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

DATE: June 20, 2018

TO: Garey E. Lindsay, Regional Director
Region 9

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Shelby County Memorial Hospital Association
d/b/a Wilson Health
Case 09-CA-210124

512-5012-0125
512-5012-3322
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The Region submitted this case for advice as to whether: (1) certain of the Employer's rules and policies violate Section 8(a)(1) of the Act because they are unlawfully overbroad, including the "Commitment to My Co-workers" document, a prohibition on making disparaging comments online about the Employer, a prohibition on the use of the Employer's electronic communication systems, a restriction on speaking on behalf of the Employer on social media, a prohibition on sharing confidential information online, and a ban on the use of cellphone cameras; (2) requiring employees to sign the Commitment to My Co-workers document violated Section 8(a)(1); and (3) terminating the Charging Party either for refusing to sign the Commitment to My Co-workers document or for suspected protected concerted activity violated Section 8(a)(1).

We conclude that the Commitment to My Co-workers document is lawful, and the Employer did not violate Section 8(a)(1) by asking employees to sign the document. Additionally, we conclude that the Employer's work rules prohibiting disparaging comments online about the Employer and prohibiting the use of the Employer's electronic communication systems (specifically email) are unlawfully overbroad and violate Section 8(a)(1). We conclude, however, that the Employer's rules restricting speaking on behalf of the Employer on social media, prohibiting the sharing of confidential information online, and prohibiting the use of cellphone cameras are lawful. Finally, we conclude that the Employer did not violate Section 8(a)(1) when it terminated the Charging Party.

FACTS

Shelby County Memorial Hospital Association d/b/a Wilson Health ("the Employer") operates a hospital in Sidney, Ohio. The Charging Party is (b) (6), (b) (7)(C)

(b) (6), (b) (7)(C) who worked for the Employer for about 16 years prior to (b) (6), (b) termination. The Charging Party worked (b) (6), (b) (7)(C) and was (b) (6), (b) (7)(C) assigned to the Employer's Behavioral Health Unit. The Charging Party reported to (b) (6), (b) (7)(C)

On (b) (6), (b) (7)(C) 2017,[1] (b) (6), (b) (7)(C) emailed a document entitled "Commitment to My Co-workers" to all of the employees in the Behavioral Health Unit. This document contained ten paragraphs, including the following:

1. I will accept responsibility for establishing and maintaining healthy interpersonal relationships with you and every member of this team.

2. I will talk to you promptly if I am having a problem with you. The only time I will discuss it with another person is when I need advice or help in deciding how to communicate with you appropriately.

* * *

5. I will not complain about another team member and ask you not to as well. If I hear you doing so, I will ask you to talk to that person.

* * *

7. I will be committed to finding solutions to problems rather than complaining about them or blaming someone for them, and ask you to do the same.

* * *

10. I have reviewed policies 47, 61, and 62 from the Employee Guidebook as well as Policy A of the Communication Guidebook[2] that states that the use of my cellphone is prohibited by all [employees] unless during my scheduled breaks and I should only use my cell phone in our designated locations.

In the email sending out copies of the document, (b) (6), (b) (7)(C) wrote that (b) (6), (b) was distributing it to help employees remember their mutual accountability to one

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[1] All dates hereinafter are 2017 unless otherwise specified.

[2] Each of these policies is analyzed separately below.

another. The email stated, "[a]ll BHU employees will be asked to review, understand, and sign this document by June 23, 2017." The Employer says that this document had previously been used in other areas of the hospital and was introduced in the Behavioral Health Unit at that time because there had been problems with staff not communicating about work-related issues due to personal animosity.[3] The Charging Party said [redacted] found the Commitment to My Co-workers document insulting and did not sign it.

Around the beginning of June, the Employer hired [redacted] The Charging Party and another coworker [redacted] discussed the fact that they hoped that the new hire would result in [redacted] only being required to work every third weekend rather than every other weekend as they were currently scheduled. [redacted] said that [redacted] had heard that [redacted] played football so [redacted] would not be available to work weekends.

On July 12, [redacted] met with [redacted] for [redacted] 30-day new employee review. During that review, [redacted] told [redacted] that the Charging Party constantly complained and talked negatively about [redacted] to other employees in the department. [redacted] said that the Charging Party warned [redacted] not to trust [redacted] and that [redacted] had favorites and changed policies to benefit [redacted] said that the Charging Party also told [redacted] that [redacted] came onto night shift just to criticize people and that things were better before [redacted] was hired. [redacted] put these comments in writing as well as noting that another new employee had told [redacted] was nervous because all the Charging Party does is talk about people.

After that meeting, [redacted] emailed [redacted] and reported what [redacted] had told [redacted] [redacted] said that the Charging Party was undermining the department and could affect other employees' willingness to stay, and that the Charging Party's behavior was not supportive of a positive work environment.

On July 13, [redacted] met with the Charging Party to discuss a medication error. After the discussion about medication concluded, according to the Charging Party, [redacted] asked [redacted] why [redacted] had not signed the Commitment to My Co-workers document. The Charging Party responded that [redacted] was already a team player, the document made them sound like they were in elementary school, and [redacted] was not going to sign it. [redacted] claims that the Charging Party raised the issue

[3] The Employer's position is that this document was never intended to be a work policy that could be utilized to discipline employees, but instead was an educational tool to help employees think about improving morale in the department by harmoniously working together.

of the Commitment to My Co-workers document at that meeting by asking whether it was used in other departments of the hospital, and [redacted] said that it was. The Charging Party says that after that discussion, [redacted] said that [redacted] was considering going to a schedule where employees would only work every third weekend instead of every other, but that [redacted] could not because [redacted] needed weekends off since [redacted] played football. The Charging Party responded that [redacted] would have liked to only work every third weekend so that [redacted] could go snowmobiling.[4] The Charging Party then returned to work.

On July 14, [redacted] met with [redacted] and [redacted] to discuss [redacted] complaint about the Charging Party. They concluded that since the Charging Party was already on a final warning,[5] the Charging Party should be terminated absent some unexpected new information. [redacted] told [redacted] to interview the Charging Party and get [redacted] side of the story with respect to accusations.

On the morning of [redacted], [redacted] called the Charging Party into [redacted] office and confronted [redacted] about the complaints made by [redacted] The Charging Party denied making any of the alleged statements about [redacted].

Later that day, [redacted] and [redacted] met with the Charging Party. [redacted] told the Charging Party that [redacted] was terminated and handed [redacted] a piece of paper. The Charging Party ripped up the paper without looking at it. The paper was a copy of the Employer's "Policy #2, Core Values that Define [the Employer]." [redacted] reviewed the termination notice, which stated,

> To date you have had a number of serious performance issues. You again have failed to perform the essential job function of: Being

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[4] [redacted] had no recollection of the scheduling issue coming up at this meeting. The only time that [redacted] recalled the issue being discussed is at a unit council meeting when [redacted] said that [redacted] would like to move to a schedule where [redacted] only work every third weekend and that [redacted] responded that they could as long as the [redacted] agreed and worked out an on-call schedule. The Charging Party was not a member of the unit council.

[5] The Employer has a progressive discipline policy that consists of a documented verbal correction, a written warning, a final written warning, and then termination. The Charging Party had received a final written warning on [redacted], 2016 for engaging in a tug of war with [redacted] over a patient's clothes and telling a coworker that [redacted] hated working for the Employer. According to the Employer's discipline policy, final warnings stay in an employee's file for 18 months.

> professional, respectful, and positive to co-workers at work. The content of your conversations with your coworkers has not supported a positive work environment. All performance issues are in violation of Wilson's Policy #2 – Core Values That Define Wilson Memorial Hospital – ASPIRE – Always Serve with Professionalism, Integrity, Respect, and Excellence. Despite numerous past conversations and Performance Corrective Notices for this type of negative and unprofessional conduct, the negative and unprofessional behavior has not improved.

Policy #2 also had been referenced in the Charging Party's previous final warning. It has several provisions, including the specific provision in the Charging Party's termination notice, i.e., "[b]eing professional, respectful, and positive to co-workers at work."

ACTION

We conclude that various portions of the Employer's rules and policies are overbroad and violate Section 8(a)(1), but that other rules are not unlawful. We further conclude that the Employer did not violate Section 8(a)(1) when it terminated the Charging Party. Thus, the Region should issue complaint, absent settlement, regarding only the aspects of the Employer's rules that are unlawfully overbroad.

I. Employer Rules and Policies

In cases where a facially neutral employer work rule, if reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on Section 7 rights, and (ii) legitimate business justifications associated with the requirement(s).[6] The Board will conduct this evaluation "consistent with the Board's 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees."[7] In so doing, "the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)," and

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[6] *Boeing Co.*, 365 NLRB No. 154, slip op. at 2–3 (Dec. 14, 2017) (expressly overruling the "reasonably construe" standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)).

[7] *Id.*, slip op. at 3, *quoting NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967).

make "reasonable distinctions between or among different industries and work settings."[8] The Board will also account for particular events that might shed light on the purpose served by the rule or the impact of its maintenance on Section 7 rights.[9]

The Board also indicated that its balancing test will ultimately result in its ability to classify the various types of employer rules into three categories, thereby eliminating the need to conduct case-specific balancing as to certain types of rules so as to provide employers, employees, and unions with greater certainty in the future. The Board described the following categories:

> • *Category 1* will include rules that the Board designates as *lawful* to maintain, either because: (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights and thus no balancing of rights and justifications is required; or (ii) even though the rule has a reasonable tendency to interfere with Section 7 rights, the potential adverse impact on those protected rights is outweighed by employer justifications associated with the rule. The Board included in this category rules requiring "harmonious relationships" in the workplace, rules requiring employees to uphold basic standards of "civility," and rules prohibiting cameras in the workplace.
>
> • *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of Section 7 rights, and if so, whether any adverse impact on protected conduct is outweighed by legitimate business justifications.
>
> • *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit Section 7 conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. The Board included as an example of a Category 3 rule one that prohibits employees from discussing wages and benefits with each other.[10]

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[8] *Boeing Co.*, 365 NLRB No. 154, slip op. at 15.

[9] *Id.,* slip op. at 16.

[10] *Id.,* slip op. at 3–4, 15.

Applying the Board's new test here, as discussed below, we conclude that the Commitment to My Co-workers document is a lawful civility rule, which the Board considers to be in Category 1. We conclude that the portion of the Employer's Privacy policy completely prohibiting employees' non-work use of email is unlawful under *Purple Communications*.[11] We also conclude that the portion of the Privacy policy about blogging is a Category 2 rule that violates Section 8(a)(1) because the impact on employee NLRA rights outweighs the Employer's business justification. Thus, the Region should issue complaint, absent settlement, alleging those rules violate Section 8(a)(1). Finally, we conclude that the disputed portions of the Employer's Social Media policy are also Category 2 rules but that they do not violate Section 8(a)(1) because they would not reasonably be read to prohibit Section 7 activities and, even if they were so read, any impact they would have on Section 7 rights is outweighed by the Employer's strong business justifications for those rules.

A. Commitment to My Co-workers document

We conclude that the Commitment to My Co-workers document is a lawful civility policy. The Board made clear in *Boeing* that employers may maintain rules requiring "harmonious relationships" in the workplace and requiring employees to uphold basic standards of "civility."[12] In so holding, the Board noted that any adverse effect on Section 7 rights would be comparatively slight since a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility.[13] The Board incorporated by reference the civility rules at issue in *William Beaumont Hospital* and Member Miscimarra's dissent arguing for their legality, in which he reasoned that the vast majority of conduct covered by such rules does not implicate Section 7 at all.[14] Additionally, there is a distinction between regulations on what employees can say about their coworkers as compared to what they can say about their employer, and the impact on Section 7 activity is far less in the first type

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[11] 361 NLRB 1050, 1063 (2014).

[12] *Id.*

[13] *Id.,* slip op. at 4 n.15.

[14] *See William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 21–23 (Apr. 13, 2016) (incorporated by reference in *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15); Memorandum GC 18-04, "Guidance on Handbook Rules Post-*Boeing,*" at 3-5 (June 6, 2018).

of rule.[15] For instance, while protected concerted activity may involve criticism of fellow employees or supervisors, the requirement that such criticism remain civil does not unduly burden the core right to criticize. Instead, it burdens the peripheral Section 7 right of criticizing other employees in a demeaning or inappropriate manner.

Balanced against the minimal impact on Section 7 rights of these types of civility rules, employers have significant interests in maintaining such rules. These interests include the employer's legal responsibility to maintain a workplace free of unlawful harassment, its substantial interest in preventing violence, and its interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity, patient care (in hospitals), and other legitimate business goals.[16] In addition to healthcare facilities, industries that rely on close teamwork or that are particularly vulnerable to toxic work environments may have further legitimate interests in promoting civility. Moreover, nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace.

Here, the Employer's interest in civility and harmonious interactions is apparent from the context of the Commitment to My Co-workers document and (b) (6), (b) (7)(C) email stating that employees need to remember their mutual accountability to one another. The Employer also cited patient care concerns, similar to those raised in *William Beaumont Hospital*, that there had been medication issues due to employees not communicating between shifts.[17] The document, both on its face and in the

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[15] *Compare Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 11–12 (Feb. 23, 2017) (Acting Chairman Miscimarra, dissenting in part) (although the Board had found rule prohibiting "[d]isparaging . . . the company's employees" unlawful under *Lutheran Heritage*, Acting Chairman Miscimarra in dissent concluded that the rule was lawful under his *William Beaumont* test), *with Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 (June 10, 2016) (Member Miscimarra, concurring in part) (recognizing that "public statements by employees about the workplace are central to the exercise of employee rights under the Act" and concurring that rule requiring permission to use employer's name was unlawful, applying his *William Beaumont* test rather than *Lutheran Heritage*).

[16] *Boeing Co.*, 365 NLRB No. 154, slip op. at 17–19, 19 n.89.

[17] *See William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 8 (the hospital had argued, and Member Miscimarra discussed in his dissent, that a rule requiring harmonious interactions was necessary after a newborn baby died in part due to inadequate communication among hospital employees).

context in which (b) (6), (b) (7)(C) distributed it to employees in (b) (6), (b) unit, relates to employees' interactions with their coworkers, and does not impinge on their ability to discuss terms and conditions of employment or criticize the Employer. Since the Commitment to My Co-workers document is the type of civility policy that the Board considers to be a lawful Category 1 policy, the Region should dismiss the allegation that the Employer unlawfully maintained this policy, absent withdrawal.

Furthermore, because the Commitment to My Co-workers document is a lawful civility policy, the Employer also did not violate Section 8(a)(1) by requesting that employees sign it. Indeed, even if (contrary to the Employer's assertions)[18] employees were required to sign the document, that would not have been a violation of the Act. Therefore, the Region should also dismiss this allegation in the charge, absent withdrawal.

B. Policy 47 – Privacy

1. *E-mail, Internet, blogs and voice mail are to be used only for [Employer] business purposes and not personal ones.*

In *Purple Communications*, the Board adopted the presumption that "employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time."[19] To justify a total ban on employees' non-work use of email, including Section 7 use on non-working time, an employer must demonstrate that "special circumstances make the ban necessary to maintain production or discipline."[20] The Board has suggested that it will be the "rare case" where special

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[18] The evidence does not establish that employees were required to sign the document. While (b) (6), (b) (7)(C) email stated that employees were "asked" to sign the document by a specific date, the Employer did not state any consequence for not signing the document. The Charging Party also faced no adverse outcome based on refusing to sign the document, and even according to (b) (6), (b) version of events, (b) (6), (b) failure to sign the document was not mentioned for several weeks after the supposed deadline. Additionally, the Employer has never relied on the document to discipline employees in the department.

[19] 361 NLRB at 1063 (overruling *Register Guard*, 351 NLRB 1110 (2007), *enfd. in relevant part*, 571 F.3d 53 (D.C. Cir. 2009), to the extent it held that employees have no statutory right to use their employers' email systems for Section 7 purposes).

[20] *Id.* at 1050.

circumstances justify a total ban, and it has emphasized that in demonstrating special circumstances, an employer's "mere assertion of an interest that could theoretically support a restriction" is insufficient.[21]

In this case, the Employer provides its employees, including (b) (6), (b) (7)(C) access to its computers and email system as part of their work. Thus, the Employer's total ban on personal use of its email system in Policy 47, which extends to non-working time, violates Section 8(a)(1) under *Purple Communications.* Although the Employer states in a separate policy in the Employer Guidebook, Policy 61, that incidental personal use of its technology resources is permitted, such as sending or receiving "necessary and occasional personal communications," that separate policy fails to cure the violation.[22] Employees should not have to decide at their own peril which of two conflicting policies they are to follow.[23]

The Employer argues that HIPAA rules and patient confidentiality concerns justify its refusing to allow employees to access email for Section 7 purposes during non-work time. However, this assertion is not sufficient to justify the ban under the high standard for special circumstances in *Purple Communications.*[24] The Employer provided no specific evidence to support its claim that such a rule is required to comply with HIPAA. The Employer is able to lawfully restrict the disclosure of confidential patient information through confidentiality rules without prohibiting Section 7 activity utilizing email during non-work time.[25] Additionally, the

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[21] *Id*. at 1063.

[22] *See, e.g., Olathe Healthcare Center*, 314 NLRB 54, 58 (1994) (unlawful no-solicitation rule in handbook not cured by presence of different, lawful no-solicitation rule in handbook).

[23] *See, e.g., DirecTV Holdings, LLC,* 359 NLRB 545, 547 (2013) (finding employer's Intranet policy unlawfully ambiguous where employees would read confidentiality provision in a separate set of rules to prohibit Section 7-protected communications), *affd. and adopted* 362 NLRB No. 48 (March 31, 2015), *enf. denied on other grounds* 650 Fed. Appx. 846 (5th Cir. 2016).

[24] 361 NLRB at 1063 (the Board anticipating only the "rare case" where special circumstances can justify a complete ban and that employers may not merely assert an interest that theoretically supports a restriction in order to meet its burden of establishing special circumstances).

[25] See discussion of the Employer's confidentiality policy below.

Employer's claimed patient privacy interest is belied by Policy 61's acknowledgement that employees may use the email system for incidental personal use. We therefore conclude that the rule is unlawful under *Purple Communications* to the extent that it prohibits use of email for Section 7 purposes during non-work time.[26] Because the Board has not expanded the holding of *Purple Communications* beyond employer email systems, the remainder of the Employer's policy referencing Internet, blogs, and voice mail, is lawful.

2. *Blogging outside of the hospital must not include . . . disparaging comments about the hospital.*

A rule prohibiting disparagement of the employer has a significant impact on NLRA rights. Concerted criticism of an employer's employment and compensation practices is central to rights guaranteed by the NLRA.[27] A general rule against disparaging the company, absent limiting context or language, would cause employees to refrain from publicly criticizing employment problems, including on social media.[28] Such criticism is often the seed that becomes protected concerted activity for improving working conditions, the core of Section 7.

Although an employer may be understandably wary of reputational damage that can occur when criticized by its own employees, such an interest does not outweigh the core NLRA rights undermined by a broad ban on criticism or disparagement of the employer.[29] Rules against disparaging the employer do not implicate the same

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[26] The General Council does not necessarily agree with the rationale or holding in *Purple Communications*. The Region should issue complaint under current Board law, but should resubmit the case to Advice for alternative argument prior to submitting it to the Board.

[27] *Richboro Community Mental Health Council*, 242 NLRB 1267, 1267–68 (1979). *Cf. Quicken Loans, Inc.*, 359 NLRB 1201, 1201 n.3, 1205 (2013) (finding unlawful under *Lutheran Heritage* rule that employees may not "publicly criticize, ridicule, disparage or defame the Company"), *incorporated by reference in* 361 NLRB 904 (2014).

[28] *See Teletech Holdings, Inc.*, 342 NLRB 924, 931–32 (2004) (finding unlawful rule that employees were not to speak negatively about their job) (citing *Lexington Chair Co.*, 150 NLRB 1328 (1965) (holding unlawful rule prohibiting employees from criticizing company rules and policies), *enfd.* 361 F.2d 283, 287 (4th Cir. 1966)).

[29] *See, e.g.*, *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311–13 (2014) (discussing an employer's interest in preventing disparagement of its products or services and protecting its reputation as balanced against Section 7 rights).

civility and anti-harassment interests involved in rules against disparaging coworkers.[30]

Since this rule is an absolute ban on employees making any comments disparaging the Employer while blogging, and is not limited to prohibiting disparagement of the Employer's product or services, the provision would have a significant impact on online protected concerted activity that is not outweighed by any legitimate interests of the Employer.[31] Therefore, this rule should be treated as a Category 2 rule,[32] and the Region should issue complaint, absent settlement, alleging this provision in Policy 47 is unlawful.

C. Policy 62 – Social Media

1. ***Do Not Refer to [the Employer] When Posting – If employees choose to post online, they must speak as individuals and not speak on behalf of the [E]mployer. Employees must identify themselves using the first person singular. Any online activity relating to or impacting the [E]mployer must be accompanied by a disclaimer such as: 'The views expressed on this site are my own and not those of [the Employer].' This disclaimer must be visible and easy to understand.***

Employees Are NOT Authorized to Speak on Behalf of the Employer, Unless Explicitly Given Permission – If employees seek to establish an account identifying the [E]mployer or sharing information about the [E]mployer, employees must obtain approval from the Marketing and Public Relations Department. Employees cannot display the [E]mployer's logo

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[30] See discussion in note 15, *supra*.

[31] *See Triple Play Sports Bar & Grille*, 361 NLRB at 311–12 (discussing the standard for disparaging comments from *Jefferson Standard,* 346 U.S. 464, 475–78 (1953), and noting that the Facebook comments at issue did not lose the Act's protection where, among other things, they did not mention the employer's products or services); *Valley Hospital Medical Center,* 351 NLRB 1250, 1252 (2007) (explaining that the Board distinguishes between "disparagement of an employer's product and the airing of what may be highly sensitive [employment] issues" and looks at whether the employee had a "malicious motive"), *enfd. mem. sub nom. Nevada Service Employees Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009).

[32] *See* Guideline Memorandum GC 18-04 at 17.

or attempt to represent the [E]mployer without obtaining explicit written approval from the [E]mployer.

We conclude that this rule lawfully prohibits employees from speaking on behalf of or attempting to represent the Employer online.

Work rules prohibiting employees from referring to their employer online have significant impact on core Section 7 activity. Although much online activity covered by this type of rule may be unrelated to Section 7 activity, almost any protected concerted activity taking place in public (which includes most social media activity) will involve use of an employer's name. Public statements by employees about their workplace are "central to the exercise of employee rights under the Act," as are social media postings among employees regarding concerns about working conditions.[33]

On the other hand, employers have significant interest in requiring that only authorized individuals speak for the company.[34] Therefore, employers may have rules ensuring that employees do not, intentionally or unintentionally, make statements that can be interpreted as coming from the company, as long as it is not a total ban on use of the company's name.

Here, the rule is not an absolute ban on referring to the Employer, since the policy acknowledges that employees may choose to post online about the Employer and provides certain instructions for doing so, such as utilizing a disclaimer. Instead, the rule would reasonably be read to only restrict employees from speaking on behalf of the Employer without permission when posting online.[35] This limited restriction is

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[33] *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 (Member Miscimarra, concurring) (concluding that rule requiring permission to use employer's name was unlawful, applying his *William Beaumont* test rather than *Lutheran Heritage*) (citing *Valley Hospital Medical Center,* 351 NLRB at 1252. *See also UPMC*, 362 NLRB No. 191, slip op. at 1, 25 (finding unlawful a rule prohibiting employees from "describing any affiliation with [the employer]" online, without the employer's consent); *Triple Play Sports Bar & Grille*, 361 NLRB at 312-13 (discussing Facebook posts by employees about their terms and conditions of employment).

[34] *See UPMC*, 362 NLRB No. 191, slip op at 14 n.17 (August 27, 2015) (Member Johnson, concurring in part) (recognizing that the employer has a "legitimate interest in prohibiting non-authorized employees from acting as representatives or spokespeople" for the employer). *See also* Guideline Memorandum GC 18-04 at 14.

[35] Policy 62 also includes a "savings clause" that states "[p]rotected concerted activity covered by the National Labor Relations Act is not prohibited by this policy." The

supported by the Employer's strong interest in determining who is an authorized representative or spokesperson, and therefore is a lawful rule.

For similar reasons, we conclude that it is lawful to prohibit employees' use of their employer's logo or other intellectual property. Although some protected concerted activity may fall under such a rule, including fair use of an employer's logo on picket signs or leaflets, usually employees will understand this type of rule as protecting the employer's intellectual property from commercial and other non-Section 7 related use. Even where employees would reasonably interpret such a rule to apply to fair use of an employer's logo as part of protected concerted activity, it is unlikely that the rule would actually cause them to refrain from doing so. Any chill would have only a peripheral effect on Section 7 rights as employees may refrain from using the logo as part of their protected concerted activity, but not stop the protected concerted activity itself. Employers have a strong interest in protecting their intellectual property, including logos and trademarks, as that property can have significant value and failure to police its use may result in significant financial loss.

Based on the preceding, the Region should dismiss the allegation as it pertains to this section of the Social Media policy, absent withdrawal.

> **2.** ***Do Not Post Confidential Information – Employees must always protect the confidential information of patients, co-workers or other employees. Employees must make sure that online postings do not violate any non-disclosure obligations, HIPAA, privacy or other confidentiality obligations. Employees may not share any confidential or proprietary information about the [E]mployer or the [E]mployer's finances, business strategy, or any other information that has not been publically released by the [E]mployer.***

Rules prohibiting disclosure of customer information,[36] and trade or business secrets,[37] should be considered Category 1 rules, as the vast majority of conduct

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Board has said that an employer's express notice to employees advising them of their NLRA rights "may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule." *First Transit Inc.*, 360 NLRB 619, 621 (2014).

[36] *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 (Member Miscimarra, dissenting in part) (although the Board found a confidentiality rule about "information concerning customers" unlawful under *Lutheran Heritage*, Member Miscimarra in dissent argued that the rule was lawful under his *William Beaumont* test). *See also* Guideline Memorandum GC 18-04 at 9–11.

affected by these types of rules is unrelated to Section 7.[38] Therefore, the provisions of this rule concerning the confidentiality of patient information (i.e., HIPAA), and confidential or proprietary information about the Employer's finances and business strategies are lawful.

General prohibitions on posting confidential information should be considered Category 2 rules, where they would reasonably be read to include information about terms and conditions of employment,[39] and such rules should be found unlawful where the impact on Section 7 rights outweighs the employer's legitimate business justification for the rule. However, context is important in determining whether such a rule would reasonably be read as prohibiting protected activities. We conclude that the general prohibitions in this rule regarding the disclosure of "confidential information of . . . coworkers or other employees" and the disclosure of "any other information that has not been publically released" are lawful.

Employees would not reasonably read this confidentiality rule as prohibiting them from disclosing information about their wages and working conditions with their co-workers or a union. The rule does not define confidential information as wages or other terms of employment, or even as information *about* their coworkers; rather it specifically refers to "confidential information *of* . . . coworkers or other employees."[40] Additionally, the requirement that employees keep confidential "any

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[37] *See Lafayette Park Hotel*, 326 NLRB 824, 826 (1998) (finding lawful a rule prohibiting "divulging Hotel-private information to employees or other individuals"), *enfd. mem.* 203 F.3d 52 (D.C. Cir. 1999).

[38] *See e.g., Super K-Mart*, 330 NLRB 263, 263 (1999) (a restriction on disclosing confidential information did not implicate Section 7 when terms and conditions of employment were not specifically included in the restriction).

[39] *See* Guideline Memorandum GC 18-04 at 17.

[40] *Compare Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 9 (Member Miscimarra, concurring) (finding that rule requiring employees to protect "confidential personal employee information" was lawful since it listed as examples "social security numbers, identification numbers, passwords, bank account information and medical information," which would have almost no impact on Section 7 rights), *with Victory Casino Cruises II*, 363 NLRB No. 167, slip op. at 8 (Apr. 22, 2016) (Member Miscimarra, concurring) (finding unlawful rule classifying "all information about present or past employees to be confidential" as the blanket prohibition would encompass protected concerted activity); *and Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 1 n.1, 5 (Nov. 3, 2015) (Member

other information that has not been publicly released" also is not concerned with working conditions when read in context. The rule specifically mentions HIPAA and the Employer's proprietary information regarding finances and business strategy, indicating that it is primarily directed at private medical information and the Employer's business secrets.[41] In the context of prohibiting disclosure of these categories of confidential information, employees would be unlikely to read the rule as also prohibiting disclosure of information about terms and conditions of employment.[42]

Moreover, even if employees would reasonably read this rule as prohibiting some protected concerted activities, any impact on NLRA rights must be balanced against the Employer's significant business interests in having such a confidentiality rule in a hospital setting. The Board has recognized the significant interests that healthcare employers have in maintaining confidentiality rules, particularly those directed at protecting patient information.[43] The full scope of the rule here shows that it is directed at protecting such information.

With regard to the impact of general confidentiality rules on Section 7 rights, a central aspect of protected concerted activity under the NLRA involves discussions and coordination among employees, and with unions and others, regarding wages and working conditions. This includes discussing the names and contact information of other employees with coworkers or union representatives. Confidentiality rules that ban discussion of broad, undefined "employee information" or "employer business," or

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Miscimarra, concurring) (rule listing information about employees as confidential was unlawful).

[41] The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-6 (2010), restricts the disclosure of individually identifiable health information.

[42] The "savings clause" in this policy, which is discussed at note 35, *supra*, also reduces the likelihood of employees reading this confidentiality provision to include prohibiting the disclosure of terms and conditions of employment that may be part of protected concerted activity.

[43] *See, e.g., Flagstaff Medical Center*, 357 NLRB 659, 663 (2011) (finding hospital's no-photography rule to be lawful where employer had "significant interest in preventing the wrongful disclosure of individually identifiable health information"), *enfd. in part on other grounds*, 715 F.3d 928 (D.C. Cir. 2013).

that prevent employees from using freely available contact information to communicate with one another, will generally adversely affect core NLRA rights.[44]

However, the Employer has a very strong interest in confidentiality and following laws requiring privacy as a health care operation.[45] Improper disclosure of patients' personally identifiable health information could result in liability on behalf of the Employer under HIPAA. The Employer, as with all other companies, also has an interest in keeping its proprietary information confidential.[46] In balancing the Employer's significant interest in confidentiality, the impact of this rule on employees' Section 7 activity will not be so significant as to outweigh the Employer's legitimate justifications.[47] These overwhelming business justifications allow the Employer to lawfully maintain this confidentiality policy even if the policy is not worded as perfectly as possible.[48]

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[44] *See Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1 n.5 (June 14, 2016) (Member Miscimarra, concurring) (finding a rule prohibiting the disclosure of certain information about employees unlawful under Member Miscimarra's *William Beaumont Hospital* test because such disclosures are central to many types of Section 7 activity); *Victory Casino Cruises II*, 363 NLRB No. 167, slip op. at 8 (Member Miscimarra, concurring); *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 1 n.1 (Member Miscimarra, concurring).

[45] *Cf. Flagstaff Medical Center*, 357 NLRB at 663 (discussing the hospital's significant interest in patient privacy in finding a no photography rule lawful); *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 4–5 (Dec. 24, 2015) (distinguishing the non-health care employer's privacy interests as "not nearly as pervasive or compelling as the patient privacy interest" in a healthcare setting), *enfd.* 691 Fed.Appx. 49 (2d Cir. 2017). The Board has long held that individuals' medical information has a "legitimate aura of confidentiality." *Johns-Manville Sales Corp.*, 252 NLRB 368, 368 (1980).

[46] *See* Guideline Memorandum GC 18-04 at 9–11.

[47] Despite this rule being lawful to maintain, the Board noted in *Boeing* that the *application* of a lawful rule against employees engaged in protected concerted activity is still unlawful. 365 NLRB No. 154, slip. op. at 16.

[48] *Boeing Co.*, 365 NLRB No. 154, slip op. at 9 & n.43 (criticizing the "linguistic perfection" improperly required by the Board under the old, *Lutheran Heritage* standard for facially neutral work rules).

Therefore, we conclude that the confidentiality provision in Policy 62 is a Category 2 rule, but that employees would not reasonably read this particular provision, in context, to prohibit protected activities, and even if they would, the substantial privacy interest of the Employer as a health care operation outweighs the adverse impact on NLRA protected conduct and renders this a lawful rule. The Region should dismiss the allegation that Policy 62 is unlawfully overbroad.

D. Policy A – Appropriate Telephone/Cellular Telephone Usage

> ***The use of cellular telephones is prohibited for all [Employer] employees unless during scheduled breaks and they should only use them in their respective lounges and/or designated break areas.***
>
> ***The use of cellular cameras is prohibited to ensure HIPAA compliance***.

In *Boeing*, the Board placed no-photography rules in Category 1.[49] In doing so, the Board determined that no-photography rules have little impact on NLRA-protected rights, since photography is not central to protected concerted activity, and employers have substantial interest in limiting photography on their property because of concerns with security, the protection of property, the protection of proprietary, confidential, and customer information, avoiding legal liability, and maintaining the integrity of operations.[50] Even prior to *Boeing*, the Board was concerned about camera use and patient privacy issues in the health care setting.[51]

The Employer's policy prohibiting the use of cellphone cameras is a lawful, Category 1 rule. The Employer even emphasizes its interest in patient privacy by citing HIPAA compliance in the text of the rule as its justification for the rule.[52] The Employer's Policy A also does not unlawfully prevent employees from possessing and using cellphones during non-work time and in non-work areas for communications,

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[49] *Id.*, slip op. at 17. *See also* Guideline Memorandum GC 18-04 at 5.

[50] *Id.,* slip op. at 17–19.

[51] *Flagstaff Medical Center*, 357 NLRB at 663 (finding that a no-photography rule was lawful because the rule's maintenance was supported by substantial patient confidentiality interests and employees would not reasonably interpret the rule as restraining Section 7 activity)..

[52] *See* note 41, *supra.*

which can include Section 7 activities. Since Policy A is a lawful, Category 1 rule, the Region should dismiss this allegation, absent withdrawal.

II. The Employer Did Not Violate Section 8(a)(1) by Terminating the Charging Party

We conclude that the Employer lawfully terminated the Charging Party because it did not terminate [redacted] either for engaging in protected concerted activity or for violating an unlawful rule.

For employee conduct to be considered protected concerted activity, it must be both "concerted" and for mutual aid or protection. Board precedent makes clear that these two elements are analytically distinct.[53] Conduct is concerted when it is "engaged in with or on the authority of other employees," or when an individual employee seeks "to initiate or to induce or to prepare for group action" or to bring group complaints to management's attention.[54] Mutual aid or protection focuses on the goal of the concerted activity and whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees."[55]

Here, there are two categories of the Charging Party's conduct that could be considered protected concerted activity, specifically, [redacted] conversations with [redacted] regarding a schedule change to work only every third weekend, and [redacted] conversations with [redacted] about the Director's effect on the night-shift's working conditions. However, neither set of facts would provide support for the initial showing that the General Counsel must make under *Wright Line*.[56] With respect to the weekend

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[53] *Summit Regional Medical Center*, 357 NLRB 1614, 1615 (2011); *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 884, 885 (1986), *enfd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

[54] *Meyers II*, 281 NLRB at 885, 887.

[55] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). *See also Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014).

[56] 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981) *cert. denied* 455 U.S. 989 (1982), *approved* in *Transportation Management, Inc. v. NLRB*, 462 U.S. 393 (1983). To establish that an employee's discharge or other discipline violates the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected concerted activity, the employer had knowledge of such activity, and the employer exhibited animus or hostility toward that activity,

scheduling issue, even if the Charging Party and [redacted] had concertedly discussed a new work schedule, there is no evidence that the Employer knew that the Charging Party had engaged in that protected concerted activity.[57] The Charging Party was not part of the unit council when [redacted] raised the issue with [redacted] and there is no evidence that [redacted] referenced the Charging Party or any other employee during that conversation. Additionally, by [redacted] own account, the Charging Party did not tell [redacted] that [redacted] had discussed the scheduling issue with anyone when [redacted] raised the possibility of a schedule change during the July 13 meeting. There is also no evidence that the Employer had any animus towards that conduct or that it was any part of the Employer's decision to terminate the Charging Party.

Regarding the Charging Party's comments to [redacted] about [redacted], the Charging Party denies making any such comments and, although there could be a violation if the Employer *believed* that the Charging Party had engaged in protected concerted activity,[58] there was no such mistaken belief; [redacted] only reported to the Employer that the Charging Party had been complaining about [redacted], not that the Charging Party was doing anything concerted such as attempting to gather support to address [redacted] treatment of the night shift staff with other management. Since there was no concerted element to the conduct that the Employer may have believed the Charging Party engaged in, the Employer could not have terminated the Charging Party in retaliation for suspected protected concerted activity.

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such that the employee's protected activity was a "motivating factor" in the employer's decision to take adverse action against the employee. Once the General Counsel makes that initial showing, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected concerted activity. *See also Approved Electric Corp.*, 356 NLRB 238, 238 (2010) (applying *Wright Line* analysis to find discharge violated Section 8(a)(1)).

[57] *Hitachi Capital America Corp.*, 361 NLRB 123, 123 n.5 (2014) (stating that Board precedent holds that "an employer must know or believe that an employee's actions are of a concerted nature to establish a violation of Sec. 8(a)(1) of the Act") (*citing Reynolds Electric, Inc.*, 342 NLRB 156, 156 (2004) (finding no violation where there was no evidence that the employer knew that the employee was acting for others as well as for himself)).

[58] *Signature Flight Support*, 333 NLRB 1250, 1250 (2001) ("it is unlawful for an employer to discharge employees in the belief that they engaged in concerted activity for the purpose of mutual aid or protection"), *affd. mem.* 31 Fed. Appx. 931 (11th Cir. 2002); *Monarch Water Systems*, 271 NLRB 558, 558 n.3 (1984) (same).

One final theory of unlawful discharge must be considered before concluding that the Employer did not violate Section 8(a)(1) by terminating the Charging Party. In *Continental Group*, the Board clarified the longstanding principle known as the "*Double Eagle* rule," that discipline pursuant to an unlawfully overbroad work rule violates Section 8(a)(1) if an employee violates the rule by engaging in either protected concerted activity or activity that – while not concerted – "touches the concerns animating Section 7."[59] The Board's rationale for this rule is the chilling effect that the enforcement of overbroad rules would likely have on the willingness of employees to exercise of their Section 7 rights.[60] This rule only applies if the employer disciplines the employee *pursuant* to an unlawful rule, however, such as by referencing the unlawful rule at the time of the discipline or referencing conduct prohibited by the unlawful rule.[61] Absent such a reference, the rationale underlying *Continental Group* would not be present because there is no potential chilling effect on employees' Section 7 activity.

Here, there are two relevant documents from the Employer that must be considered, specifically, the Commitment to My Co-workers document and Policy #2, Core Values that Define the Employer. Regarding the former, we have concluded that the Commitment to My Co-workers document was not an unlawful rule, and there is also no evidence that the Charging Party's failure to sign the document played any role in (b) (6), (b) termination. Moreover, the Employer did not reference that document as a

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[59] *Continental Group*, 357 NLRB 409, 411–12 (2011) (citing *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enfd.* 414 F.3d 1249 (10th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006)). The General Counsel does not necessarily agree with the holding or rationale set forth in *Continental Group*.

[60] *Continental Group*, 357 NLRB at 411. *See also Butler Medical Transport, LLC*, 365 NLRB No. 112, slip op. at 7 (July 27, 2017) ("When an employee sees a coworker actually disciplined or discharged for conduct that, in somewhat different circumstances, *would be* protected by the Act, the employee (not to mention the coworker himself) is surely more likely to be chilled by the enforcement of an unlawful rule than he would be by the mere maintenance of the rule.").

[61] *E.g., Butler Medical Transport, LLC*, 365 NLRB No. 112, slip op. at 3–4 (employer informed employee he was being discharged for violating its social media policy, which was overbroad); *Continental Group,* 357 NLRB at 410, 413 (finding discipline was pursuant to overbroad no-access rule where, although written warning did not specify that employee had breached the rule, it did state that he was "frequenting the property while off duty" and "loitering on the property," which was conduct prohibited by the rule).

basis for the Charging Party's termination. Regarding Policy #2, the Employer explicitly stated during the termination meeting on [redacted] that the Charging Party's conduct violated that policy. Specifically, the Employer said that the Charging Party's comments to coworkers violated the aspects of Policy #2 relating to "[b]eing professional, respectful, and positive to co-workers at work." However, as with the provisions of the Commitment to My Co-workers document, we conclude that this aspect of Policy #2 is a lawful civility rule under *Boeing*.[62] Therefore, since the Charging Party was not terminated pursuant to an unlawful rule, the concerns about chilling Section 7 activity underpinning *Continental Group* do not apply. Thus, the Employer's termination of the Charging Party also did not violate Section 8(a)(1) under this alternate theory.

Accordingly, the Region should issue a complaint, absent settlement, alleging that the following portions of the Employer's Policy 47 violate Section 8(a)(1): the total ban on employees' non-work use of email and its the prohibition on employees making disparaging comments online about the Employer. The Region should dismiss the remaining allegations, absent withdrawal, including those alleging that the Employer violated Section 8(a)(1) by requiring employees to sign the Commitment to My Co-workers document and by terminating the Charging Party.

/s/
J.L.S.

ADV.09-CA-210124.Response.WilsonHealth [redacted]

[62] *Boeing Co.*, 365 NLRB No. 154, slip op. at 3–4, 15.