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

Advice Memorandum

DATE: June 5, 2012

TO: Terry A. Morgan, Regional Director
Region 7

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

SUBJECT: Alpine Access, Inc.
Case 07-CA-068538

Digest numbers on final page

The Region submitted this case for advice on the issues of whether the Employer violated Section 8(a)(1) by maintaining certain policies regarding use of its computer systems and email; maintaining other rules regarding confidentiality and media contacts; and taking certain actions regarding employee access to its communications systems in response to the Charging Party's organizing activity.

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by: maintaining policies regarding the use of its computer systems and email that restrained employees from engaging in Section 7 activity in their workplace; promulgating an unlawful rule regarding the use of its email that discriminated along Section 7 lines, in response to the Charging Party's union-related email, and threatening the Charging Party with discipline if he sent other union-related emails; disabling the private chat capabilities in its Adobe software in response to Section 7 conduct; directing employees not to communicate with the Charging Party, instructing employees to report the Charging Party's communications, and thereby creating the impression that employees' union activities were under surveillance and engaging in actual surveillance; maintaining and enforcing an unlawful Non-Disclosure Agreement; and maintaining overbroad Confidentiality and Media Relations Policies. But the Region should dismiss, absent withdrawal, the allegation that the Employer unlawfully altered its internal email system capabilities to prohibit employees from sending email to outside accounts because the Employer has a valid *Wright Line* defense for its action.

FACTS

Background

Alpine Access, Inc. (Employer), headquartered in Denver, Colorado, provides virtual call-center services to various entities in several different industries. The Employer employs approximately 4,000 Customer Care Professionals ("CCPs"), in forty states and the District of Columbia. All CCPs work from home and have no face-to-face interaction with any of their coworkers. Since the Employer provides call-center services for customers 24 hours a day, seven days a week, at any given time at least some employees are working. The time between calls can vary significantly depending upon call volume. Likewise, although the employees try to take their breaks at designated times, start and end times for breaks vary based on call volume. And because employees work remotely, they are unable to view whether another employee is on break or on "down time" between calls.

In view of the unique nature of the Employer's "workplace," the Employer has configured its computer systems to permit CCPs to communicate with team leaders and other CCPs through its internal email system or through "chat rooms" in its Adobe software. Each specific team has its own web-based chat room that allows messages to be shared between individual users (private) or with the entire team (public). When employees are logged into an Adobe chat room, other individuals can view their names and job classifications. Thus, the Adobe chat rooms allow employees to indentify who their coworkers are, much like in a traditional office or factory. There are approximately five different Adobe chat rooms related to different topics or uses, such as technical issues, "water cooler," customer questions, and agent empowerment. Employees use the "water cooler" chat room to discuss personal issues, issues with computer systems not working, and music. Employees often utilize these chat rooms during their official break times and during their down time in between calls and often discuss work-related issues. Although CCPs also utilize third-party chat systems such as Yahoo Instant Messaging (YIM) to communicate with team leaders or other CCPs, they must know individuals' screen names before they can send them a message through these third-party systems.

Employees are required to pay for and provide their own computer and hardware, a headset, Internet service and connection, landline telephone, and various items required to maintain workplace safety. The employees access the Employer's systems, such as internal email, the Intranet, and software, including the Adobe chat rooms, through an Employer-provided electronic token.

The Charging Party's Organizing Activities

The Employer hired the Charging Party in March 2011[1] as a CCP for its customer account with the Microsoft Corporation supporting the X-Box gaming system. As of December 30, the Employer had approximately 1,260 CCPs working on the X-Box account. Those CCPs were assigned to separate groups supervised by ten Senior Team Leaders. The Charging Party was assigned to "Team Immortality," which consisted of approximately ten to twenty CCPs under the direction of a Senior Team Leader, Interim Team Leader, and Assistant Team Leader. The Employer admits that Team Leaders and Interim Team Leaders are supervisors under the Act but denies that Assistant Team Leaders are Section 2(11) supervisors.

In early November, the Charging Party began his union organizing efforts by speaking with organizers from both the Communication Workers of America ("CWA") and the International Brotherhood of Electrical Workers ("IBEW"). Thereafter, he began sending messages to fellow employees via YIM. He claims that there was discontent among employees on his team because of the way their Assistant Team Leader treated them.

Meanwhile, on November 5, the Employer received a complaint from a client claiming that an employee had emailed confidential information about one of the client's members to a third party. The Employer investigated the issue, determined that the employee had violated its policy when she used the Employer's email to send confidential client information to her personal email address, and disciplined that employee.

Early on November 7, the Charging Party and three other employees, all of whom were on nonworking time, held their first union organizing meeting via a conference call that did not utilize any of the Employer's systems. Approximately thirteen hours later, the Charging Party's Assistant Team Leader sent the following "blast" via YIM to approximately seventeen of the Charging Party's fellow team members: "Do not speak to the Charging Party…if he approaches you it is imperative that you contact me at once…Thanks." There is no evidence that any of the employees who the Assistant Team Leader sent the message to had previously complained to him about the Charging Party contacting them. At least one team member interpreted the message as a request to inform the Assistant Team Leader of the Charging Party's union-related contacts.

Later that same day, the Employer's Vice President of Client Services emailed employees that in order to ensure compliance with its information

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[1] All dates herein are in 2011 unless otherwise noted.

security policies, it was disabling the functionality that permitted users to send emails from the Employer's email system to any address outside of the company. This change was in response to the customer complaint received November 5 concerning an employee's email of confidential client information.

On November 8, the Charging Party used his own computer after his working hours to send an email titled "Important Message" via the Employer's email system to approximately fifty employees' work email accounts. In his email, he introduced himself; told employees about the first organizing meeting; explained that they would be seeking better wages and a due process disciplinary procedure; explained employee rights to organize; and gave employees a link to the NLRB website. He also began recruiting employees for his organizing campaign via his team's Adobe chat room through private chat messages. The following day, the Charging Party sent an email to the Employer's Chief Operating Officer asking whether the Employer disabled employees' ability to send emails to third parties in order to interfere with employees' organizing activities.

That same day, November 9, the Charging Party noticed that he could not utilize the private messaging function in the Adobe software and contacted his Interim Team Leader via YIM to inform her that his private chat was disabled. Her response was that he was the only one who reported the problem and that it was a technical issue with his connection. The Employer claims that on or about November 9, the Charging Party's Senior Team Leader instructed the Team Leaders and Interim Team Leaders for the eight teams she managed to disable the private-messaging function because of the CCPs' scores on quality of service (QOS) surveys used to measure the efficiency of its X-Box program's call-center operations. Thereafter, the other nine Senior Team Leaders within the X-Box program were instructed by the Senior Account Manager to disable the private chat functions in their teams' Adobe rooms. The Employer contends that after it disabled the private chat function, the QOS scores increased, but the data it provided during the investigation is inconclusive and does not support that conclusion.

Also on November 9, the Charging Party began posting on a personal blog, "aaworkersleague.wordpress.com." He has used that blog to post: information on employees' organizing rights; links to other websites regarding union organizing; comments about the Employer terminating certain employees; solicitations to employees to sign union authorization cards; comments about working conditions; and comments about his communications with the Employer regarding the disabling of email and chat room functions.

Early on November 10, the Charging Party's Interim Team Leader emailed her team to tell them that the private chat function in the Adobe software had been disabled so that the team members could focus on their QOS survey scores. Approximately twelve hours later, while off duty, the Charging Party sent the following email from his work email address to all the Employer's employees at their work addresses:

> Did you know that it is your federally protected right to organize your co-workers to request better pay and working conditions?
>
> The workers at Alpine are doing just that! Check it out here: http://aaworkersleague.wordpress.com/
>
> Feel free to contact me if you have any questions or concerns or would like to joint the movement or start one in your program.
>
> PS: You cannot be fired for such activities. I have included a link to the National Labor Relations Board which spells out the laws on these issues: http://www.nlrb.gov/rights-we-protect/employee-rights

The email also contained the Charging Party's personal contact information, including his telephone number, personal email address, and YIM screename, and requested that employees contact him through those channels. This email was received by approximately 5,000 to 8,000 employees, some of whom must have been working.

Later that day, the Employer's Employee Relations Manager called the Charging Party to discuss this email. She explained to him that although employees have the right to organize, if he sent another mass email of that nature, the Employer would fire him. She then memorialized their conversation via email as follows:

> As a follow up to our conversation, please know that communications are protected as long as they are done on an employee's own time and in non-work areas. Employees are not permitted to use company email or resources for any union or organizing activity. This morning you sent out communications using Alpine email and this is not permitted. Please know that proceeding to do so could lead to disciplinary action up to termination.

The next day, the Charging Party posted the Employee Relations Manager's email to him on his blog and also wrote about his telephone conversation with her.

On November 14, the Charging Party emailed the Employee Relations Manager asking her for further explanation. She replied on November 21, stating:

> I wanted to clarify the Company's position with respect to the issues we discussed last week. You have a right to solicit coworkers as long as both you and the employees you are communicating with are not on working time. For example, you may solicit coworkers when both you and the employee(s) you are communicating with are on a work break and/or meal break. We recognize that certain rights are provided to you as an employee under the National Labor Relations Act. Alpine Access' policies and work rules will not be enforced in any manner that would limit or infringe upon those rights.

Sometime before November 23, the Charging Party spoke with the Employer's Chief Executive Officer regarding his Assistant Team Leader's actions, and the CEO told him that he would speak to the Vice President of Employee Relations about the matter. Subsequently, the Vice President of Employee Relations called the Charging Party and informed him that the Employer would discipline the Assistant Team Leader for making ethnic impersonations. He also acknowledged, on behalf of the Employer, that the Assistant Team Leader was wrong in trying to prevent organizing activities and stated that the Employer would have him retract his November 7 blast. On November 23, the Assistant Team Leader sent the following message via YIM to all of the Charging Party's fellow team members who were sent the original blast:

> On 11/7/11...I sent a blast requesting you to contact me if you were approached by [the Charging Party]. This blast was sent in error. To clarify, you do not need to notify me if you are contacted by [him]. You are free to speak to [him] as long as your communications do not affect your ability to perform your job. Feel free to contact Human Resources if you have any questions or concerns.

On December 6, the Charging Party posted that message on his blog and further indicated that the Vice President of Employee Relations had reiterated in a private email to the Charging Party that the Employer intended to fully retract the November 7 blast and that if the Charging Party

did not believe the retraction was properly conveyed, the Employer would work with him to make it right.

The Employer's Policies Regarding Use of its Computer Systems

The Employer maintains an "Acceptable Use Policy" that permits "incidental personal" use of its systems "only if the use: (a) does not consume more than a trivial amount of resources that could be used for business purposes, (b) does not interfere with staff productivity [,] (c) does not preempt any business activity, and (d) does not otherwise violate Alpine Access policy." The Employer interprets its Acceptable Use Policy to permit employees to check personal email and view other non-Alpine related websites while on working time as long as their conduct does not interfere with their productivity and/or the productivity of their coworkers. The Employer further maintains that employees are permitted to send non-work related emails, such as solicitation emails, over the Employer's system during non-working hours and/or non-working time as long as the emails do not cause a distraction or result in decreased productivity.

In addition to the Acceptable Use Policy, the Employer also maintains the following rules regarding computer systems usage in the employees' Handbook:

> **Computer Systems**
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> ... Alpine Access allows limited personal use for communication with family and friends, independent learning, and public service. ...
>
> Inappropriate use includes, but is not limited, to the following: ...
>
> - Using systems for mass unsolicited mailings, access for non-employees to Alpine Access resources or network facilities, competitive commercial activity unless pre-approved by Alpine Access, or the dissemination of chain letters. ...
>
> - Sending or downloading unreasonably large electronic mail attachments.
>
> **Communication Systems**
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> The Organization utilizes systems where employees receive and send messages through email and voicemail. . . . In keeping

> with this intention, the communication systems are intended solely for business use.

Miscellaneous Other Rules and Policies

Non-Disclosure Agreement

The Employer requires employees to sign a non-disclosure agreement as a condition of their employment when they are first hired. This agreement provides that at all times during and after an employee's employment with the Employer, the employee "will hold in strictest confidence and will not directly or indirectly disclose, use, copy, transmit, lecture upon, or publish any of the Company's Proprietary Information," except when required in connection with the employee's work for the Employer, or unless an officer of the Employer expressly authorizes such use or disclosure in writing. The term "Proprietary Information" is expressly defined as:

> (c) information concerning the manner and details of the Company's operation, organization, and management; the identities of customers and the specific individual customer representatives with whom the Company works; the details of the Company's relationship with such customers and customer representatives; the identities of, and details of the business; the nature of fees and charges to the Company's customers, nonpublic forms, contracts, and other documents used in the Company's business; all information concerning the Company's employees, agents, and contractors, including without limitation such persons' compensation, benefits, skills, abilities, experience, knowledge, and shortcomings, if any; the nature and content of computer software used in the Company's business, whether proprietary to the Company or used by the Company under license from a third party; and all other information concerning the Company's concepts, prospects, customers, employees, agents, contractors, earnings, products, services, equipment, systems, and/or prospective and executed contracts and other business arrangements. Notwithstanding the foregoing, it is understood that, at all such times, Employee is free to use information which is generally known in the trade or industry, which is not gained as a result of breach of this Agreement, and Employee's own, skill, knowledge, know how, and experience to whatever extent and in whichever way Employee wishes.

The agreement further provides that upon any breach or threatened breach of the agreement, the Employer has the right to enforce the agreement and

any of its provisions by injunction, specific performance, or other equitable relief.

Beginning sometime in November, the Employer's attorneys and Vice President of Employee Relations sent cease and desist letters, threatening to take legal action for violation of the Non-Disclosure Agreement, to the former employee who administers a Facebook group called "Alpine Access Sucks" and to other current and former employees who authored Facebook posts on that group's page concerning the Employer's employment practices. Those posts discussed the Employer's absenteeism policies, employee wages, and other topics related to employees' terms and conditions of employment.[2]

Confidentiality Rules

The Employer also maintains identical versions of the following confidentiality policy in its Handbook and Code of Conduct:

> **Confidentiality**
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> We encourage and expect all Alpine Access employees to consider themselves as an employee of the client for the assigned client program during all work-related activities.
>
> - Alpine Access employees supporting or assigned to client programs must preserve all confidential information related to the business, products, customers, employees, policies and procedures, processes, systems, training materials or any other confidential or secure information.
>
> - Alpine Access employees supporting or assigned to client programs are strictly prohibited from disclosing our client's name outside of work-related activities and is in direct violation of the Non-Disclosure Agreement and Master Services Agreement between Alpine Access and the client. This includes using the client's name in any form of collaboration tool (chat rooms, instant messaging, etc) or verbal communication outside of work-related activities including with family, friends or other networking situations. [Employees who do so]. . . are liable for

2 [FOIA Ex. 5

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> damages including the value of diverted resources and any legal fees. ...
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> - Writing down account numbers or storing chat logs is strictly prohibited. ...
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> - Emails that may contain private personal information of any employee, client or customer such as names, addresses, phone numbers, user IDs, or account numbers must be immediately deleted upon the completion of the work. Whenever possible provide this information via phone and work the issue real-time to avoid electronic transmission of data.
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> - Yahoo Messenger and other commercial instant messaging tools (including Alpine Access Instant Access Production and Training Chat Rooms) and personal email systems are strictly prohibited from being used to communicate personal private information regarding our clients and their customers.

That policy also provides that employees must continue to follow the policy after leaving the Employer's employ, and that any employee who violates the policy is subject to disciplinary action, including termination.

In addition, the Employer maintains a "Fraudulent Activity" provision in its Handbook and Code of Conduct, which defines fraudulent activity that will be investigated and prosecuted to include, among other things: "Sharing information obtained in the course of your employment that should be treated as confidential."

Media Relations Guidelines

The Employer maintains a policy entitled "Media Relations Guidelines for all Employees" within its Handbook, which provides in relevant part:

> **Policy**
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> Alpine Access employees shall not discuss any company related matters with anyone outside of Alpine Access. The Marketing Department is officially designated as Alpine Access's liaison with media outlets and is responsible for planning and coordinating all media efforts. It is Alpine Access's desire to maintain an attitude of openness with the media, while maintaining control over the release of information due to our status as a private company. This is done while allowing

> appropriate employees the opportunity to work with the media to promote the company and their role within the company.
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> **Procedures**
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> 1. ALL questions, interviews, etc. raised by the media should be referred to the Marketing Department immediately. . . .
> 2. The proper procedure to release information to the media is to go through the Marketing Department. All news releases are issued by the Marketing Department, unless a special arrangement has been made.

Employees may be disciplined for failing to comply with this policy.

ACTION

We first conclude that employees at this "virtual workplace" have a Section 7 right to use the Employer's electronic communication systems. The Acting General Counsel continues to take the position that the Board's decision in *Register Guard*[3] was incorrectly decided and should be overruled. In addition, the Employer's policies regarding the use of its computer systems violate Section 8(a)(1) under current Board law because these employees cannot communicate by traditional means and would otherwise be entirely deprived of their Section 7 right to communicate at work on their own time. Second, the Employer violated Section 8(a)(1) by promulgating a rule that prohibited the Charging Party from using the Employer's email system for union activities and threatening him with discipline for doing so, while permitting other personal use and solicitations, because the rule was promulgated in response to Section 7 activity and discriminated along Section 7 lines. Third, the Employer unlawfully disabled the private message function in its Adobe software in order to prohibit employees working on X-Box accounts from sending union-related messages to one another. Fourth, the Employer, through its agent, unlawfully ordered employees not to speak to the Charging Party and instructed employees to report contacts from the Charging Party in order to restrain Section 7 activities and thereby also created the impression that employees' union activities were under surveillance and engaged in actual surveillance. Fifth, the Employer has unlawfully maintained overly broad rules in its Non-Disclosure Agreement, Code of Conduct, and Handbook regarding confidentiality and media contacts. And the Employer violated Section 8(a)(1) on the additional basis

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[3] 351 NLRB 1110, 1110, 1116 (2007), *enforcement denied in part,* 571 F.3d 53 (D.C. Cir. 2009).

that it enforced the Non-Disclosure Agreement against current and former employees in order to restrict employees' Section 7 activities on an anti-Employer Facebook page. However, the Employer did not violate the Act by changing its internal email system capabilities to preclude employees from sending email to outside accounts because it did so for a legitimate business reason.

I. The Employer's Policies Regarding Use of its Communication and Computer Systems Are Unlawful Because They Deprive Employees of their Right to Engage in Section 7 Activity in their Workplace during Nonwork Time.

In *Register Guard*, the Board held, based upon its decisions regarding employer-owned equipment, that employees have no statutory right to use an employer's email system for Section 7 matters.[4] In so holding, the Board rejected the General Counsel's argument that the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*[5] required the Board to balance the employer's business interest against the employees' equally important Section 7 interest in communicating at the workplace.[6] The Board reasoned that *Republic Aviation* required the employer to yield its property interest only "to the extent necessary to ensure that employees" are not "entirely deprived" of their ability to communicate over Section 7 matters at work on their own time.[7] Because the *Register Guard* employees still communicated face-to-face at work, email had not "changed the pattern of industrial life" at the facility to the extent that traditional communication sanctioned in *Republic Aviation* "had been rendered useless," thereby requiring the employer to allow employees to use its email system.[8] In reaching this conclusion, the Board stressed that there was "no contention in this case that the Respondent's employees rarely or never see each other in person or that they communicate with each other solely by electronic means."[9] And the

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[4] 351 NLRB at 1110, 1116.

[5] 324 U.S. 793, 801-02 (1945).

[6] *Register Guard*, 351 NLRB at 1115-16.

[7] *Id.* at 1115, citing *Republic Aviation*, 324 U.S. at 801 n.6.

[8] *Id.* at 1116.

[9] *Id.*

Board expressly noted that it was not passing on circumstances where that was the case—"in which there are no means of communication among employees at work other than email."[10]

Initially, we note that the Acting General Counsel continues to take the position that the Board's decision in *Register Guard* was incorrectly decided and should be overruled.[11] Accordingly, the Region should use this case as a vehicle to argue that the *Register Guard* majority erroneously rejected the General Counsel's position that employees presumptively have a statutory right to use their employer's communication systems, subject to the employer's need to maintain production and discipline.[12]

Further, this case presents exactly those circumstances that the Board did not need to address in *Register Guard*—a work environment where employees have no means of communication with one another other than through email. The Employer's approximately four thousand CCPs are spread among forty states and the District of Columbia, have no common physical workplace, and no face-to-face communications. The employees' workplace is a "virtual workplace" comprised of the Employer's communication systems that the employees utilize in performing their work. Indeed, the Employer has structured its computer and communication systems, including email and Adobe chat, to permit employees to communicate with each other and their team leaders because of the unique nature of this "virtual workplace." Moreover, nearly all employees, not just the Charging Party, utilize the Adobe chat rooms and the Employer's internal email for connecting with one another and discussing work concerns and personal matters; indeed those systems are the only way that the employees can connect with one another at work.

Accordingly, the Region should also argue that in a "workplace" such as this, where employees have no traditional methods of communicating with one another and the Employer's electronic communication systems are the

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[10] *Id.* at n.13.

[11] *See* Brief of the Acting General Counsel at 19-22, *Roundy's Inc.* (Case 30-CA-17185).

[12] *See* Pre-Argument Brief of General Counsel at 14-17, *Register Guard,* 351 NLRB 1110 (2007) (36-CA-8743, 36-CA-8789, 36 CA-8842, 36-CA-8849), relying upon *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803 n.10 (1945).

"natural gathering place" for employees to communicate,[13] employees presumptively have a statutory right to use those communication systems, subject to the Employer's need to maintain production and discipline.[14]

Here, the Employer permits employees to surf the Internet and engage in other non-work related activities during down time between calls and during official break time, and also permits employees to send personal messages through email, Adobe chat, and YIM during those times. Moreover, the Employer has presented no evidence that the Charging Party's utilization of its systems for Section 7 activities have interfered with productivity or caused a disruption in the workplace. Thus, to the extent that the Employer's policies preclude employees from utilizing its communication systems for Section 7 activity on nonworking time, those policies are unlawful.

We also find the Employer's argument that it is not required to permit employees to utilize its electronic communication systems for Section 7 activities because employees could alternatively communicate through YIM unavailing. The Supreme Court has held that the availability of alternative means of employee-to-employee communication is not relevant in determining the nature and strength of the Section 7 right.[15] And even if the availability of alternative means was relevant to the analysis, employees have no way of identifying or communicating with their fellow employees other than email in order to obtain their coworkers' YIM screen names for the purpose of communicating through YIM.

Finally, we acknowledge that an employer has a business interest in limiting employee-to-employee e-mail communication to prevent liability triggered by inappropriate e-mail content, to protect space on its server, to protect against computer viruses that can be transferred through e-mail attachments, and to ensure that employees are not spending excessive time

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[13] *See Beth Israel Hospital v. NLRB*, 437 U.S. 483, 495, 501-02 (1978) (noting that balancing of interests weighed in favor of allowing employees to solicit and distribute union materials in the hospital cafeteria where it was the "natural gathering place" for employees). *See also Republic Aviation Corp.*, 324 U.S. at 801, n.6 (in the workplace on their own time is "the very time and place uniquely appropriate" for employee communications).

[14] *See Republic Aviation Corp.*, 324 U.S. at 803, n.10.

[15] *See Beth Israel Hospital v. NLRB*, 437 U.S. at 504-05.

engaged in personal e-mail to the detriment of productivity.[16] A rule that, for example, applies lawful harassment and confidentiality policies to e-mail and other electronic communications or restricts the size or the nature or e-mail attachment may be lawful in cases such as this one. Accordingly, although the Employer's policies here are unlawful, the employees' Section 7 right is not unlimited. Thus, after the Employer rescinds its unlawful policies regarding use of its computer systems and email, it may lawfully integrate its own legitimate managerial and business concerns in formulating a new policy that balances its employees' Section 7 rights with its need to maintain production and discipline.[17]

II. The Employer Unlawfully Took Action to Restrict Employee Section 7 Rights in Response to the Charging Party's Organizing Activity.

A. The Employer Unlawfully Promulgated an Email Rule that Discriminated along Section 7 Lines and Was Motivated by the Charging Party's Union Activities.

The *Register Guard* decision modified Board law concerning discriminatory enforcement, concluding that an employer violates the Act only if it discriminates along Section 7 lines by treating activities of "a similar character" disparately because of their union or other Section 7 status.[18] The Board thus adopted the Seventh Circuit's analysis in *Fleming*

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[16] *See* Pre-Argument Brief of General Counsel at 12-13, *Register Guard*, 351 NLRB 1110 (2007) (36-CA-8743, 36-CA-8789, 36-CA-8842, 36-CA-8849).

[17] It is only at that point, that we would address any issues of overbreadth under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Thus, we do not reach the issue of whether certain provisions of the Employer's Acceptable Use Policy violated the Act because an employee would reasonably interpret them to restrict Section 7 activities. Although some of those provisions could be unlawfully overbroad under a *Lutheran Heritage* test if they applied to employee conduct beyond the mere use of the Employer's email system and other electronic resources, the Board currently applies a different analysis to employee use of employer email systems, namely the discrimination analysis set forth in *Register Guard*. Thus, instead of addressing whether employees would reasonably interpret certain provisions of the Employer's Acceptable Use Policy to restrict Section 7 activities, we conclude that the Employer's Acceptable Use Policy, as applied, is unlawful.

[18] *Id.* at 1118.

Co.[19] and *Guardian Industries*,[20] where the court found lawful policies that distinguished between "personal," non-work-related postings on a bulletin board, such as for-sale notices and wedding announcements, and "group" or "organizational" postings, such as union materials.[21] Under this view of discriminatory enforcement, an employer does not violate the Act if it distinguishes between charitable and noncharitable solicitations, personal and commercial solicitations, personal and organizational invitations, solicitation and "mere talk," and business-related use and non-business related use.[22] In each case, the Board noted, the fact that union solicitation may be prohibited does not establish that the rule discriminates along Section 7 lines.[23] The Board, however, noted, "if the evidence showed that the employer's motive for the line-drawing was antiunion, then the action would be unlawful."[24]

We conclude that the Employee Relations Manager's November 10 email to the Charging Party, advising that "Employees are not permitted to use company email or resources for any union or organizing activity," promulgated an unlawful rule that discriminated along Section 7 lines, and was motivated by the Charging Party's Section 7 activity. Notwithstanding a general ban on the use of the Employer's email and other resources for non-business purposes in other written policies and its Handbook, the Employer admits that it has enforced and interpreted its Acceptable Use Policy to permit employees to send non-work related emails, such as solicitation emails, over its systems as long as they do not cause a distraction, result in decreased productivity, or contain offensive or inappropriate content. In any event, the Employee Relations Manager's November 10 email singled out the Charging Party's use of its email system for union activities and did not place similar restrictions on similar, non-union related solicitation emails, thereby

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[19] *Fleming Cos. v. NLRB,* 349 F.3d 968 (7th Cir. 2003), *denying enforcement to* 336 NLRB 192 (2001).

[20] *Guardian Indus. Group v. NLRB,* 49 F.3d 317 (7th Cir. 1995), *denying enforcement to* 313 NLRB 1275 (1994).

[21] *Register Guard*, 351 NLRB at 1117-18.

[22] *Id.* at 1118.

[23] *Id.* at 1119.

[24] *Id.* at 1119, n. 18.

unlawfully discriminating along Section 7 lines.[25] Moreover, the timing and content of the email demonstrate that the Employer's "motive for the line-drawing was antiunion," and thus unlawful.[26]

To the extent that the Employer defends its action on the ground that the Charging Party and/or the recipients of his email were on working time when he sent the email, there is no evidence that it has disciplined other employees for sending emails of similar character to coworkers, even though it is inevitable that such emails have been sent because of the employees' unpredictable break times and call schedules, and the 24-hour nature of the Employer's operations.

Furthermore, we would argue that a rule here that requires both the recipient and the sender of an electronic communication to be on non-working time when the communication is sent unreasonably infringes upon Section 7 activities.[27] Here, employees' "down time"—that is, the time between calls when employees are being paid but not actually performing work—varies greatly during the day, and employees are permitted to utilize electronic communication systems to communicate with each other about personal issues during that time. Employees sending emails have no way of knowing which of their fellow employees are on "down time" or breaks. And, unlike a face-to-face communication, an email does not need to be reviewed or responded to until the recipient is between calls or on official break time. Because these employees are permitted to engage in non-work activities during their "down time," and during designated break times, they should

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[25] *Id.* at 1118.

[26] *Id.* at 1118, n. 18.

[27] As noted in prior Advice memoranda, the lines between working time and non-working time discussed in *Republic Aviation* may be blurrier and doubtful with regard to employees, such as those here, whose work involves extensive use of computers. *See Pratt & Whitney*, Case 12-CA-18446, et al, Advice Memorandum dated February 23, 1998, at pp. 13-14; *Guard Publishing Co. d/b/a The Register Guard*, Case 36-CA-8743, Advice Memorandum dated June 12, 2011, at p. 8, n. 20. *See also* Elena N. Broder, Note, "(Net)workers' Rights: The NLRA and Employee Electronic Communications," 105 Yale Law Journal 1639, 1659-60 (1996) ("many of the assumptions underlying the traditional presumptions are frequently no longer true . . . Thus, for many [computer users], the nonwork-time presumption is essentially meaningless").

similarly be allowed to engage in Section 7 communications during those times, as long as the communications do not cause a disruption or hamper productivity.

We reject also the Employer's defense that it effectively repudiated the unlawful November 10 email. In order for an employer to relieve itself of liability by effectively repudiating unlawful conduct, the repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct."[28] In addition, the repudiation must be adequately published to employees, and the employees must receive assurances that in the future there will be no interference with their exercise of Section 7 rights.[29]

The Employee Relations Manager sent a subsequent email to the Charging Party on November 14 "to clarify the Company's position with respect to the issues we discussed last week." She stated that he had the right to solicit coworkers as long as that solicitation occurred when both he and the employees he was communicating with were not on working time. She concluded: "[w]e recognize that certain rights are provided to you as an employee under the National Labor Relations Act. Alpine Access' policies and work rules will not be enforced in any manner that would limit or infringe upon those rights." Even if this email was a timely attempt at repudiation of the prior unlawful conduct,[30] it was not specific in nature to that conduct,[31] did not unambiguously repudiate the previously promulgated

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[28] *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978) (citations omitted).

[29] *Id.* at 138-39.

[30] *See, e.g., Community Action Commission of Fayette County*, 338 NLRB 664, 667 (2002) (assuming, without deciding, that the employer's purported repudiation of threat was timely where letter was sent approximately three weeks after the threat).

[31] *See, e.g., Powellton Coal Co.*, 355 NLRB No. 75, slip op. at 4 (Aug. 9, 2010), incorporating by reference 354 NLRB 419, 424 (2009) (alleged repudiation was not specific in nature where it did not mention the prior unlawful statement, but merely asserted that it was designed to clear up "confusion" about employees' solicitation rights, without indicating what the source of the "confusion" was, and therefore "[did] not repudiate anything.").

unlawful rule,[32] was not free from similar unlawful conduct occurring in the same timeframe,[33] and did not provide the Charging Party with assurances that the Employer would not interfere with his Section 7 rights in the future.[34]

Moreover, the addition of what is essentially a savings clause into its existing policies—that the Employer would not enforce its policies or work rules in a manner that would limit or infringe upon employee rights under the NLRA—did not render an otherwise unlawful rule lawful. It is well-established that an employer may not prohibit specific employee activity protected by the Act and then escape the consequences of the prohibition by a general reference to rights protected by the Act.[35] Thus, where certain

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[32] *See, e.g.*, *Community Action Commission of Fayette County*, 338 NLRB at 667 (where employer threatened that a union victory would have a detrimental effect on employees, employer's later assurance that it would not retaliate against individuals based on their stance on unionization was not unambiguous because an employee would still fear adverse consequences based on the employer's initial threat that a union victory would have a detrimental effect on employees, regardless of his or her own stance on unionization).

[33] *See, e.g.*, *Powellton Coal Co.*, 355 NLRB No. 75 (Aug. 9, 2010), incorporating by reference 354 NLRB 419, n.2 (2009) (purported repudiation held ineffective where the employer committed similar violations in between the initial unlawful ban on the distribution of union literature and the purported repudiation); *Holly Farms Corp.*, 311 NLRB 273, 274 (1994) (employer did not negate coercive effect of unlawful unilateral change where purported repudiation did not occur in an atmosphere free from other coercive conduct), *enforced* 48 F.3d 1360 (4th Cir. 1995), *affirmed on other grounds* 517 U.S. 392 (1996).

[34] *See e.g., Community Action Commission of Fayette County*, 338 NLRB at 667 (employer's post-threat assurances did not disavow future employer interference with exercise of Section 7 rights); *Fresh and Easy Neighborhood Market*, 356 NLRB No. 85, slip op. 1, n. 1 (Jan. 31, 2011) (employer did not effectively repudiate unlawful no-distribution rule where new rule by itself did not provide notice to employees of their Section 7 right to distribute literature), *enforced mem.* 2012 WL 1138769 (D.C. Cir. March 5, 2012).

[35] *See Allied Mechanical*, 349 NLRB 1077, 1084 (2007) (employer's unlawful conditioning of the settlement of employee wage claims upon the requirement that employees not engage in protected activity was not saved by clause

protected activities are specifically prohibited, employees would reasonably conclude that the general declaration of rights set out in the savings clause either does not include—or that the employer does not interpret the savings clause to include—those activities.

B. The Employer Unlawfully Disabled the Private Chat Function in Response to the Charging Party's Section 7 Activities.

We agree with the Region that the Employer unlawfully disabled the private chat function in its Adobe software for employees working on the X-Box account in order to preclude those employees from communicating with one another about Section 7 matters. Although the Employer asserts a non-discriminatory motive for the action—in order to improve the teams' QOS scores—the evidence establishes that this alleged business justification was pretextual.[36] The following factors establish the pretextual nature of the Employer's asserted business justification: the disabling of the private chat function occurred within two to three days of the Charging Party's utilization of email and Adobe chat to communicate regarding Section 7 concerns with his coworkers;[37] the Interim Team Leader initially told the Charging Party that there was nothing wrong with the private chat and that he had an issue with his system, notwithstanding that the Senior Team Leader had intentionally disabled the private chat function;[38] the Employer engaged in

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stating "unless . . . permitted by federal or state law including but not limited to the National Labor Relations Act").

[36] In cases where the General Counsel establishes that the employer's asserted reason for the adverse employment action is pretextual—that is either false or not in fact relied upon—"the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). *See also Wright Line*, 251 NLRB 1083, 1084 (1980) ("evidence may reveal, however, that the asserted [business] justification is a sham"), *enforced* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

[37] *See, e.g., North Carolina License Plate Agency #18*, 346 NLRB 293, 294 (2003) (where discharges occurred immediately after employees threatened to file complaint with state agency, timing supported the inference that employer was motivated by animus).

[38] *See, e.g.*, *Ellicot Development Square*, 320 NLRB 762, 762, 773 (1996) (Board upheld ALJ finding that an employer's shifting explanations for its

disparate treatment by only disabling the private chat function for its X-Box employees;[39] and employees are still permitted to utilize equally distracting forms of electronic communication, such as public chat rooms in Adobe and YIM.[40]

C. The Employer Did Not Violate the Act by Disabling Employees' Ability to Send Email Messages to Outside Parties.

We also agree with the Region that notwithstanding the suspect timing of the Employer's action, the Employer can meet its *Wright Line* burden and establish that it had a legitimate, non-discriminatory reason for disabling employees' ability to send email messages from its email system to third parties, and would have taken the same action in the absence of the Charging Party's Section 7 activities. The evidence indicates that the Employer acted in response to a client's complaint that an employee had violated confidentiality rules by emailing confidential client information from her work email account to her personal email account. Therefore, the Employer did not unlawfully disable employees' ability to utilize its email system to send emails to third parties.

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actions was evidence of pretext), *enforced* 104 F.3d 354 (2d Cir. 1996); *Rogers Electric*, 346 NLRB 508, 517-18 (2006) (same).

[39] *See e.g., Ellicot Development Square*, 320 NLRB at 762, 775 (Board upheld ALJ finding that evidence of disparate treatment significantly detracted from employer's attempt to meet its *Wright Line* burden); *Stoody Co.*, 312 NLRB 1175, 1175, 1182-83 (1993) (Board upheld ALJ finding that employer's disparate application of attendance policies was evidence of pretext).

[40] *See, e.g., Jack in the Box Distribution Center Systems*, 339 NLRB 40, 53 (2003) (where employer's reason for why it conducted investigation into accuracy of employees' timecards was not convincing, ALJ concludes that the employer's asserted reason was false and the false explanation supported an inference that the employer's true motive was an unlawful one). *See also Rogers Electric*, 346 NLRB at 518 (same).

D. The Employer Unlawfully Directed Employees Not to Communicate with the Charging Party and to Report Contacts from Him.

An employer violates Section 8(a)(1) by directing its employees to cease discussing protected subjects.[41] An employer also violates Section 8(a)(1) when it requests employees to inform the employer about their coworkers' union activities, because such a request has the "dual effect" of encouraging employees to report the identity of union card solicitors and of "discouraging card solicitors in their protected organizational activities."[42] In determining whether an employer request is tantamount to a request that employees report on their coworkers' Section 7 activities or a lawful attempt to prevent undue harassment, the Board considers the specific context of the statement, and is inclined to find a violation where such a request occurs in the context of lawful union activities.[43]

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[41] *Palms Hotel & Casino*, 344 NLRB 1363, 1363 n.2 (2005) (employer violated Section 8(a)(1) when its supervisor ordered employees to stop discussing complaints about overtime pay and lack of breaks).

[42] *Ryder Transportation Services*, 341 NLRB 761, 762 (2004) (citations omitted), *enforced*, 401 F.3d 815 (7th Cir. 2005). *See also Nashville Plastic Products*, 313 NLRB 462, 462 (1993) (requesting employees to report to management if they were bothered or harassed by other employees who were advocating the union unlawful, because it would "tend to restrain union proponents from attempting to persuade other employees for fear of being reported to management").

[43] *Compare Ryder Transportation Services*, 341 NLRB at 762 (instructing employees "that, if they felt that they were being harassed concerning the Union, to put it in writing and come see him" unlawful, where there was no evidence that employees had engaged in unlawful harassment, notwithstanding that request was made in response employees' reports that they felt harassed by union organizers' solicitation efforts), and *Niblock Excavating, Inc.*, 337 NLRB 53, 61 (2001) (employer's request that employees report to their foreman if they feel pressured or harassed by union agents asking them to sign an authorization card unlawful, where there was no evidence that union supporters employed any unprotected tactics in soliciting support for the union) *with River's Bend Health and Rehabilitation Services*, 350 NLRB 184, 186-87 (2007) (employer's request, in response to an employee's complaint of actual harassment, lawful, where context established that employer was inquiring into incidents of unlawful harassment and

Here, the Assistant Team Leader sent the following message to all of the Charging Party's fellow team members: "Do not speak to [the Charging Party]…if he approaches you it is imperative that you contact me at once…Thanks." Initially, we agree with the Region that the Assistant Team Leader was acting as the Employer's agent when he sent the message to the Charging Party's fellow team members, regardless of whether he is a Section 2(11) supervisor. As Assistant Team Leader, he regularly gave employees directives regarding work and commented upon employees' performance, and this email fell well within the scope of his authority.

Further, the Assistant Team Leader's email was in direct response to the Charging Party's protected organizing activity, and clearly designed to restrain that activity. The Charging Party had begun his organizing activities, including discussing work issues with coworkers on his team, holding a union meeting via teleconference, and contacting the IBEW and CWA, before the Assistant Team Leader sent his blast to the other individuals on the Charging Party's team, and the Employer apparently knew of the Charging Party's union activities. At least one team member interpreted the message as a request to inform the Assistant Team Leader when the Charging Party contacted him about unionizing. In this context, and in the absence of evidence of a single employee complaint that the Charging Party's messages had disrupted their work or adversely affected them in any way, the Assistant Team Leader's order violated Section 8(a)(1) because it had the necessary effect of restraining Section 7 activity.

Moreover, the Assistant Team Leader's instruction also created the impression that employees' union activities were under surveillance and was an effort to engage in actual surveillance of the Charging Party's Union activities. Employer surveillance or creation of an impression of surveillance constitutes unlawful interference with Section 7 rights because employees should feel free to participate in union activity "without the fear that members of management are peering over their shoulders[.]"[44] The Board's test for determining whether an employer has created an impression of surveillance is whether the employee "would reasonably assume from the statement in question that his union activities had been placed under surveillance."[45] For example, in *Fresh & Easy Neighborhood Market*, the

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threats, and employer stated that it was requesting such reports to ensure that employees worked in a non-threatening environment).

[44] *See Flexsteel Industries*, 311 NLRB 257, 257 (1993).

[45] *Mountaineer Steel, Inc.*, 326 NLRB 787, 787 (1998), *enforced mem.* 8 F. App'x 180 (4th Cir. 2001).

Board affirmed the administrative law judge's conclusion that the employer had created the impression that employees' union activities were under surveillance when the store manager requested that two employees furnish statements about union harassment, where neither employee had ever mentioned the union to any employer official.[46] In addition, an employer who seeks to recruit employees to pass on information that they learn about their fellow employees' union activity engages in unlawful surveillance.[47]

Here, where there is no evidence that the Employer gained its knowledge of the Charging Party's union activities from employees prior to the Assistant Team Leader's directive, employees would likely believe that management was monitoring the Charging Party's union-related activities. Accordingly, the Assistant Team Manager's instruction violated Section 8(a)(1) on the additional basis that it created the impression that employees' union activities were under surveillance. The Employer also engaged in unlawful surveillance by seeking to recruit employees to report the Charging Party's union-related contacts with them.

Finally, the Employer did not effectively repudiate the Assistant Team Leader's unlawful conduct to relieve itself of liability under *Passavant*.[48] On November 23, the Assistant Team Leader sent a message to each of the employees he sent the original message to, stating that his November 7 "blast was sent in error. To clarify, you do not need to notify me if you are contacted by [him]. You are free to speak to [him] as long as your communications do not affect your ability to perform your job." Although the subsequent message to employees was likely a timely attempt to repudiate the unlawful "blast" because it was sent sixteen days after the initial message, the

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[46] *Fresh and Easy Neighborhood Market*, 356 NLRB No. 85, slip op. 1, 10-11 (Jan. 31, 2011), *enforced mem.* 2012 WL 1138769 (D.C. Cir. March 5, 2012).

[47] *See Vought Corp.,* 273 NLRB 1290, n.2, 1298 (1984) (employer violated Section 8(a)(1) by requesting that employee become company informer and provide information about his fellow employees' organizing activity), *enforced,* 788 F.2d 1378 (8th Cir. 1986); *GAC Properties, Inc.*, 205 NLRB 1150, 1168 (1973) (affirming ALJ's conclusion that the employer unlawfully recruited employees to engage in surveillance where a supervisor asked an employee to try "to find out and let me know" where a union meeting was going to be held); *Carnation Company*, 183 NLRB 1096, 1098-99 (1970) (affirming ALJ's finding that employer engaged in unlawful surveillance by seeking to recruit two employees to pass on what they learned about union activity).

[48] *Passavant Memorial Area Hospital*, 237 NLRB at 138.

Employer's purported repudiation did not satisfy most of the other *Passavant* factors. The message was not specific in nature to the unlawful conduct because it stated that the November 7 blast was sent in error rather than that the prior directive was unlawful.[49] It was not free from similar unlawful conduct; the Employer committed other similar unlawful acts in between the purported repudiation and the initial message.[50] And the message did not provide assurances that the Employer would not interfere with Section 7 rights in the future.[51]

III. The Employer's Non-Disclosure Agreement and Confidentiality and Media Relations Rules Are Unlawfully Overbroad.

An employer violates Section 8(a)(1) through the mere maintenance of a work rule if the rule "would reasonably tend to chill employees in the exercise of their Section 7 rights."[52] The Board has developed a two-step inquiry to determine if a work rule would have that effect.[53] First, a rule is clearly unlawful if it explicitly restricts Section 7 activities. Second, if it does not, the rule will violate Section 8(a)(1) only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[54] In

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[49] *See, e.g., Powellton Coal Co.*, 355 NLRB No. 75 (Aug. 9, 2010), incorporating by reference 354 NLRB 419, 424 (2009) (alleged repudiation was not specific in nature where instead of mentioning prior unlawful statement, it stated that it was designed to clear up "confusion" about employees' solicitation rights, without indicating what the source of the "confusion" was).

[50] *See id.* at 419, n.2 (purported repudiation held ineffective where the employer committed similar violations in between the initial unlawful ban on the distribution of union literature and the purported repudiation).

[51] *See e.g., Community Action Commission of Fayette County*, 338 NLRB at 667 (employer's post-threat assurances did not disavow future employer interference with exercise of Section 7 rights).

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

[53] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

[54] *Id.* at 647.

determining how an employee would reasonably construe the rule, particular phrases should not be read in isolation, but rather considered in context.[55] Rules that are ambiguous regarding their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that they do not restrict their Section 7 rights, are unlawful.[56] In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.[57]

A. The Employer's Non-Disclosure Agreement Violates Section 8(a)(1) Because It Explicitly Restricts Certain Section 7 Conduct, Would Reasonably Be Interpreted to Prohibit Other Section 7 Conduct, and Has Been Enforced Against Section 7 Conduct.

Employees have a Section 7 right to discuss their wages and other terms and conditions of employment, both amongst themselves and with non-employees, and a rule that precludes them from exercising that right therefore violates Section 8(a)(1).[58] The provision of the Non-Disclosure

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[55] *Id.* at 646.

[56] *See Claremont Resort and Spa*, 344 NLRB 832, 836 (2005) (rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful); *University Medical Center*, 335 NLRB 1318, 1320–1322 (2001) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in pertinent part,* 335 F.3d 1079 (D.C. Cir. 2003).

[57] *See Tradesmen International*, 338 NLRB 460, 460–462 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

[58] *See, e.g., Bigg's Foods*, 347 NLRB 425, 425 n.4 (2006) (rule prohibiting employees from discussing their own or their "fellow employees'" salaries with "anyone outside the company" violated Section 8(a)(1)); *Cintas Corp.*, 344 NLRB 943, 943 (2005) (holding unlawful a rule that prohibited the release of any information regarding employees, because it could reasonably be construed to restrict discussion of wages and other terms and conditions of employment among fellow employees and with the union), *enforced*, 482 F.3d 463 (D.C. Cir. 2007); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–72

Agreement that prohibits employees from discussing "all information concerning the Company's employees, agents, and contractors, including without limitation such persons' compensation, benefits, skills, abilities, experience, knowledge, and shortcomings, if any," is unlawful under first step of the *Lutheran Heritage* test. The plain language of the rule expressly "muzzles employees who seek to engage in concerted activity for mutual aid or protection" by prohibiting employees from discussing information regarding other employees' wages and other terms and conditions of employment that they lawfully obtained.[59]

In addition, employees would reasonably construe other provisions of the Non-Disclosure Agreement to foreclose protected discussions of their working conditions and the Employer's employment policies. Thus, the Agreement prohibits the disclosure of: "information concerning the manner and details of the Company's operation, organization, and management; the identities of customers and the specific individual customer representatives with whom the Company works; the details of the Company's relationship with such customers and customer representatives"; "the nature of fees and charges to the Company's customers"; "the nature and content of the computer software" the Company uses; "and all other information concerning the Company's concepts, prospects, customers, employees, agents, contractors, earnings, products, services, equipment, systems[.]" Employees would reasonably interpret these provisions to prohibit them from discussing, for example, how the Employer's business operates; the identity of individuals who comprise the Employer's management structure, including their supervisors; the general nature of the fees the Employer charges its customers in relation to the employees' compensation and benefits; the software the employees utilize in completing their work; the services the employees perform for the Employer's customers; and the Employer's profitability and earnings—all matters relevant to terms and conditions of employment. Therefore, the above-referenced language also violates Section 8(a)(1).

Finally, this Agreement is unlawful under the second part of the *Lutheran Heritage* test on the additional basis that the Employer has applied the Agreement against Section 7 activity. The Employer has sent cease and

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(1990) (rule prohibiting employees from discussing the condition of the employer's facilities or terms and conditions of employment with third parties violated Section 8(a)(1)).

[59] *Labinal, Inc.*, 340 NLRB 203, 210 (2003) (employer's ethics policy, which expressly prohibited one employee from discussing another employee's pay without the latter's knowledge and permission was unlawful).

desist letters threatening to take legal action against current and former employees for violations of the Non-Disclosure Agreement because they discussed their terms and conditions of employment, such as the Employer's absenteeism policies and wages, through a Facebook page called "Alpine Access Sucks."

B. The Employer's Media Relations Policy Violates the Act Because Employees Would Reasonably Interpret It to Prohibit their Discussion of Section 7 Matters with the Media.

The Employer's Media Relations policy is unlawfully overbroad because employees would reasonably construe it as precluding all contacts with the media. Employees have a Section 7 right to speak to reporters about wages and other terms and conditions of employment.[60] For example, in *Leather Center Inc.*, a rule that "[o]nly an officer of Leather Center is to make any comment to any member of the media" was found unlawful.[61] And in *Trump Marina Associates*, the Board upheld an ALJ's decision that a rule against "[r]eleasing [a] statement to the news media without prior authorization" was unlawful.[62]

In this case, the Employer's policy states that "employees shall not discuss any company related matters with anyone outside of Alpine Access," requires that employees immediately refer *all* questions and interviews raised by the media to the marketing department, requires employees to go through that department before releasing any information to the media, and warns that the failure to comply with the policy may result in disciplinary action. Thus, it is so broadly worded that employees would reasonably interpret the policy to prohibit them from exercising their Section 7 right to

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[60] *See Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990) (rule prohibiting employees from discussing the condition of the employer's facilities or terms and conditions of employment with third parties violated Section 8(a)(1)); *Trump Marina Associates*, 355 NLRB No. 107 (2010), incorporated by reference 354 NLRB No. 124, slip op. at 1 n.2, 2 (2009), *enforced mem.* 435 Fed.Appx. 1, 1-2 (D.C. Cir. 2011); *Leather Center, Inc.*, 312 NLRB 521, 525 (1993).

[61] 312 NLRB at 525.

[62] 355 NLRB No. 107, incorporating by reference 354 NLRB No. 123, slip op. at 1 n.2, 2.

speak to the media about their working conditions and the Employer's labor policies, and therefore violates Section 8(a)(1).

C. The Employer's Confidentiality Policy Violates the Act Because Employees Would Reasonably Interpret It to Prohibit Section 7 Activity.

The Employer's Confidentiality Rule, contained in both its Code of Conduct and Handbook, is also unlawfully overbroad because employees would reasonably interpret several provisions of the rule to prohibit Section 7 conduct. First, the provision requiring employees to "preserve all confidential information related to the business, products, customers, employees, policies and procedures, processes, systems, training materials or any other confidential information" is unlawful because employees would reasonably interpret it to prohibit employees' discussion of wages and other terms and conditions of employment.[63]

Second, the provision that prohibits employees from disclosing the client's name outside of work-related activities, including "using the client's name in any form of collaboration tool (chat rooms, instant messaging, etc) or verbal communication outside of work-related activities including with family, friends or other networking situations," is unlawful because it interferes with employees' ability to identify other employees who work on the same project.[64]

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[63] *See, e.g.*, *Windstream Corp.*, 355 NLRB No. 119 (Aug. 24, 2010), *incorporating by reference* 352 NLRB 510, 513-14 (2008) (rule that employees "should not disclose [employee compensation, benefits, and personal records and information] to any other Windstream employee unless that employee has a need to know such information in the course of employment" unlawful),; *Cintas Corp.*, 344 NLRB 943, 943 (2005) (rule "protect[ing] the confidentiality of any information concerning the company, its business plans, its partners [i.e. employees], new business efforts, customers, accounting and financial matters" unlawful), *enforced* 482 F.3d 463 (D.C. Cir. 2007); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3, 291-292 (1999) (rule prohibiting employees from revealing confidential information regarding hotel's customers, fellow employees, or hotel business unlawful).

[64] *See, e.g., ON Semiconductor and Superior Technical Resources (Joint Employers)*, Case 28-CA-061699, Advice Memorandum dated October 17, 2011, at p. 3 (rule that prohibited employees from posting about their "specific job duties or activities" was unlawfully overbroad because notwithstanding that the employer may have a legitimate interest in preventing the disclosure of certain company information about job duties or activities to outside

Finally, the provisions prohibiting employees from "storing chat logs" and requiring employees to immediately delete emails containing "personal information of any employee, client or customer such as names, addresses, phone numbers" are unlawfully overbroad because employees could reasonably construe the provisions to prohibit them from storing lawfully obtained contact and other useful information[65] needed for later Section 7 communications.[66]

CONCLUSION

In sum, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by: maintaining policies regarding the use of its computer systems and email that restrained employees from engaging in Section 7 activity in their workplace; promulgating an unlawful rule regarding the use of its email that discriminated along Section 7 lines, in response to the Charging Party's union-related email, and threatening the Charging Party with discipline if he sent other union-related emails; disabling the private chat capabilities in its Adobe software in response to Section 7 conduct; directing employees not to communicate with the Charging Party, instructing employees to report the Charging Party's communications, and thereby creating the impression that employees' union activities were under surveillance and engaging in actual

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individuals, employees would reasonably interpret it to prohibit protected activity, including communicating with other employees about terms and conditions of employment); *Rite Aid Corporation*, Cases 8-CA-62080 and 31-CA-30255, Advice Memorandum dated September 22, 2011, at p. 4 (rule was unlawfully overbroad because employees would reasonably interpret it to prohibit their use of the employer's name in social media communications, and use of an employer's name is essential for employees to communicate with their colleagues about the workplace or search online for additional employees of the employer at its other locations).

[65] *See, e.g., Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), (employee tape recording at jobsite to provide evidence in a Department of Labor investigation considered protected), *enforced,* 976 F.2d 743 (11th Cir. 1992).

[66] Although the Employer's Fraudulent Activity rule prohibits "[s]haring information obtained in the course of your employment that should be treated as confidential," the Region need not allege that this rule independently violates Section 8(a)(1). Once the offending Confidentiality provisions are removed, the Fraudulent Activity rule will no longer reasonably be read to restrict Section 7 communications.

surveillance; maintaining and enforcing an unlawful Non-Disclosure Agreement; and maintaining overbroad Confidentiality and Media Relations Policies. The Region should dismiss, absent withdrawal, all other allegations.

/s/
B.J.K.

Digest Numbers:

378-2847-5000-0000
378-2847-9600-0000
378-2855
378-2858
506-6090-0200-0000
512-5012-1737-0000
512-5012-1737-6900
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