal in October 2014. (GC Exh. 6.) Therein, she noted that "he provides excellent customer service and elevates so many around him. He cares about his team and is open to criticism so that he can get better." More significantly, not a week or two before the termination, Cruz had discussed with Kennedy the possibility of him moving up in the organization by learning the grill, a prerequisite for kitchen manager.

8 *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

9 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.

10 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."

364 NLRB No. 72 (N.L.R.B.), 207 L.R.R.M. (BNA) 1777, 2016-17 NLRB Dec. P 16209, 2016 WL 4419756

End of Document

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Re: BSA | The Software Alliance –

Dear Mr.

This firm has been retained to represent BSA | The Software Alliance ("BSA") in connection with its investigation of possible instances of illegal duplication of certain software companies' proprietary software products. The BSA represents the interests of Adobe Systems Incorporated, ANSYS, Inc., Autodesk Inc., Bentley Systems Incorporated, CNC Software, Inc., Microsoft Corp., Minitab, Inc., Parametric Technology Corporation, and Rosetta Stone Ltd. Through the BSA, these companies work to ensure that organizations are using those computer software products in compliance with federal copyright laws.

We recently have been advised that has installed on its computers more copies of Microsoft Access, Microsoft Great Plains Dynamics, and Microsoft SQL Server software than it is licensed to use.

Unauthorized duplication of computer software products constitutes copyright infringement. The Copyright Act (17 U.S.C. § 101 *et seq.*) provides that copyright owners may recover actual damages or statutory damages. In cases where the infringement is willful, statutory damages can reach $150,000 for each copyrighted product that has been infringed. The copyright owner can also seek its attorney's fees.

Weir Johnson, PLLC
1701 N. Market Street • Suite 300 • Dallas, Texas 75202
214.635.4039 • 214.635.3901 fax

However, the BSA member companies have determined that litigation may not be necessary in this case, especially as senior management may not have had an opportunity to investigate or consider the ramifications of using unlicensed software. The BSA member companies instead wish to resolve this matter amicably by providing APR with an opportunity to conduct its own company-wide investigation. To take advantage of this opportunity, APR's investigation must include an audit of all of the software published by BSA members (*see above*) on all of its computers and a review of the software licenses and proofs of purchase for those licenses.

Please understand that while we are contacting you in an effort to avoid litigation, the BSA member companies are not waiving their right to litigate to protect their copyrights if this effort is not successful. We therefore must insist that you contact us by At that time we will provide you with specific guidance on how to conduct your audit.

In addition, please <u>do not destroy</u> or replace any copies of any of the computer software products published by the above-mentioned companies that are currently installed on APR's computers. The software programs installed on APR's computers are evidence and therefore must be preserved in case this matter does proceed to litigation. In the meantime, you should not attempt to enter into negotiations with sales representatives of these companies to purchase computer software products prior to the resolution of this matter. <u>Purchasing or deleting software at this point will not remedy past unauthorized installation or use, will not conclude our investigation, and may prejudice our ability to reach a mutually satisfactory resolution of this matter.</u>

We look forward to your cooperation.

Sincerely,

KWJ

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into between the BSA Business Software Alliance, Inc. d/b/a BSA | The Software Alliance ("BSA") and [redacted] as of the date signed by [redacted] (the "Effective Date").

WHEREAS:

A. The BSA is a trade association representing software publishers in the business of developing and marketing a variety of computer software products (the "Computer Software Products");

B. A dispute has arisen regarding [redacted] alleged unauthorized copying or use of certain of the Computer Software Products in the course of its business; and

C. BSA and [redacted] have reached an agreement resolving that dispute and wish to evidence that agreement in writing.

NOW THEREFORE, in consideration of the mutual covenants and conditions set forth below, BSA and [redacted] agree as follows:

1. COMPLIANCE

1.1. Certification of Audit Results. [redacted] warrants and represents that the software audit results provided to BSA during the negotiation of this settlement are a true, accurate and complete list of all copies of all Computer Software Products that were installed on [redacted] computers as of [redacted]

1.2. Certification of Compliance. Not later than thirty (30) days after the Effective Date, [redacted] shall ensure that all copies of all Computer Software Products installed, used or operated on its computers are licensed to [redacted] and utilized solely in accordance with their licenses. Not later than forty-five (45) days after the Effective Date, [redacted] shall deliver to [redacted], PLLC ("BSA's Attorneys") a certification in the form of Exhibit A that the obligations of this paragraph have been met.

1.3. Schedules. [redacted] shall attach to the certification required by section 1.2 the following schedules:

a. a list identifying each Computer Software Product that was destroyed pursuant to section 1.2, and the number of copies destroyed;

b. a list identifying all Computer Software Products, including version number, purchased by [redacted] since [redacted] the number of licenses for each Computer Software Product purchased, the dates of the purchases, and the price paid; and

c. copies of receipts or invoices reflecting proof of each purchase listed in the schedule required by section 1.3(b). [redacted] agrees

that within sixty (60) days of the receipt of this schedule, BSA may require that [redacted] provide BSA with any sample(s) specified by BSA of the original media purchased, not to exceed ten percent (10%) of the overall purchase reported. The purpose of this review will be to ensure that [redacted] has purchased legally obtained, legitimately licensed software.

1.4. Warranty of Continued Compliance. [redacted] warrants that all copies of computer software products coming into its possession or under its control in the future will be licensed to [redacted] and installed and utilized solely in accordance with the computer software products' respective licenses.

1.5. Software Code of Ethics. [redacted] shall adopt the Software Code of Ethics attached as Exhibit B and incorporated by reference. Within forty-five (45) days of the Effective Date, [redacted] shall deliver a copy of the Software Code of Ethics signed by an officer of [redacted] to BSA's Attorneys and to all [redacted] employees and/or personnel. [redacted] shall provide a copy of the Code to all new employees at the commencement of their employment and shall reissue the notice annually.

1.6. Inspections. For three (3) years following the Effective Date, [redacted] shall permit BSA, at BSA's option and expense, to conduct two (2) inspections per year of [redacted]'s computers at each of [redacted] offices or locations to confirm the absence of infringing Computer Software Products. The BSA agrees to provide one (1) week's notice of any such inspection and to conduct any inspection in a manner designed to minimize any disruption to [redacted] business activities. In the event BSA discovers unlicensed Computer Software Products during an inspection, [redacted] shall reimburse BSA for the cost of the inspection. [redacted] agrees that this cost reimbursement shall be separate from and in addition to any damages or costs for which [redacted] may be liable under the Copyright Act as a result of any infringement discovered during an inspection.

2. RESOLUTION OF LIABILITY.

2.1. Settlement Payment. Upon [redacted] execution of this Agreement, [redacted] shall pay to BSA the sum of [redacted] This payment shall be in the form of a wire transfer.

2.2. Release. Through BSA, Adobe Systems Incorporated, Microsoft Corp. and Rosetta Stone Ltd. hereby release and forever discharge [redacted] its officers, directors, employees, shareholders, attorneys and assigns from any and all claims, demands, causes of action, actions and costs relating to the alleged infringement of the copyrights in the Computer Software Products listed below due to the installation or use of the Computer Software Products at [redacted], occurring before the thirty-first (31st) day following the Effective Date: Adobe Acrobat Professional, Adobe Acrobat Standard, Adobe After Effects, Adobe Audition, Adobe Dreamweaver, Adobe Fireworks, Adobe Flash Professional, Adobe Illustrator, Adobe InDesign, Adobe Photoshop, Adobe Photoshop Extended, Adobe Premier Pro, Microsoft Access, Microsoft Excel, Microsoft InfoPath, Microsoft OneNote, Microsoft Outlook, Microsoft PowerPoint, Microsoft Publisher, Microsoft Visio Professional, Microsoft Visual Studio Professional, Microsoft Visual Studio Ultimate, Microsoft Windows Operating System

Professional, Microsoft Windows Operating System Ultimate, Microsoft Windows Server CAL, Microsoft Windows DataCenter, Microsoft Windows Server Enterprise, Microsoft Windows Server Standard, Microsoft Word and Rosetta Stone TOTALe German; provided, however, that this release is conditioned on the accuracy of the representations and the performance of the obligations listed in sections 1.1, 1.2, 1.3 and 2.1 of this Agreement. In no event shall this release extend to any claim that [redacted] has engaged in the unauthorized sale, transfer, or distribution of any computer software product to any person or entity not related to [redacted] or that [redacted] has created, transferred, or distributed any derivative work(s) based upon or incorporating any computer software product, or part thereof.

3. MISCELLANEOUS.

3.1. Entire Agreement. This Agreement and its attachments set forth the entire agreement of the BSA and [redacted]. No amendment may be made to this Agreement unless it is in writing and signed by both parties.

3.2. Attorney's Fees. In the event that legal action is brought to enforce the terms of this Agreement, the prevailing party in any such legal action or proceeding shall be entitled, in addition to any other rights and remedies it may have, to an award of the costs of the action, including an award of court costs, actual attorney's fees and experts' fees.

3.3. Severability. In the event any provision of this Agreement is held invalid, illegal, or unenforceable by a court of competent jurisdiction, that provision shall be severed from this Agreement and the remaining provisions shall continue in full force.

3.4. Binding Agreement. The terms and provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective successors, assigns and transferees.

3.5. BSA Warranty. BSA warrants that it is fully authorized to make this Agreement on behalf of Microsoft Corp. and to bind it to the terms hereof.

3.6. [redacted] Warranty. APR represents and warrants that there is no pending litigation between [redacted] and Adobe Systems Incorporated, Microsoft Corp., or Rosetta Stone Ltd. If there is any pending litigation between [redacted] and Adobe Systems Incorporated, Microsoft Corp., or Rosetta Stone Ltd., the terms of this Agreement will not apply to such litigation.

IN WITNESS WHEREOF, the BSA and [redacted] have executed this Agreement as of the date written below.

[redacted]

By:______________________________
Name:____________________________
Title:_____________________________
Date: ____________________________ (Effective Date)

BSA Business Software Alliance, Inc.

By: ______________________________
[redacted]
[redacted]
[redacted]
Date: ____________________________

EXHIBIT A

CERTIFICATE OF COMPLIANCE OF [redacted]

I, ______________________________, am the ________________________ of [redacted] ("[redacted]") and am authorized to provide this certificate.

As of ____________, 201__ (30 days following the Effective Date of the Settlement Agreement dated ______________, 201_ between the Business Software Alliance and [redacted] (the "Agreement")), I hereby certify that:

a. all Computer Software Products installed on [redacted] computers for which [redacted] does not have a license have been destroyed;

b. any licenses necessary to ensure that all remaining copies of Computers Software Products are licensed have been acquired; and

c. all Computer Software Products installed on [redacted] computers are utilized solely in accordance with their licenses.

I further certify that attached hereto as Schedule 1 is a list of the Computer Software Products destroyed as certified in paragraph a above; attached hereto as Schedule 2 is a list of the Computer Software Products purchased by [redacted] since [redacted] dates of the purchases, and the price paid; and attached hereto as Schedule 3 are copies of receipts or invoices as proof of the purchases described in Schedule 2.

I declare under penalty of perjury under the laws of the State/Commonwealth of ____________ and the United States that the foregoing is true and correct.

Executed the _____ of __________ 201__ at ______________, ______________.

[redacted]

By:______________________________

Name:____________________________

Title:_____________________________

SCHEDULE 1

Software Product	Number Destroyed	Date Destroyed

SCHEDULE 2

Software Product	Number Purchased	Date Purchased	Price Paid

<u>SCHEDULE 3</u>

[Copies of receipts or other proof of software purchase(s) attached]

<u>EXHIBIT B</u>

<u>SOFTWARE CODE OF ETHICS</u>

Unauthorized duplication of copyrighted computer software violates the law and is contrary to our organization's standards of conduct. We disapprove of such copying and recognize the following principles as a basis for preventing its occurrences:

* We will neither engage in nor tolerate the making or using of unauthorized software copies under any circumstances.

* We will provide legally acquired software to meet the legitimate software needs in a timely fashion and in sufficient quantities for all our computers.

* We will comply with all license or purchase terms regulating the use of any software we acquire or use.

* We will enforce strong internal controls to prevent the making or using of unauthorized software copies, including effective measures to verify compliance with these standards and appropriate disciplinary measures for violation of these standards.

By:____________________________________
Name:__________________________________
Title:___________________________________

Dated:_________________________, 201__

SAMPLE Copyright Infringement Policy

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. [NLRB Language]

1.) Copyrights of Others

No employee of **[Employer]** may reproduce any copyrighted work in print, video or digital form in violation of the law. Works are considered protected even if they are not registered with the U.S. Copyright Office or any registering agency outside the U.S. and even if they do not carry the copyright symbol (©). Copyrighted works include, but are not limited to: software, photographs, printed articles from publications, electronic articles in online publications, online videos, movies, TV and radio programs, recorded music performances, images, training materials, manuals, documentation, databases, websites and blogs. In general, the laws that apply to printed materials also apply to visual and digital formats such as websites, streaming media, music downloads, mobile apps, CDs and DVDs.

2.) Copyrights of [Employer]

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. [NLRB Language]