

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DESIGN TECHNOLOGY GROUP, LLC
d/b/a BETTIE PAGE CLOTHING
and DTG CALIFORNIA MANAGEMENT, LLC
d/b/a BETTIE PAGE CLOTHING, a Single Employer

and

Case 20-CA-35511

VANESSA MORRIS, an Individual

Christy J. Kwon and Yasmin Macariola, Esqs.,
for the General Counsel.

David R. Koch, Esq. (Koch & Scow, LLC)
Henderson, Nevada, for the Respondent.

David A. Rosenfeld and Nina A. Fendel, Esqs.
(Weinberg, Roger & Rosenfeld)
Alameda, California, for the Charging Party.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in San Francisco, California, on February 1-3, 2012. Vanessa Moore, an individual, filed the charge on April 5, 2011¹ and the General Counsel issued the complaint on October 25, 2011. The complaint as amended at the hearing alleges that Design Technology Group, LLC d/b/a Bettie Page Clothing and DTG California Management, LLC, d/b/a Bettie Page Clothing, a single employer (herein Bettie Page) violated Section 8(a)(1) by maintaining a rule in its handbook prohibiting the disclosure of wages or compensation to any third party or other employee, and by discharging employees Vanessa Morris, Brittany Johnson, and Holli Thomas. Bettie Page filed a timely answer which, combined with a joint stipulation of facts, admits the allegations in the complaint concerning interstate commerce, jurisdiction, and agency and supervisory status. Bettie Page denied that it had violated the Act.

At the hearing I granted the General Counsel's motion to amend the complaint to allege that Design Technology Group, LLC d/b/a Bettie Page Clothing and DTG California Management, LLC, d/b/a Bettie Page Clothing is a single employer and Bettie Page admitted that allegation.

¹ All dates are in 2010 unless otherwise indicated.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and Bettie Page, I make the following.

5 Findings of Fact

I. JURISDICTION

10 Bettie Page, a corporation, is a wholesale and retail clothing sales company with facilities in the states of California, Nevada, and Minnesota, including at store located in San Francisco, California, where it annually derives gross revenues in excess of \$500,000 and purchased and received goods and services valued in excess of \$5000 directly from points located outside the State of California.. Bettie Page admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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20 ² Prior to the trial counsel for the Charging Party, David Rosenfeld, Esq., filed a motion for a more definite statement and a notice for request for remedy; both are frivolous and simply waste time and resources. Also, Bettie Page served a subpoena on Vanessa Morris, the charging party, and David Rosenfeld, Esq., counsel for the Charging Party, filed a motion to quash. At the trial the following ensued.

JUDGE KOCOL: Mr. Rosenfeld, please listen to me. The – in your petition to revoke, you agree to turn over certain items. Please turn those items over.

25 MR. ROSENFELD: It will take me a month or so, Your Honor. I’ve got to talk with the client and see where they are. I don’t know whether they are here or not. Your honor, she was served late. Fine, I’ll go look. I don’t care. Your Honor was late, I’ll be late.

MR. KOCH: We’re talking about Facebook postings that can be pulled off the computer and printed out.

30 MR. ROSENFELD: I’ll have to talk with the client.

JUDGE KOCOL: No, that won’t do, Mr. Rosenfeld.

MR. ROSENFELD: Then I can’t do anything until I talk to the client and find out where they are.

35 JUDGE KOCOL: Mr. Rosenfeld, when a subpoena is served and you agree to turn over certain documents; you’re expected to be prepared with those documents.

MR. ROSENFELD: I’m not prepared now.

JUDGE KOCOL: Is there an explanation why you are not?

40 MR. ROSENFELD: No, other than the fact that I haven’t talked to her about it, because I was under

JUDGE KOCOL: Okay. Mr. Rosenfeld, I’m thinking now of excluding you from this hearing for not being cooperative. Now, I’m putting you on notice of that. We will take a – aside from other possible repercussions from your inability to perform your legal obligations here, so we’re going to take a five-minute break, for the record, and you will tell how quickly those documents will be here.

45 (Off the record at 1:57 p.m.)

JUDGE KOCOL: Mr. Rosenfeld?

MR. ROSENFELD: She has nothing in response to the subpoena.

50 So much for Rosenfeld’s representation on the record that it would take him “a month or so” to provide the documents! Indeed, in its brief Bettie Page asserts that by the above conduct the Charging Party “flippantly” defied the subpoena power of the Board and therefore does not have “clean hands” in this proceeding.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

5 Bettie Page runs an upscale women’s clothing store in San Francisco in the Haight-Ashbury district. Jan Glaser and his wife Tatyana Khomyakova own Bettie Page. They opened the San Francisco store on about July 2; Hayley Griffin is the manager of that store. Bettie Page also has a store located in Las Vegas, Nevada; Carla Avila is the manager of that store. Avila also assists managers at other Bettie Page stores with any managerial issues they might have. Jan Hutto provides services to Bettie Page, including advising Glaser on human resources matters. Holli Thomas, Vanessa Morris, and Brittany Johnson worked at the San Francisco store as sales personnel.

B. Credibility

15 There were five main witnesses in this case: the alleged discriminates Thomas, Morris, and Johnson, and Bettie Page management officials Glaser and Griffin. The facts that follow are largely based on documentary evidence and the testimony of Thomas, Morris, and Johnson. Their testimony was mutually corroborative and their demeanor was entirely convincing. They impressed me with both their ability to recall the events and relate them as accurately as they could. The demeanor of Glaser and Griffin, on the other hand, was entirely unconvincing; it seemed they were prone to exaggerate, stretch the truth, and simply fabricate testimony to suit the situation. I give more specific examples below why I have decided generally not to credit their testimony unless it stands as an admission of a party opponent.

C. Handbook

Bettie Page’s employee handbook stated:

30 Wage and Salary Disclosure
Compensation programs are confidential between the employee and [Bettie Page.] Disclosure of wages or compensation to any third party or other employee is prohibited and could be grounds for termination.

Analysis

35 Section 7 protects the right of employees to discuss the wages and other benefits with each other and with nonemployees. *Mobile Exploration & Producing U.S.*, 323 NLRB 1064 (1997), *enfd.* 156 F.3d 182 (5th Cir. 1998). An employer may not forbid employees from doing so. *Hyundai American Shipping Agency, Inc.*, 357 NLRB No. 80 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004). By maintaining a rule that forbids employees from disclosing wages and compensation to each other or to any third party, Bettie Page violated Section 8(a)(1).

45 Bettie Page claims, and the General Counsel concedes, that after the complaint issued in this case, Bettie Page omitted this section from its employee handbook, but there is no evidence that employees were informed of the change. And as the General Counsel points out, another provision in the handbook that remains in effect states as follows:

50 Commercial Information Security

As a matter of course employees of [Bettie Page] will have access to confidential and proprietary information. This information includes, but is not limited to, **personnel information**, pricing client lists, contractual agreement, intellectual property and marketing/sales strategies. **It is a condition of employment that you not disclose this information to third parties during or after employment. Disclosure of [Bettie Page] confidential information without express written approval is prohibited.** (emphasis added).

This provision, although not alleged to be unlawful in the complaint, continues to forbid employees from disclosing wages and compensation, which are subsumed within the ban on disclosure of personnel information. I conclude that a full remedy is required. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

D. Facts

On July 14, shortly after the store opened, Thomas sent Glaser a message with a few ideas to make the store “the best it could possibly be.” Griffin selected an employee of the month for special attention. Griffin twice selected Morris as the employee of the month, including for the month of November. As will be seen below Morris as well as Thomas was fired on November 10.

Store Manager Griffin and the employees socialized together outside of work. In late August while Griffin and another employee were partying together after work, Griffin tore her dress. Griffin then told the employee to repair the dress and that if the employee did not Griffin would cut her hours at the store. This event, among others, did not sit well with the other employees. Thomas began calling Avila on behalf of herself and the other employees complaining about the way Griffin managed the store and other personnel³ matters. Avila told Thomas to write down the issues as they occurred and send them to her. On September 12 Thomas sent a message to Avila that was also signed by Morris, Johnson, and two other employees. The message indicated that the “management situation in our store has become extremely unstable, unsafe, and unprofessional.” The message contained a long description of Griffin’s alleged shortcomings, including that Griffin “used her position to bully, manipulate, and intimidate” the workers. In response to the message Glaser and Avila visited the store and spoke to Griffin and the employees, including Thomas, Morris, and Johnson. None of the employees were disciplined by Glaser concerning the message they sent about Griffin. However, after the letter was sent Griffin tearfully told Thomas that someone was trying to get her fired and had written a letter to top management complaining of the all the bad things she was doing. Griffin asked Thomas if she had sent that letter and Thomas untruthfully answered that she had not. Griffin told Allison Jones, also employed by Bettie Page as a sales employee, that she suspected that Thomas and Morris had sent the letter.

During monthly meetings at the store, employees asked Griffin whether the store could close at 7 p.m. instead of at 8 p.m. The employees explained to Griffin that other stores in the area were closing earlier and that the employees working late sometimes were harassed late at night by the street people after the tourists had left the neighborhood. Griffin’s reply was that she would raise the issue with corporate, but nothing was resolved.

On November 4 Thomas and Morris were working together; Griffin was out of town at the time. After speaking by telephone with Jan Hutto, Bettie Page’s human resources

³ I correct the transcript at p. 384, line 13, to substitute “personnel” for “personal.”

consultant, about a computer issue, Thomas and Hutto began speaking about sales for the day. Thomas indicated that the season seemed to be winding down as the tourists were not there as much and sales were declining. Hutto asked if that was the case for other stores in the area and Thomas indicated that the other stores were closing as 6 or 7 p.m. and Bettie Page was the
 5 only store that remained open until 8 p.m. Hutto said that management was unaware of that fact and said that she would talk to Glaser about the matter. Glaser then called and Thomas again reported about sales. Then Thomas explained how typically Griffin opened the store and she, Thomas, typically closed the store. She told Glaser what the employees had expressed to Griffin during the store meetings about closing the store earlier. Thomas explained to Glaser
 10 that the employees had expressed their concerns about safety because Bettie Page was the only store open late in the area and street people occasionally harassed the employees from outside the store - even came into the store - and the store had no alarm or security system to assist the young women who were working until 8 p.m.. Glaser told Thomas that Griffin had never raised the subject with him and they were unaware of the fact that the other stores were
 15 closing earlier. Glaser gave his approval to close the store at 7 p.m. Contrary to what Bettie Page later claimed, Thomas did not indicate that Griffin had agreed that the store should close earlier. As she was walking home that evening after closing the store at 7 p.m. Thomas received a call from Griffin; Griffin, as mentioned, was out of town. Griffin angrily asked why Thomas was not answering the phone at the store. Thomas explained that Glaser had agreed
 20 that the store should close at 7 p.m. going forward. Griffin replied that she did not believe Thomas and would call Glaser. Thomas then called Glaser and told him of the call from Griffin; Glaser said that Thomas should not worry and that he would handle Griffin. Continuing, Griffin then again called Thomas and indicated that she had just spoken with Glaser and the store would again close at 8 p.m. Griffin said that she could not believe that Thomas had spoken with
 25 Glaser about the matter. Thomas then called Morris and informed her of the turn of events. Later that evening Morris, Thomas, and Johnson posted the following messages on Facebook.

Holli Thomas needs a new job. I'm physically and mentally sickened.

30 Vanessa Morris It's pretty obvious that my manager is as immature as a person can be and she proved that this evening even more so. I'm am (sic) unbelievably stressed out and I can't believe NO ONE is doing anything about it! The way she treats us in NOT okay but no one cares because everytime we try to solve conflicts NOTHING GETS
 DONE!!

Holli Thomas bettie page would roll over in her grave.

35 Vanessa Morris She already is girl!

Holli Thomas 800 miles away yet she's still continues our lives miserable. Phenomenal!

Vanessa Morris And no one's doing anything about it! Big surprise!

Brittany [Johnson] "bettie page would roll over in her grave." I've been thinking the
 40 same thing for quite some time.

Vanessa Morris hey dudes it's totally cool, tomorrow I'm bringing a California Worker's
 Rights book to work. My mom works for a law firm that specializes in labor law and BOY
 will you be surprised by all the crap that's going on that's in violation 8) see you
 tomorrow!

45 The next day or so Morris brought the book about worker's rights to the store and placed it in the break room where other employees looked through it. The book covered matters such as benefits, discrimination, the right to organize, safety, health and sanitation.

50 Brynn Michel, sales employee at Bettie Page and a friend of Griffin's, told Griffin of the Facebook postings described above. Griffin then accessed Michel's Facebook page and viewed the postings. Griffin then called Avila who then called Hutto. On November 6 Hutto sent

Glaser the following message entitled "Facebook comments by Vanessa Morris and Holli Thomas San Francisco":

5 I screen printed these so you could see them. Carla (Avila) gave me the heads up. I guess she also stated that her mom picked up a California employment book and that we are doing all kind of things wrong. I didn't see that post. Maybe ask Carla about it. I think we need to take action right away. Also I don't k now if Hayley (Griffin) is the right person to do it.

10 Attached to this message were copies of some of the Facebook postings described above. Later Hutto also sent Glaser a copy of the Facebook posting wherein Thomas indicated her intention to bring the worker's rights book to work.

15 On November 10 Thomas arrived at work and observed that Griffin had returned early from her trip. Griffin immediately directed Thomas to her office and summoned Morris from the work floor to join them. Also present was Ashley Cunningham a/k/a Doris Mayday, who had been flown in by Bettie Page to assist Griffin in the termination process that follows. Griffin stated that they were being fired because things were not working out. Griffin gave them their paychecks, stated that they were paid until 3 p.m. that day, told them to leave the premises immediately and that they were not allowed on Bettie Page premises again.

Griffin testified that after she fired Thomas and Morris:

25 [T]hey started giggling and smiling and [Thomas] looked at me and said so we don't have to work today? And I said nope and they were so happy and they gave each other hugs and [Morris] ran to the back and grabbed the new dress she just bought which I checked the bag to make sure she had the receipt. Just so ecstatic, ran out to the store and gave the other girls hugs and high fives. And said we'll be back. I don't remember who said that. But just absolutely thrilled that they got to leave.

30 I conclude Griffin's testimony concerning the happiness of Morris and Thomas at being fired is exaggerated to say the least; to the contrary, I conclude this uncorroborated testimony was created to fit neatly in with the Facebook posting described below. Instead, I credit Thomas' testimony denying that she and Morris laughed, giggled, and hugged each other after they were fired and Morris' testimony that admitted only that they may have hugged each other outside the store as they were leaving.

After they were fired the following comments were posted on Facebook by Morris and her Facebook friends:

40 VANESSA MORRIS OMG the most AMAZING thing just happened!!!! 8D
ANNA GARCIA What?!

45 VANESSA MORRIS Oh just the best thing came happen at the job!!
SHANNON IMPERO did they fire that one mean bitch for you?
VANESSA MORRIS Nooooo they fired me and my assistant manager because "it just wasn't working out" we both laughed and said see yaaaaah and hugged each other while giggling
ANNA GARCIA Hahaha
VANESSA MORRIS Muhahahahaha!!! "So they've fallen into my crutches"

50 Although Bettie Page contends that this posting shows it was setup by the employees to be discharged Morris credibly explained at trial that she and her sister were big fans of "The

Monkees", a popular band with a television program in the 60's; this sentence is something they said on that program.⁴

5 I now describe several incidents that Bettie Page claims caused it to fire Thomas and
 Morris. A day or so after November 5 Thomas was outside the store during a break period
 talking with Johnson on her mobile phone. Thomas and Johnson were discussing the early
 closing matter and Thomas was stating how she felt Griffin had been unprofessional and
 incompetent. Then Thomas discovered that she had accidentally dialed Griffin's number.
 10 Thomas hung up and returned to the store. Griffin then called Thomas and announced she had
 heard what Thomas had said about her and that she could not believe Thomas was talking to
 the other employees about her. Thomas credibly denied describing Griffin as a "bitch." The
 foregoing facts are based on the credible testimony of Thomas, Johnson, and Allison Jones.
 Their testimony was mutually corroborative and their demeanor was convincing. Griffin, on the
 15 other hand, testified that after receiving the call "I heard noise and then I heard [Thomas'] voice
 and it sounded like maybe three or four other girls' voices and I heard other noises, I heard my
 store, customers" She also claimed that she heard Thomas calling her a "bitch." I do not
 credit this testimony and I also do not believe that Griffin's hearing was such that she could hear
 the voices of other employees and hear and distinguish them from the voices of customers and
 20 at the same time hear the noises that indicated that Thomas was inside the store as she was
 talking. Importantly, in the affidavit that Griffin provided during the investigation of the charge in
 this case she made no mention of hearing any customers during this incident. Based on
 testimony such as this⁵ and on my observation of Griffin's demeanor I hesitate to credit any of
 her testimony.

25 On November 5 Hutto was sent messages from a service that monitors the emails sent
 from Bettie Page's computers. The messages indicated the following three emails were sent by
 Morris from those computers:

30 Vanessa Morris – Seeking Sales Associate Position!!!

Hello, My name is Vanessa Morris and I am seeking a full time position but I will take
 part time if there are no full time positions available. I love customer service and retail
 because I love the constant interactions with different types of people on an everyday
 basis. I currently work for a 1950's reproduction dress boutique in the city.

35 Vanessa Morris – Craig's List POSTING!!!!!!!

Hello my name is Vanessa Morris and I am inquiring about your post. I love
 reproduction clothing and I love working retail. I have open availability and can start
 immediately. Attached is my resume.

Thanks you for your time.

40 V. Morris

Vanessa Morris – Job Resume

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⁴ In his brief that General Counsel states that Bettie Page's "conspiracy theory is
 nonsensical." I agree and give in no more consideration.

50 ⁵ Other examples are Griffin's testimony during cross-examination by the General Counsel
 concerning why she did and did not make certain markings on tardiness records, concerning
 when Griffin began to more strictly enforce the tardiness policy, and concerning usage of the
 company computer for personal use.

The record is unclear when Morris sent those messages and what prompted the monitoring service to send the messages to Hutto. On November 9 Bettie Page was sent message from the email monitoring service that showed that Johnson had used the company's computer to send two resumes seeking employment elsewhere.

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With those events in mind, I now describe the reasons Bettie Page has given for its termination of Thomas and Morris. Glaser made the decision to fire Thomas. In his pretrial affidavit, given under penalty of perjury, Glaser stated:

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My decision to terminate . . . Thomas was because while Griffin was out of town . . . Thomas did things. Thomas called me to change operating hours and close early. She told me that she had spoken with Griffin and that Griffin agreed to close early. The next day I spoke with Griffin and she told me that she had never talked to her. Soon after we hired the employees in late June 2010, Thomas sent me a long letter about how she thought the store should be run. She was not complaining about Griffin, but about what she thought Griffin should be doing at the store. I told her to talk to Griffin. It appeared from the beginning that there was a competing issue for manager between them. The behavior manifested into insubordination in November 2010 with Thomas contravening Griffin's decisions. The conflicts continued, finally resulting in her termination.

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At the trial Glaser testified that he fired Thomas for two instances of insubordination. The first was for calling him on his mobile phone and telling him that "we" decided that since there are no customers in the store after 7 p.m. "we" are going to permanently close the store one hour early. Glaser explained that the insubordination "was unilaterally deciding to close the store while giving me the impression she had (the) consent (of) the manager to do so, which she did not." Glaser explained that Thomas gave him the impression that Griffin, the store manager, had agreed to the early closing time when Thomas used the word "we" in the phone conversation. Glaser admitted, however, that Thomas never specifically mentioned the manager during that conversation. Glaser claims that he also spoke with Jan Hutto about closing the store early. According to Glaser, Hutto told him that Thomas had called her and they discussed the matter of closing the store at 7 p.m. Hutto suggested that Thomas call Glaser first to get his permission. According to Glaser, Hutto said that she too was "under the impression" that Thomas had discussed the matter with Griffin. However, I have concluded above as a matter of fact that Thomas never indicated that Griffin had agreed to close early to either Glaser or Hutto; on the contrary, Thomas indicated that Griffin was passively resistant to that suggestion. And if Griffin had wanted to close the store early, Glaser must have wondered why she did not raise the matter directly with him instead of having that suggestion come from a subordinate. The second instance of insubordination, according to Glaser, occurred when Thomas referred to Griffin "as a bitch while on the sales floor of our store in the presence of customers and other employees." He learned of this from Griffin. Glaser admitted, however, that Griffin was not present on the sales floor during this incident. Rather, Griffin was in San Diego and she heard the remarks over her mobile phone. According to Glaser, Griffin "heard customers and talking and the cash register and other people." Glaser also claimed that Thomas had called Griffin a bitch in his presence and in front of other people in the past, but he did not discipline her for using that language. However, on the unemployment insurance claim form for Thomas, Bettie Page indicated that:

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Holli Thomas was fired for not performing her duties as an assistant manager by working against her manager at all times and taking too many days off after being written up for it.

So the name calling incident not only did not occur but was not even mentioned as a reason for termination in the unemployment insurance claim and had been tolerated in the past if it had occurred. Finally, at trial Respondent's counsel asserted still other reasons for Thomas' termination. Among them were that Thomas had decided to take off the week of Thanksgiving to go on vacation with her mother. Of course, that event had not yet occurred because Thomas was fired two weeks before Thanksgiving.

According to Glaser, he fired Morris for insubordination after she disobeyed specific requests from Griffin to perform expected functions as a sales associate "(c)ontinually since her employment began, but it accelerated while Ms. Griffin was in San Diego." At trial Glaser explained:

She was told not to text from the salesroom floor, personal texting. She did so. She was told not to eat on the salesroom floor behind the register. She would do so. She was told not to change the displays without talking to the manager. She would do so. And, most specifically, she signed a specific document to not use company computers for personal purposes, and instead she used company computers to send out her resume looking for jobs with our competitors.

I can tell you that the proximate cause of firing her was using the computer, the company computer to send out her resume to competitors.

Glaser admitted that Brittany Johnson also used the company computer to send out her resumes and that Jan Hutto was aware of this but Johnson was not fired for this conduct. According to Glaser, Griffin told him that she would see Morris "constantly texting" and Griffin would be "constantly telling her to stop it." On one occasion in around August or September Glaser waited outside the store while his wife Tatyana went inside to act as a secret shopper. They discovered that Morris was eating potato chips behind the counter. On the unemployment insurance claim form for Morris, Bettie Page indicated that Morris:

[H]as been written up for a few different things and caused an overall negative work environment. Her overall attitude towards the company was not acceptable. She stated on many occasions that she hated her job and Bettie Page store and sent out resumes from the company computer.

On an appeal form contesting Morris' unemployment insurance claim Bettie Page indicated:

Attached are documents of postings on Facebook and proof that Vanessa Morris was using the company computer after signing documents stating it was not to be used for personal use. She not only was undermining [illegible] the Bettie Page company. Her attitude was affecting all staff.

Attached to the appeal form were copies of the Facebook postings described above. At Morris' unemployment compensation hearing Glaser testified that the reasons Morris was fired were:

Insubordination, defamation on public media regarding our personnel and our company, tardiness to her job, personal use of company equipment in direct violation of the employee handbook and the specific document prohibiting the same.

At the trial in this case Glaser explained the reference to Morris' use of the public media in his testimony at the unemployment compensation hearing as follows:

She was fired – the proximate cause was because of her personal computer use. The reason the defamation was referred to in [the transcript of the unemployment compensation hearing] is probably – it’s my fault. But after she was fired, I noticed on Facebook that she wrote that I fell into her trap, fell into her clutches

5 And I was really upset. I said that I was setup, that it was entrapment and I was just livid. And so, when I went to this hearing, that was on my mind. And it’s the only reason I threw in this defamation as part of a number of reasons, which were the real reason, she was dismissed.

10 Yet at the unemployment compensation hearing the judge asked Glaser why Morris was fired and he testified, in part, referring to the Facebook postings described above:

Mr. Glaser: I don’t know if this would warrant discharge, but there’s a comment prior to that, hey dude, totally cool; tomorrow I’m bringing a California Worker’s Rights Book to work.

15 My mom works for a law firm that specializes in labor laws and, boy, will you be surprised by all the crap that’s going on in violations.
See you tomorrow.

20 I conclude that Bettie Page’s and particularly Glaser’s explanations concerning the reasons for the discharges of Morris and Thomas morphed as needed based on the exigencies of the situation.

Bettie Page’s handbook permitted use of its computers for personal reasons only during break or lunch time, and then only to “an absolute minimum.” Employees were also required to sign a lengthy computer use policy in October that restricted use of company computers for personal matters to “minimal and incidental use.” The evidence, however, shows that employees and especially Griffin used the work computers for personal matters such as viewing online dating, shopping and Facebook. Indeed, on August 17, 2011, employee Brynn Michel used the work computer for personal use, including sending her resumes to another employer. She was given a first warning for this conduct. The evidence also shows that other employees, including Griffin, ate food on the salesroom floor without being disciplined.

Analysis of the Terminations of Thomas and Morris

35 For over three-quarters of a century Section 7 of the Act has given employees the right to act together (“concerted activity”) to improve their working conditions. Concerted activity is activity that is “engaged in, with or on the authority of other employees, and not solely by and of the employee himself.” *Meyers Industries*, 281 NLRB 882, 885 (1986), *aff’d*. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1986), cert. denied, 487 U.S. 1205 (1988). Likewise, “It is well-settled Board law that concerted protests of supervisory conduct are protected under Section 7 of the Act where such protective conduct affects employees’ working conditions.” *Rhee Bros., Inc.*, 343 NLRB 695 (2004, at fn. 3, quoting *Trampler, Inc.*, 335 NLRB 478, 479 (2001) *enfd.* 338 F.3d 747 (7th Cir. 2003). Thomas and Morris engaged in protected, concerted activity when they presented the concerns of the employees about working late in an unsafe neighborhood to Griffin and then when Thomas presented those concerns on behalf of the employees to Glaser. In the conversation with Glaser, Thomas explained those concerns were shared by other employees who also wanted the store to close early. Their Facebook postings were a

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continuation of that effort culminating in the employee rights handbook being brought to work for the employees to peruse.⁶ Clearly Bettie Page knew of the concerted nature of these activities.

5 I now apply the shifting burden analysis required by *Wright Line*, 251 NLRB 1083 (1980),
 enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)⁷ to determine whether the
 General Counsel has met his initial burden of showing that Thomas and Morris were fired
 because of those activities. See also *T & J Trucking Co.*, 316 NLRB 771 (1995). Stripped of its
 fabricated patina, Glaser's testimony amounted to an admission that he fired Thomas because
 10 she raised the concerns of the employees about safety and the store closing time. And Bettie
 Page's presentations to the unemployment insurance department are admissions that the
 Facebook postings were a reason Bettie Page terminated Morris. Remember also that Avila
 advised Glaser that "I think we need to take action right away" concerning discharging Thomas
 and Morris for their Facebook postings. These admissions alone easily satisfy the General
 Counsel's burden. The element of timing strengthens the case, inasmuch the terminations
 15 came quickly on the heels of the protected concerted activity by Thomas and Morris. Finally, as
 explained above the shifting and specious reasons given by Bettie Page for the terminations
 further strengthen the General Counsel's case.

20 I now examine whether Bettie Page has met its burden of showing that it would have
 fired Thomas and Morris even if they had not engaged in protected concerted activity. Where,
 as here, the General Counsel makes a strong showing of discriminatory motivation, an
 employer's rebuttal burden is substantial. See *Eddyleon Chocolate Co.*, 301 NLRB 887, 890
 (1991); see also *Van Vlerah Mechanical*, 320 NLRB 739, 744 (1996). I have already noted the
 shifting and specious nature of the reasons for discharge and I therefore conclude that Bettie
 25 Page has failed to meet its burden. By discharging Vanessa Morris and Holli Thomas for
 engaging in protected concerted activity Bettie Page violated Section 8(a)(1).

30 Bettie Page claims that Thomas is not entitled to reinstatement because she gave an
 incorrect social security number on her employment application. However, Morris credibly
 explained that when she filled out that application she had just moved to San Francisco from
 Los Angeles away from her parents' house for the first time and she did not have credentials
 such as her birth certificate or social security card with her. So she called her mother to obtain
 her social security number who gave Thomas the number based on her memory. Well, it turned
 35 out that the last four digits were incorrect. Thomas discovered this in the course of her
 application for unemployment compensation and she then sent Hutto a message advising her of
 the error. Moreover, on June 29 Bettie Page did a background check on Thomas; the report it
 received had Thomas' correct social security number. Under these circumstances I conclude
 that this was nothing more than an isolated, inadvertent error and Bettie Page would have
 viewed it as such. I conclude Bettie Page has failed to show that it would have fired Thomas
 40 had it known of this mistake.

45 ⁶ The General Counsel urges that I consider the September 12 message, described above,
 as part of the protected, concerted activity of Thomas and Morris. To be sure, it was. But
 I discount the role that activity played in the discharges of the employees because there is no
 evidence that Glaser harbored any animus towards the employees because of that activity.
 Remember it was Glaser who decided to fire Thomas and Morris.

50 ⁷ In its brief, Bettie Page cites *Western Exterminator, Co., v. NLRB*, 565 F.2d. 1114, 1118
 (9th Cir. 1977) for the proposition that the General Counsel must establish that the unlawful
 motive was the "dominant" motive. But this and similar cases were implicitly overruled by the
 Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Turning to the discharge of Brittany Johnson, shortly after Thomas and Morris were fired on November 10 Griffin told Johnson that she could not tell Johnson who Johnson could be friends with, but she was tempted to put a gag order on Johnson so she would not be able to talk about work. Griffin made this comment after she noticed that Johnson had received a text message from Thomas.

Griffin posted a schedule for the employees, but she would change the schedule and sometimes forget to tell employees she had done so. On December 11 Johnson believed she was scheduled to start work at 2 p.m. However, shortly after 12 p.m. she received a call from Griffin asking where she was and that she was supposed to start at 12. Johnson explained that she thought she was scheduled to start at 2 p.m. but she would get to the store as soon as possible. When she arrived Griffin terminated Johnson's employment. Griffin made the decision to fire Johnson and informed Glaser of it after the fact. The termination form indicated that Johnson "was supposed to be @ work @ 12 pm. I called Brittany she thought she worked @ 2 pm. Brittany didn't show up until 1:10 pm" and "also Brittany was obviously hung over." Brynn Michel, a sales employee for Bettie Page who was working the day that Johnson was fired noticed that Johnson was wearing sunglasses when she arrived to work that day but that Johnson in the past had frequently admitted to being hung over when she arrived to work. On the unemployment insurance claim form for Johnson, Bettie Page indicated that Johnson "had been written up 2 times over a 4-month period for being late but continued to be late. Almost everyday." In its statement of position submitted during the investigation of the charge filed in this case, Bettie Page indicates that Johnson was fired for "for chronic tardiness and insubordinately challenging her supervisor Griffin when she was reprimanded for being over an hour late to work in December."

Bettie Page has the following provision in its employee handbook:

ATTENDANCE

Punctual attendance is mandatory for efficient job performance. ... [H]abitual tardiness will be subject to appropriate disciplinary action, up to and including termination. Habitual tardiness, regardless of how minor, reflects negatively on the employee and the company. ... Late is late. 1 incident is cause for verbal warning. 2 incidents earn a written warning, at management's discretion. Multiple incidents are cause for further action.

Despite this provision in the handbook, employees regularly arrived late for work and were not disciplined, although the length of their tardiness was, for the most part, in the range of ten minutes or less. More specifically, on August 23 Griffin gave Morris a verbal and written warning for tardiness and on September 17 Griffin gave Thomas a verbal and written warning for tardiness, both warnings indicated that if it happened again it could lead to a suspension or termination. However, notwithstanding the written policy in the handbook and the comments on the warnings, Griffin told employees that so long as someone is present to open the store on time, it did not matter much if employees arrived 10 minutes or so late. After receiving the warnings Thomas and Morris continued to be late but were not disciplined. Allison Jones worked for Bettie Page as a sales employee. One day Griffin called Jones and told her that she was supposed to be at work. Jones told Griffin that she did not realize the schedule had been changed, but she lived nearby and quickly came to work. Jones was not disciplined for arriving late.

I now examine Johnson's tardiness record. On August 28 Griffin gave Johnson a verbal and written warning for arriving 40 minutes late to work that day. The warning indicate "if happens again - will be suspended, and if happens a third time can result in termination."

Johnson continued to be tardy on a regular basis but was not warned or disciplined until December 6, when Griffin issued Johnson another written warning, this time for being fifteen minutes late for work. This warning indicated that Johnson “has been late to work multiple times in the last month” and that “If happens again – possible termination.” The only other written discipline given to employees relating to tardiness before or near the time Johnson was fired was given to employee Jennifer Townsend on October 2.

Analysis of Johnson’s Termination

Johnson engaged in protected concerted activity when she joined the Facebook postings of Morris and Thomas by posting “‘bettie page would roll over in her grave.’ I’ve been thinking the same thing for quite some time.”⁸ Although viewed alone this was a rather innocuous comment, at least compared to the postings of Morris and Thomas. But other evidence shows that Griffin more strongly connected Johnson with Morris and Thomas than a more disinterested observer might think. Shortly after the terminations of Morris and Thomas Griffin warned Johnson that she would like to place a “gag order” on Johnson so that she would not be able to talk about working conditions; this was after Griffin observed that Johnson was reading a text message from Thomas. I take into consideration my conclusion that Bettie Page unlawfully terminated Thomas and Morris thereby showing its hostility towards the fact that those employees made those Facebook postings. In sum, the evidence shows that Johnson engaged in protected concerted activity and Bettie Page knew this. Bettie Page continued to link Johnson with the protected concerted activity of Morris and Thomas and expressed a desire to disrupt that link. Bettie Page had unlawful animus towards that protected concerted activity. I conclude that General Counsel has met his initial burden under *Wright Line*.

I now determine whether Bettie Page has met its burden of showing that it would have fired Johnson anyway. To be sure, Johnson had been late on the day she was fired and she had been warned about tardiness just days before. But the record shows that no employee had ever before been fired for tardiness despite the widespread, continuing tardiness of employees. Remember, Bettie Page cannot merely point to employee misconduct to meet its burden; rather, it must show that it would have terminated the employee based on the misconduct. *Cardinal Home Products*, 338 NLRB 1004, 1008 (2003). I conclude it has failed to do so. It follows that by terminating Brittany Johnson, Bettie Page violated Section 8(a)(1).

Bettie Page claims that Johnson is not entitled to reinstatement because of comments she made after she was fired. According to Brynn Michel, the sales employee who was working the day that Johnson was fired, after she had been terminated Johnson said that she always knew that Griffin was “a horrid bitch from the moment I met you.” According to Griffin, Johnson:

[W]as pissed off. She was very, very mad. She stormed out of the store. She maybe ran and grabbed like her, you know, something maybe a CD she had and something else and came behind the counter and stormed out and when she left, she said “Hayley, now I can finally tell you, I’ve always thought that you were a horrid bitch. Screamed it through my store in front of customers. Huge scene.

⁸ Johnson also engaged in protected concerted activity when she signed the September 12 message. However, there is no evidence that Griffin knew that Johnson signed that message. Rather, as described above, Griffin concluded that Thomas and Morris had sent the message. And while Glaser knew that Johnson signed the message, there is no evidence that Glaser was angry at the employees for sending that message. I therefore discount the impact this activity had in the decision to terminate Johnson.

Although Johnson did not deny this event, I do not entirely credit Griffin’s testimony that the name calling occurred in front of customers or caused a “huge scene.” Rather, I attribute this part of her testimony to her propensity to exaggerate. I do conclude, however, that Johnson did call Griffin a “bitch.” But this inappropriate outburst was triggered directly by Bettie Page’s unlawful termination of Johnson. I have concluded that there is no credible evidence that this occurred in front of customers and that the comment was brief and isolated. Remember that Glaser himself admitted that an employee called Griffin a “bitch” in his presence and he did not even discipline, much less terminate, that employee. Under these circumstances, I conclude that Johnson’s intemperate outburst is not sufficient to deprive her of an offer of reinstatement.

Bettie Page also contends that Johnson is not entitled to reinstatement because on her employment application she indicated that she had not been convicted of a crime yet in fact she had. Bettie Page has an employee handbook that contains the following provision:

CRIMINAL CONVICTIONS

Criminal convictions are taken very seriously by [Bettie Page.] We reserve the right to disqualify any applicant for employment that has been convicted of a criminal offense. Furthermore, conviction of a crime may result in automatic termination. [Bettie Page] will make every effort to evaluate the nature and circumstances of the conviction. With safety and well being of co-workers at stake, convicted employees may be subject to appropriate disciplinary action, up to and including termination.

Johnson’s conviction was a misdemeanor DUI that occurred in 2005. Johnson was required to attend classes on Thursday evenings as part of her probation. Johnson told Griffin that she needed to have those evenings off to attend the classes, specifically mentioning that they were DUI classes. Moreover, Griffin herself admitted to Johnson that she had spent 6 months in jail in Georgia for involvement with crystal meth, although there is no evidence concerning whether Griffin listed this conviction on her employment application. There is no evidence in the record concerning how Bettie Page learned that Johnson had not listed the conviction on her employment application. I do not read the “after-acquired” evidence cases as allowing an employer to troll through an unlawfully discharged employee’s work record in search for something that might serve to deprive the employee of reinstatement; to do so would allow the employer to continue to subject the employee to negative employment consequences that the employee would not have otherwise suffered had the employee not engaged in protected activity and been unlawfully discharged.

Conclusions of Law

1. By discharging Vanessa Morris, Holli Thomas, and Brittany Johnson for engaging in protected concerted activity Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By maintaining a rule that forbids employees from disclosing wages and compensation to each other or to any third party Respondent violated Section 8(a)(1) and Section 2(6) and (7) of the Act..

Remedy

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

employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

The General Counsel seeks two additional remedies. For reasons that follow I grant both of them. Section 10(c) of the Act gives the Board the power to devise remedies for unfair labor practices that will “effectuate the policies of the Act.” The discriminatees here will receive lump sum payments of backpay. This may result in higher State and Federal income taxes than they would have paid had they not been unlawfully fired. To this extent the unlawfully discharged employees will not have been made whole. To more fully remedy the violations I have described above and therefore to more fully effectuate the policies of the Act, I shall order Respondent to reimburse the unlawfully discharged employees for the amounts equal to the difference in taxes they owe upon receipt of the lump sum payment and the amount of taxes they would have owed had they not been unlawfully terminated. Next, the General Counsel points out that the Social Security Administration generally credits backpay to an individual’s earnings record in the year reported by the employer. Here the unlawfully discharged employees will likely receive backpay several years after they were fired. In some cases this may result in lower benefits or even the failure to qualify for any benefits due to a lack of the required credits. Again, to the extent that this happens an unlawfully discharged employee will not have been made whole for the unlawful discharge. Again, to more fully remedy the violations I have described above and therefore to more fully effectuate the policies of the Act, I shall order Respondent to complete the paperwork needed to properly notify the Social Security Administration so that it may properly allocate the backpay to the appropriate periods.

Having found that Respondent maintained an unlawful rule in its handbook, I shall require it to revise or rescind the unlawful rule and advise employees in writing that the rule has been rescinded or revised.

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

ORDER

The Respondent, Design Technology Group, LLC d/b/a Bettie Page Clothing and DTG California Management, LLC, d/b/a Bettie Page Clothing, a single employer, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Maintaining a rule that forbids employees from disclosing wages and compensation to each other or to any third party.

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

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

10 (a) Within 14 days from the date of the Board’s Order, revise or rescind the unlawful rule and advise employees in writing that we have done so.

15 (b) Within 14 days from the date of the Board’s Order, offer Vanessa Morris, Holli Thomas, and Brittany Johnson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

20 (c) Make Vanessa Morris, Holli Thomas, and Brittany Johnson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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

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(f) Within 14 days after service by the Region, post at its facility in San Francisco, California, copies of the attached notice marked “Appendix.”¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 5, 2010.

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50 ¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

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

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Dated, Washington, D.C., April 27, 2012.

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William G. Kocol
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity

WE WILL NOT maintain a rule that forbids employees from disclosing wages and compensation to each other or to any third party

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

WE WILL, within 14 days of this Order, revise or rescind the unlawful rule and advise employees in writing that we have done so.

WE WILL, within 14 days from the date of this Order, offer Vanessa Morris, Holli Thomas, and Brittany Johnson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Vanessa Morris, Holli Thomas, and Brittany Johnson whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Vanessa Morris, Holli Thomas, and Brittany Johnson, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DESIGN TECHNOLOGY GROUP, LLC d/b/a
BETTIE PAGE CLOTHING and DTG CALIFORNIA
MANAGEMENT, LLC d/b/a BETTIE PAGE
CLOTHING, a Single Employer

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market Street, Suite 400
San Francisco, California 94103-1735
Hours: 8:30 a.m. to 5 p.m.
415-356-5130.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HISPANICS UNITED OF BUFFALO, INC.

and

Case No. 3-CA-27872

CARLOS ORTIZ
An Individual

Aaron B. Sukert, Esq.
for the General Counsel.
Rafael O. Gomez and Michael H Kooshoian, Esqs.,
(Lo Tempio & Brown, P.C). Buffalo, New York
for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR I. AMCHAN, Administrative Law Judge. This case was tried in Buffalo, New York on July 13-15, 2011. Charging Party, Carlos Ortiz, filed the charge on November 18, 2011 and the General Counsel issued the complaint on May 9, 2011 and an amended complaint on May 27.

Respondent, Hispanics United of Buffalo, Inc. (HUB) is a not-for-profit corporation which renders social services to its economically disadvantaged clients in Buffalo, New York. Its services include housing, advocacy for domestic violence victims, translation and interpretation services, a food pantry, senior and youth services and employment assistance.

HUB's Executive Director Lourdes Iglesias terminated the employment of Carlos Ortiz, Mariana Cole-Rivera, Ludimar Rodriguez, Damicela Rodriguez and Yaritza Campos on October 12, 2010. The General Counsel alleges that the five alleged discriminatees were terminated because they engaged in protected concerted activity and that therefore these terminations violated Section 8(a)(1) of the Act.

5 On the entire record,¹ including my observation of the demeanor of the witnesses, and
after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

10 Respondent disputes whether the discriminatees' activity was protected and also
disputes whether the Board has jurisdiction over it. With regard to jurisdiction, HUB points to
15 the fact that it renders its services only in Buffalo and purchases goods and services only from
companies which have facilities in New York State, mostly near Buffalo. Moreover,
Respondent uses such goods and services only in the Buffalo, New York area.

20 The record establishes that in 2010, HUB had grant income of \$1,184,197. \$115,637 of
this income came directly from the U.S. Department of Housing and Urban Development.
Another \$38,657 came from a Community Development Bloc Grant. Although received
directly from the City of Buffalo, this money also emanates from the Federal Government, G.C.
Exh. 27, p. 8, Tr. 65-66, G.C. Exh. 4. The relevant figures for 2009 are similar and HUB
continues to receive federal grant funds in 2011, G.C. Exh. 4.

25 Respondent admits that it derives gross revenues in excess of \$250,000. I find that the
Board has jurisdiction over Respondent solely on the basis of its annual revenue and the
amount of federal funds it receives.

30 Moreover, assuming that its federal funding was insufficient to give the Board
jurisdiction, Respondent purchased more than \$60,000 annually from entities which are
engaged in interstate commerce. This is also sufficient to give the Board jurisdiction over
Respondent. For example, HUB purchases services from Otis Elevator, which maintains the
elevators at Respondent's facility, Verizon, Allied Waste Services, National Fuel and National
Grid. I rely on the following cases in concluding that the Board has jurisdiction over
35 Respondent.

40 In *St. Aloysius Home*, 224 NLRB 1344 (1976), the Board reversed its prior policy of
declining jurisdiction over charitable organizations. This decision was based in part on the 1974
health care amendments to the Act. These amendments deleted the only reference to the
exclusion from Board jurisdiction of charitable organizations.

The Board established a jurisdictional standard of \$250,000 annual revenue for all
social service organizations other than those for which there existed a standard specifically

¹ The General Counsel has submitted a motion to correct errors in the transcript. I have reviewed
the motion and the transcript (Vol. 1 as corrected by the reporting service) and am satisfied that the
motion accurately captures what was said at the hearing. I therefore grant the motion and incorporate it
as part of the record in this matter. I do note, however, the following corrections should be modified as
follows: page 52, line 13, should be page 52, line 12; page 143, line 1, should be page 142, line 24;
page 171, line 21, should be page 170, line 21; page 180, line 4, should be page 179, line 20. Also the
name of the case I mentioned at Tr. 153 and 157 is Parexel.

5 applicable to the type of activity in which they were engaged, *Hispanic Federation for Social Development*, 284 NLRB 500 (1987). The specific standards range from \$50,000 for nonretail nonprofit organizations to \$500,000 for apartment houses, and \$1,000,000 for art museums, cultural centers, libraries, colleges, and universities, *Latin Business Assn.*, 322 NLRB 1026 (1997). HUB does not dispute that the \$250,000 standard applies it and I so conclude.

10 In *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1101 (2000), the Board found that it had jurisdiction over an employer very similar to HUB. That employer provided nutrition and other services to a housing project in the Bronx, and received most of its funding from New York State agencies. The Board asserted jurisdiction solely on the basis that the
15 employer's gross revenues exceeded \$250,000.

The Board asserted jurisdiction in *Catholic Social Services*, 225 NLRB 288 (1976) over a charitable social service agency similar to HUB, which had an annual income of \$412,000. The Board noted that the employer received \$24,000 from the Federal Bureau of Prisons and paid in excess of \$13,000 to Pacific Telephone and Telegraph, "an instrumentality of interstate
20 commerce." Similarly, in *Fivecap, Inc.*, 332 NLRB 943, 948 (2000), the Board asserted jurisdiction by virtue of the fact that the Respondent, a local community action agency, had gross revenues of over \$1,000,000 and received federal funds in excess of \$50,000 from outside of Michigan.²

25 In several cases, the Board has focused on the federal government as a source of the employer's revenue. In *Community Services Planning Council*, 243 NLRB 798, 799 (1979), the Board asserted jurisdiction because the greatest portion of the employer's revenues ultimately came from the federal government (75%).³ Later in the decision the Board indicated that it
30 would assert jurisdiction over an employer whenever "a substantial portion of its moneys," are received from the federal government. In *Bricklayers & Allied Craftsmen, Local 2*, 254 NLRB 1003 (1981), the Board asserted jurisdiction on the basis of the fact that the employer's \$1 million contract with the Los Angeles County Department of Roads was funded through the federal government.

35 I would also note that in the only Board decision relied upon by Respondent, *Ohio Public Interest Campaign*, 284 NLRB 281 (1987), the Board affirmed the judge's finding at page 286, that "there is no evidence of OPIC receiving grants from any Federal, state, or local governmental unit source." Thus, that decision is materially distinguishable from the facts of
40 the instant case. In sum, I find that Respondent is an employer engaged in commerce within the meaning of the Act.

² For other cases in which the Board has asserted jurisdiction over similar employers, see *East Oakland Community Health Alliance*, 218 NLRB 1270, 1271 (1975); *Saratoga County Economic Council*, 249 NLRB 453, 455 (1980); *Upstate Home for Children*, 309 NLRB 986, 987 (1992); *Hudelson Baptist Home for Children*, 276 NLRB 126 (1985); *Garfield Park Health Center*, 232 NLRB 1046 (1977); *Mon Valley United Health Services*, 227 NLRB 728 (1977).

³ A similar case is *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1497-98 (2000).

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II. ALLEGED UNFAIR LABOR PRACTICES

*The Alleged Protected Concerted Activity**Relevant events prior to October 9, 2010*

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Respondent hired Lydia Cruz-Moore in May 2010 as a domestic violence (DV) advocate pursuant to a one-year grant from Erie County. Her job was primarily to accompany victims of domestic violence to hearings at the City of Buffalo's Family Justice Center. One day each week Cruz-Moore worked at HUB's offices doing such tasks as finding employment for HUB clients or insuring that their rent was paid. A number of other HUB employees were at the main office every day and generally performed different tasks than Cruz-Moore.

15

Cruz-Moore and discriminatee Mariana Cole-Rivera communicated very often, normally by sending each other text messages. In these messages Cruz-Moore was often critical about the job performance of other HUB employees, primarily those in Respondent's housing department. Early on the morning of Saturday, October 9, Cruz-Moore told Cole-Rivera that she was going to raise these concerns with Respondent's Executive Director, Lourdes Iglesias.

20

Several others of the discriminatees also had conversations or text message exchanges with Cruz-Moore, in which Cruz-Moore criticized HUB employees. On August 2, 2010, Cruz-Moore told discriminatee Ludimar Rodriguez that a client had been waiting for Rodriguez for 20 minutes and criticized Rodriguez's job performance.

25

Discriminatee Damicela Rodriguez had a conversation with Cruz-Moore in late September or early October in which Cruz-Moore complained that HUB staff members were not doing their jobs. Cruz-Moore also complained to Carlos Ortiz about the job performance of employees in Respondent's housing department.

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*The Facebook postings on which Respondent relies
in terminating the five alleged discriminatees*

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On Saturday, October 9, 2010 at 10:14 a.m., Mariana Cole-Rivera posted the following message on her Facebook page from her home:

40

Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?⁴

The following employees responded by posting comments on Cole-Rivera's Facebook page:

⁴ Respondent argues at page 32 of its brief that this statement is a lie and suggests therefore, the discriminatees are not entitled to protection of the Act. First of all, Cruz-Moore did not testify at the instant hearing, thus, I cannot credit what Respondent's brief characterizes as her "vehement denial." Moreover, I credit Cole-Rivera's testimony, which is corroborated by other discriminatees, that Cruz-Moore had repeatedly criticized the job performance of HUB employees, and Cole-Rivera's testimony, at Tr. 251, that Cruz-Moore had told her that she was going to go to Iglesias with her complaints.

5 At 10:19, Damicela Rodriguez (also known as Damicela Pedroza Natal) posted the following response:

What the f. .. Try doing my job I have 5 programs

10 At 10:26, Ludimar (Ludahy) Rodriguez posted:

What the Hell, we don't have a life as is, What else can we do???

15 At 11: 11, Yaritza (M Ntal) Campos posted:

Tell her to come do mt [my] fucking job n c if I don't do enough, this is just dum

At 11:41, Carlos Ortiz de Jesus posted:

20 I think we should give our paychecks to our clients so they can "pay" the rent, also we can take them to their Dr's appts, and served as translators (oh! We do that). Also we can clean their houses, we can go to DSS for them and we can run all their errands and they can spend their day in their house watching tv, and also we can go to do their grocery shop and organized the food in their house pantries ... (insert sarcasm here now)

25 Mariana Cole-Rivera posted again at 11:45:

30 Lol. I know! I think it is difficult for someone that its not at HUB 24-7 to really grasp and understand what we do ..I will give her that. Clients will complain especially when they ask for services we don't provide, like washer, dryers stove and refrigerators, I'm proud to work at HUB and you are all my family and I see what you do and yes, some things may fall thru the cracks, but we are all human :) love ya guys

35 Nannette Dorrios, a member of the Board of Directors at HUB posted at 12:10:

Who is Lydia Cruz?

Yaritza Campos posted a second time at 12:11:

40 Luv ya too boo

Mariana Cole-Rivera at 12:12 responded to Dorrios by the following post:

45 She's from the dv program works at the FJC [Family Justice Center] at hub once a week.

Jessica Rivera, the Secretary to HUD Director Iglesias, posted at 1: 10 p.m.

50 Is it not overwhelming enough over there?

5 At 2:27 Lydia Cruz-Moore posted:

Marianna stop with ur lies about me. I'll b at HUB Tuesday..

10 Cole-Rivera responded at 2:56:

Lies? Ok. In any case Lydia, Magalie [Lomax, HUB'S Business Manager] is inviting us over to her house today after 6:00 pm and wanted to invite you but does not have your number i'll inbox you her phone number if you wish.

15 Carlos Ortiz posted at 10:30 p.m.

Bueno el martes llevo el pop corn [Good, Tuesday, I'll bring the popcorn].

20 Saturday, October 9, was not a work day for any of HUB's employees. None of the discriminatees used HUB's computers in making these Facebook posts.

25 Lydia Cruz-Moore complained to HUB Executive Director Lourdes Iglesias about the Facebook posts. Her text messages to Iglesias suggest that she was trying to get Iglesias to terminate or at least discipline the employees who posted the comments on Facebook. She appears to have had a dispute with Mariana Cole-Rivera, which was at least in part work-related. It is not clear why she bore such animosity against the other employees, most of whom did not mention her name in their posts.

Tuesday, October 12, 2010

30

On October 12, Lourdes Iglesias met individually with five of the employees who had made the Facebook posts on October 9 and fired each one of them.⁵ She told them that the posts constituted bullying and harassment and violated HUB's policy on harassment. Iglesias did not terminate the employment of her secretary, Jessica Rivera, who had also entered a post on 35 Cole-Rivera's Facebook page on October 9.

40 Each of the meetings was very short. Iglesias told each of the employees that Cruz-Moore had suffered a heart attack as a result of their harassment and that Respondent was going to have pay her compensation. For these reasons, Iglesias told each one that she would have to fire them. It is not established in this record that Cruz-Moore had a heart attack, nor whether there was any casual relationship between whatever health problems Cruz-Moore may have been experiencing and the Facebook posts. Furthermore, the record establishes that when Iglesias decided to fire the five discriminatees she had no rational basis for concluding that their Facebook posts had any relationship to Cruz-Moore's health.

45

⁵ I do not credit Mariana Cole-Rivera's testimony that she attempted to speak to Iglesias on October 12, prior to the meeting in which she was terminated. Iglesias denies any such contact with Cole-Rivera and Carlos Ortiz's testimony leads me not to credit Cole-Rivera's testimony on this point. However, since I find that the October 9 Facebook postings were protected, this finding does not materially affect the outcome of this case.

5 It has also not been established why Respondent or its insurance carrier would have had to compensate Cruz-Moore. Typically, a workers compensation claimant has to show some relationship between their physical ailment and their employment. This is often difficult in cases in which the ailment, particularly something like a heart attack or a stroke, manifested itself when the employee was not at work.⁶

10 Several employees were handed termination letters at their meeting with Iglesias; others received them in the mail a few days later. Respondent has not replaced the five alleged discriminatees. It has given their work responsibilities to other employees and has operated with five fewer employees (25 as opposed to 30).

15 *Analysis*

*The Discriminatees engaged in protected concerted activity.
Respondent terminated their employment in violation of Section 8(a)(1) of the Act.*

20 Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other
25 *concerted activities for the purpose of collective bargaining or other mutual aid or protection ... (Emphasis added)*"

30 In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

35 Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom Transportation Co.*, 330 F.2d 683,685 (3d Cir. 1964). The object of inducing group action need not be express.

40 Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991) that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

⁶ Under New York Workers Compensation Law, there is a rebuttable presumption that an employee's death from a heart attack or stroke is compensable-if it occurs at work. However, even in cases in which an employee dies of a heart attack while at work, the death is not necessarily compensable in New York State. The presumption may be rebutted by medical evidence, particularly where the decedent had a preexisting medical condition, see, e.g., *Schwartz v. Hebrew Academy of Five Towns*, 39 A.D.3d 1134, 834 N.Y.S. 2d 400, N.Y.A.D. 3 Dept., 2007.

5 Respondent concedes that the sole reason it discharged the five discriminatees is the
October 9 Facebook postings. It also concedes that regardless of whether the comments and
actions of the five terminated employees took place on Facebook or “around the water cooler”
the result would be the same. Thus, the only substantive issue in this case, other than
jurisdiction, is whether by their postings on Facebook, the five employees engaged in activity
10 protected by the Act. I conclude that their Facebook communications with each other, in
reaction to a co-worker’s criticisms of the manner in which HUB employees performed their
jobs, are protected.

15 It is irrelevant to this case that the discriminatees were not trying to change their
working conditions and that they did not communicate their concerns to Respondent. A
leading case in this regard is *Aroostook County Regional Ophthalmology Center*, 317 NLRB
218, 220 (1995) enf. denied on other grounds 81 F. 3d 209 (D.C. Cir. 1996),⁷ in which the
Board held that employee complaints to each other concerning schedule changes constituted
20 protected activity. By analogy, I find that the discriminatees’ discussions about criticisms of
their job performance are also protected.

25 Likewise in *Parexel International, LLC*, 356 NLRB No. 82 (January 28, 2011) at slip
opinion page 3 and n. 3, the Board found protected, employees’ discussions of possible
discrimination in setting the terms or conditions of employment. Moreover, concerted activity
for employees’ mutual aid and protection that is motivated by a desire to maintain the status
quo may be protected by Section 7 to the same extent as such activity seeking changes in
wages, hours or working conditions, *Five Star Transportation, Inc.*, 349 NLRB 42, 47 (2007).

30 Other cases similar to the instant matter are *Jhirmack Enterprises*, 283 NLRB 609, 615
(1987) and *Akal Security, Inc.*, 355 NLRB No. 106 (2010). In *Akal Security*, the Board
reaffirmed the decision by a 2-member Board at 354 NLRB No. 11 (2009). The Board
dismissed the Complaint allegation that Akal had terminated the employment of two court
security officers in violation of Section 8(a)(1). However, the Board found that the
discriminatees’ conversations with a coworker about his job performance constituted concerted
35 activity protected by Section 8(a)(1).

40 Equally relevant are the Board decisions in *Automatic Screw Products Co.*, 306 NLRB
1072 (1992) and *Triana Industries*, 245 NLRB 1072 (1979). In those cases the Board found
that the employers violated Section 8(a)(1) by promulgating a rule prohibiting employees from
discussing their wages. It stands to reason that if employees have a protected right to discuss
wages and other terms and conditions of employment, an employer violates Section 8(a)(1) in
disciplining or terminating employees for exercising this right—regardless of whether there is
evidence that such discussions are engaged in with the object of initiating or inducing group
45 action.

However, assuming that the decision in *Mushroom Transportation, supra*, is applicable
to this case, I conclude that the Facebook postings satisfy the requirements of that decision.
The discriminatees herein were taking a first step towards taking group action to defend

⁷ The Court of Appeals denied enforcement regarding the termination of Aroostook’s employees primarily on the grounds that their complaints were made in patient care areas.

5 themselves against the accusations they could reasonably believe Cruz-Moore was going to
 make to management. By discharging the discriminatees on October 12, Respondent prevented
 them by taking any further group action vis-à-vis Cruz-Moore's criticisms. Moreover, the fact
 that Respondent lumped the discriminatees together in terminating them, establishes that
 Respondent viewed the five as a group and that their activity was concerted, *Whittaker Corp.*,
 10 *supra*.

In sum, I conclude that the above cases control the disposition of the instant case. Just
 as the protection of Sections 7 and 8 of the Act does not depend on whether organizing activity
 was ongoing, it does not depend on whether the employees herein had brought their concerns to
 15 management before they were fired, or that there is no express evidence that they intended to
 take further action, or that they were not attempting to change any of their working conditions.⁸

Employees have a protected right to discuss matters affecting their employment
 amongst themselves. Explicit or implicit criticism by a co-worker of the manner in which they
 20 are performing their jobs is a subject about which employee discussion is protected by Section
 7. That is particularly true in this case, where at least some of the discriminatees had an
 expectation that Lydia Cruz-Moore might take her criticisms to management. By terminating
 the five discriminatees for discussing Ms. Cruz-Moore's criticisms of HUB employees' work,
 Respondent violated Section 8(a)(1).
 25

The five discriminatees did not engage in conduct which forfeited the protection of the Act

If an employer asserts that an employee engaged in misconduct during the course of
 otherwise protected activity, the Board looks to the factors set forth in *Atlantic Steel Co.*, 245
 30 NLRB 814 (1979), to aid in determining whether the employee's conduct became so
 opprobrious as to lose protection under the Act. The *Atlantic Steel* factors are: (1) the place of
 the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's
 outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor
 practice. Applying these factors, there is no basis for denying any of the five discriminatees the
 35 protection of the Act.

As to factor 1, the "discussion," the Facebook posts were not made at work and not
 made during working hours. As to 2) the subject matter, the Facebook posts were related to a
 coworker's criticisms of employee job performance, a matter the discriminatees had a protected
 40 right to discuss. As to factor 3) there were no "outbursts." Indeed, several of the discriminatees
 did not even mention Cruz-Moore; none criticized HUB. Regarding *Atlantic Steel* factor 4,
 while the Facebook comments were not provoked by the employer, this factor is irrelevant to
 the instant case.

45 Additionally, Respondent has not established that the discriminatees violated any of its
 policies or rules. It relies on an assertion that it was entitled to discharge the five pursuant to its
 "zero tolerance" policy regarding harassment. Respondent has a policy against sexual

⁸ Respondent argues that the Facebook postings were not protected in part because persons other
 than HUB employees may have seen them. I find this irrelevant. Cole-Rivera's initial post asked for
 responses from co-workers about Cruz-Moore's criticism of HUB employees job performance.

5 harassment which has no relevance to this case. It also has a policy against harassment of other
 sorts, which states as follows:

10 Hispanics United of Buffalo will not tolerate any form of harassment, joking remarks or
 other abusive conduct (including verbal, nonverbal, or physical conduct) that demeans
 or shows hostility toward an individual because of his/her race, color, sex, religion,
 national origin, age, disability, veteran status or other prohibited basis that creates an
 intimidating, hostile or offensive work environment, unreasonably interferes with an
 individual's work performance or otherwise adversely affects an individual's
 employment opportunity.

15 There is nothing in this record that establishes that any of the discriminatees were
 harassing Lydia Cruz Moore, and even if there were such evidence, there is no evidence that
 she was being harassed on the basis of any of the factors listed above. Finally, there is no
 evidence that the comments would have impacted Cruz-Moore's job performance. She rarely
 20 interacted with the discriminatees. In summary, Lourdes Iglesias had no rational basis for
 concluding that the discriminatees violated Respondent's zero tolerance or discrimination
 policy. For reasons not disclosed in this record, Respondent was looking for an excuse to
 reduce its workforce and seized upon the Facebook posts as an excuse for doing so.

25 The terminations are also not justified by the alleged relationship between the Facebook
 posts and Ms. Moore's health. There is no probative evidence as to the nature of Ms. Cruz-
 Moore's health problem following the Facebook posts nor is there any probative evidence as to
 a causal relationship between Ms. Moore's heart attack (assuming she had one) or other health
 condition and the Facebook posts.

30

REMEDY

35 The Respondent, having discriminatorily discharged employees, must offer them
 reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall
 be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at
 the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded
 daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No.8 (2010).

40 On these findings of fact and conclusions of law and on the entire record, I issue the
 following recommended⁹

ORDER

45 The Respondent, Hispanics United of Buffalo, Inc., Buffalo, New York, its officers,
 agents, successors, and assigns, shall

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 1. Cease and desist from

(a) Discharging its employees due to their engaging in protected concerted activities.

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

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

15 (a) Within 14 days from the date of the Board's Order, offer Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez and Yaritza Campos full reinstatement to their former jobs or, if any of those jobs no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

20 (b) Make Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez and Yaritza Campos whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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

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

(e) Within 14 days after service by the Region, post at its Buffalo, New York office copies of the attached notice marked "Appendix"¹⁰ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the
40 Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or
45 other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5 not altered, defaced, or covered by any other material. In the event that, during the pendency of
these proceedings, the Respondent has gone out of business or closed the facility involved in
these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the
notice to all current employees and former employees employed by the Respondent at any time
since October 12, 2010.

10

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

15 Dated, Washington, D.C., September 2, 2011.

20

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity, including discussing amongst yourselves your wages, hours and other terms and conditions of your employment, including criticisms by coworkers of your work performance.

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

WE WILL, within 14 days from the date of this Order, offer Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez and Yaritza Campos full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez and Yaritza Campos whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Mariana Cole-Rivera, Carlos Ortiz de Jesus, Ludimar Rodriguez, Damicela Rodriguez and Yaritza Campos, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

HISPANICS UNITED OF BUFFALO, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.
Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2387
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Karl Knauz Motors, Inc. d/b/a Knauz BMW and Robert Becker. Case 13–CA–046452

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND BLOCK

On September 28, 2011, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Acting General Counsel and the Respondent each filed exceptions and a supporting brief, an answering brief to the other party’s exceptions, and a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

The judge found that the Respondent, which owned and operated a BMW dealership, violated Section 8(a)(1) of the Act by maintaining a rule³ in its employee handbook stating:

¹ The Acting General Counsel has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find that the high threshold for reversing a judge’s credibility findings has not been met.

We adopt the judge’s finding that the Respondent lawfully discharged employee Robert Becker solely because of his unprotected Facebook postings about an auto accident at a Land Rover dealership also owned by the Respondent. Accordingly, we find it unnecessary to pass on whether Becker’s Facebook posts concerning a marketing event at the Respondent’s BMW dealership were protected.

The Respondent does not except to the judge’s finding that it violated Sec. 8(a)(1) of the Act by maintaining the “Unauthorized Interviews” and “Outside Inquiries Concerning Employees” rules in its employee handbook. The Acting General Counsel does not except to the judge’s dismissal of the allegation that the “Bad Attitude” rule in the handbook was unlawful.

² We shall modify the judge’s recommended Order to conform to the violations found, and we shall substitute a new notice to conform to the Order as modified.

³ The judge found that the Respondent rescinded this and the unlawful “Unauthorized Interviews” and “Outside Inquiries Concerning Employees” rules shortly before the hearing.

(b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

For the following reasons, we agree with the judge’s finding.⁴

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). If it does not, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647.

We find the “Courtesy” rule unlawful because employees would reasonably construe its broad prohibition against “disrespectful” conduct and “language which injures the image or reputation of the Dealership” as encompassing Section 7 activity, such as employees’ protected statements—whether to coworkers, supervisors, managers, or third parties who deal with the Respondent—that object to their working conditions and seek the support of others in improving them. First, there is nothing in the rule, or anywhere else in the employee handbook, that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the rule’s broad reach. See generally *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) (finding unlawful the maintenance of a rule prohibiting statements posted electronically that “damage the Company . . . or damage any person’s reputation”). Second, an employee reading this rule would reasonably assume that the Respondent would regard statements of protest or criticism as “disrespectful” or “injur[ious] [to] the image or reputation of the Dealership.” Cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (in evaluating employer statements alleged to violate Sec. 8(a)(1), “assessment of the precise scope of employer expression . . .

⁴ In deciding this issue, we do not rely on *Crowne Plaza Hotel*, 352 NLRB 382 (2009), a case issued by a two-member Board and cited by the judge. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010); *Hospital Pavia Perea*, 355 NLRB 1300, 1300 fn. 2 (2010) (recognizing that the two-member Board “lacked authority to issue an order”).

must be made in the context of its labor relations setting” and “must take into account the economic dependence of the employees on their employers”). As we recently observed:

Board law is settled that ambiguous employer rules – rules that reasonably could be read to have a coercive meaning – are construed against the employer. This principle follows from the Act’s goal of preventing employees from being chilled in the exercise of their Section 7 rights[,], whether or not that is the intent of the employer

Flex Frac Logistics, LLC, 358 NLRB No. 127, slip op. at 2 (2012).

Our dissenting colleague contends that we have read the crucial phrases of the rule out of context. In support, he argues that the first section of the rule, encouraging “courteous, polite, and friendly” behavior, clearly establishes that the rule is nothing more than a “common-sense behavioral guideline for employees.” If the rule only contained the first section, we might agree.⁵ By going further than just providing the positive, aspirational language of the first section, the rule conveys a more complicated message to employees. The second section of the rule is in sharp contrast to the first, specifically proscribing certain types of conduct and statements. A reasonable employee who wishes to avoid discipline or discharge will surely pay careful attention and exercise caution when he is told what lines he may not safely cross at work.

There is no merit to our colleague’s accusation that we have departed from Board precedent holding that an employer rule is unlawful if employees would reasonably understand it to apply to protected activity. *Lutheran Heritage Village*, supra, which we apply here, does not stand for the proposition that an employer rule “must be upheld if employees could reasonably construe its language not to prohibit Section 7 activity.” *Flex Frac Logistics*, supra, slip op. at 2. Nor, in finding the rule unlawful, do we rely on our own subjective views, or those of the Acting General Counsel, as our colleague claims, but on well established precedent. See *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990)

⁵ See, e.g., *Costco Wholesale Corp.*, supra, in which the Board adopted the judge’s dismissal of the complaint allegation that the employer violated Sec. 8(a)(1) by maintaining a different rule requiring employees to use “appropriate business decorum” in communicating with others. Unlike the rule in this case, the rule there contained no prohibition on employee statements or conduct that would reasonably apply to protected activity.

(unlawful rule prohibited “derogatory attacks on . . . hospital representative[s]”); *Claremont Resort & Spa*, 344 NLRB 832 (2005) (unlawful rule prohibited “negative conversations about associates and/or managers”); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000), enfd. 297 F.3d 468 (6th Cir. 2002) (unlawful rule prohibited “[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates”).⁶

In other words, compliance with the first sentence of the rule is no assurance against sanctions under the second sentence of the rule. Reasonable employees would believe that even “courteous, polite, and friendly” expressions of disagreement with the Respondent’s employment practices or terms and conditions of employment risk being deemed “disrespectful” or damaging to the Respondent’s image or reputation. Thus, contrary to the dissent’s contention, the second sentence of the rule proscribes not a manner of speaking, but the content of employee speech—content that would damage the Respondent’s reputation. For example, here we find that the Respondent unlawfully coerced its employees by promulgating two other rules that restrict employees’ ability to communicate about their terms and conditions of employment. Presumably, even if employees shared with third parties information about our findings of the Respondent’s unlawful conduct in the most genteel manner, such sharing would be injurious to the Respondent’s image or reputation. A reasonable employee, consequently, would believe that such a communication would expose him or her to sanctions under the Respondent’s rule.

For these reasons, we affirm the judge’s finding that the Respondent’s maintenance of this rule violates Section 8(a)(1).

ORDER

The National Labor Relations Board orders that the Respondent, Karl Knauz Motors, Inc., d/b/a Knauz BMW, Lake Bluff, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the “Courtesy” rule in its employee handbook that prohibits employees from being disrespectful or using profanity or any other language which injures the image or reputation of the Dealership.

⁶ The cases cited by the dissent in support of this argument are distinguishable. The rules at issue in those cases more clearly described conduct that was outside the protections of the Act, such as malicious, abusive, unlawful, or unethical actions or statements.

(b) Maintaining the “Unauthorized Interviews” and “Outside Inquiries Concerning Employees” rules in its employee handbook that prohibit employees from discussing their terms and conditions of employment or information about other employees with third parties.

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

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

(a) Rescind the “Courtesy” rule in its employee handbook that prohibits employees from being disrespectful or using profanity or any other language which injures the image or reputation of the Dealership.

(b) Rescind the “Unauthorized Interviews” and “Outside Inquiries Concerning Employees” rules in its employee handbook that prohibit employees from discussing their terms and conditions of employment or information about other employees with third parties.

(c) Furnish all current employees with inserts for the current employee handbook that

1. advise that the unlawful rules have been rescinded, or
2. provide the language of lawful rules or publish and distribute a revised employee handbook that
 - a. does not contain the unlawful rules, or
 - b. provides the language of lawful rules.

(d) Within 14 days after service by the Region, post at its Lake Bluff, Illinois facility copies of the attached notice, in English and Spanish, marked “Appendix.”⁷ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall du-

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

plicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2012

Mark Gaston Pearce, Chairman

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

My colleagues find that the Respondent’s facially neutral “Courtesy” rule, which encourages workplace civility and discourages disrespectful, profane, or injurious language, violates federal law. They reach that result by reading words and phrases in isolation and by effectively determining that the National Labor Relations Act invalidates any handbook policy that employees conceivably could construe to prohibit protected activity, regardless of whether they *reasonably* would do so. Because the majority’s analysis departs from precedent, and because employees and employers alike have a right to expect a civil workplace, promoted through policies like the one that my colleagues find unlawful, I respectfully dissent.¹

The Respondent owns and operates a BMW dealership. Its Employee Handbook included the following rule:

(b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

The rule plainly does not explicitly restrict Section 7 activity. Neither was it promulgated in response to, or applied to restrict, such activity. Thus, under the practi-

¹ I join my colleagues’ dismissal of the allegation that Respondent unlawfully discharged employee Becker and, like them, I find it unnecessary to decide whether Becker’s Facebook posts concerning “The Ultimate Driving Event” were protected.

cal approach adopted by the Board in *Lutheran Heritage Village-Livonia*,² the issue here is whether employees would reasonably construe the rule to prohibit Section 7 activity. In deciding that issue, the Board is supposed to give the challenged rule a reasonable reading and “refrain from reading particular phrases in isolation.”³ My colleagues depart from these strictures. They focus on one word—“disrespectful”—and one phrase—“language which injures the image or reputation of the Dealership”—in isolation from the rest of the rule. They assert that employees would reasonably believe that even courteous and friendly expressions of disagreement with employment terms might be deemed “disrespectful” or damaging to the Respondent’s image or reputation.⁴

This sort of piecemeal analysis has for good reason been rejected by the D.C. Circuit,⁵ as well as by the Board itself in its more reflective moments.⁶ Purporting to apply an objective test of how employees would reasonably view rules in the context of their particular workplace and employment relationship, the analysis instead represents the views of the Acting General Counsel and Board members whose post hoc deconstruction of such rules turns on their own labor relations “expertise.” In other words, the test now is how the Board, not affected employees, interprets words and phrases in a challenged rule. Such an abstracted bureaucratic approach is in many instances, including here, not “reasonably defensible.”⁷ It is clearly unnecessary for the protection of employees’ Section 7 rights and impermissibly fetters legitimate employer attempts to fashion workplace rules.

Reasonably construed and read as a whole, the rule is nothing more than a common-sense behavioral guideline

for employees. Courtesy—“well-mannered conduct indicative of respect for or consideration of others”⁸—is to be extended to customers, vendors, suppliers, and co-workers. Accordingly, in communications with individuals in those groups, employees are not to “be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.” Nothing in the rule suggests a restriction on the content of conversations (such as a prohibition against discussion of wages); rather the rule concerns the tenor of any conversation. In short, by its “Courtesy” rule the Respondent sought to promote civility and decorum in the workplace and prevent conduct that injures the dealership’s reputation—purposes that would have been patently obvious to Respondent’s employees, who depend on the dealership’s image for their livelihoods. Such rules, the Board and the D.C. Circuit have held, are lawful.⁹

The majority’s analysis departs from precedent in another respect. The Board is supposed to ask whether employees would *reasonably* understand a challenged rule to prohibit protected activity, not whether they *could*, in theory, do so. This is not a distinction without a difference. As the Board has explained, where a rule “*does not* address Section 7 activity . . . the mere fact that it could be read in that fashion will not establish its illegality.” *Palms Hotel & Casino*, supra. “To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity. *Lutheran Heritage Village*, supra at 647.

My colleagues state the correct standard, but they fail to faithfully apply it. Instead, citing *Costco Wholesale Corp.*,¹⁰ they find the Courtesy rule unlawful because it does not suggest that “employee communications protected by Section 7 of the Act are *excluded*” from its reach. In other words, they find that the rule is unlawful because it *could* be read to include protected communications, and it lacks limiting language making it clear that such communications are excluded. That is the *dissenting* view in *Lutheran Heritage Village*. See supra at 649–652. The majority in that case stated that “[w]e will

² 343 NLRB 646, 646 (2004).

³ Id.

⁴ My colleagues even go so far as to posit that employees would reasonably fear violating the rule if they were to share information about the uncontested judge’s findings that two other rules maintained by the Respondent are unlawful. Inasmuch as the Respondent has effectively conceded its obligation to rescind those rules and to post a Board remedial notice about them, I can only wonder why any employee would reasonably think that the Courtesy rule would nevertheless prohibit civil discussion of these rules.

⁵ See *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003) (stating that allegedly unlawful language in a rule must be read in context).

⁶ In addition to *Lutheran Heritage Village*, supra, see *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (rejecting an analysis that finds “arguable ambiguity . . . through parsing the language of the rule, viewing [a] phrase . . . in isolation, and attributing to the [employer] an intent to interfere with employee rights”), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

⁷ *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497, 99 S. Ct. 1842, 60 L.Ed.2d 420 (1979)).

⁸ *Webster’s Third New International Dictionary* (1981) at 523.

⁹ See, e.g., *Palms Hotel & Casino*, 344 NLRB 1363, 1368 (2005) (finding challenged rule lawful where its terms were not “so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace”); *Tradesmen International*, 338 NLRB 460, 462 (2002) (collecting cases in which the Board has found lawful a variety of rules that prohibit conduct “tending to damage or discredit an employer’s reputation”); *Adtranz*, supra at 25-28 (upholding rule prohibiting “abusive or threatening language”).

¹⁰ 358 NLRB No. 106 (2012). I did not participate in *Costco*.

not require employers to anticipate and catalogue in their work rules every instance in which, for example, the use of abusive or profane language might conceivably be protected by . . . Section 7.” *Id.* at 648. The majority’s finding today cannot be reconciled with this precedent.¹¹ For that matter, it cannot even be reconciled with the judge’s finding and analysis in *Costco* that a rule requiring employees to use “appropriate business decorum” in communicating with others was lawful. The judge there specifically rejected reliance on the dissenting view in *Lutheran Heritage Village*, and the Board specifically affirmed his reasoning.¹²

The majority additionally claims that it is “settled” that “ambiguous employer rules—rules that could be read to have a coercive meaning—are construed against the employer,” citing *Flex Frac Logistics, LLC*, 358 NLRB No. 127 (2012), a case in which I dissented. That principle has generally been applied to rules limiting solicitation or distribution of literature—i.e., rules that explicitly touch on Section 7 activity. Its application to rules that do *not* explicitly address Section 7 activity, as here, contradicts *Lutheran Heritage Village*, as the Board explained in *Palms Hotel*, *supra*, 344 NLRB at 1368. The majority’s resurrection of that concept in this context defies precedent as well.¹³

My colleagues say the problem with the language at issue here is that it is “broad” and “ambiguous.” This ra-

tionale fails on two grounds. First, language both the Board and the D.C. Circuit have upheld could be characterized in precisely the same way. Words like “appropriate,” “injurious,” “offensive,” “intimidating,”¹⁴ “abusive,”¹⁵ and the phrase “satisfactory attitude,”¹⁶ surely are subject to the same critique the majority levels at “disrespectful.” Thus, the majority’s approach fails to adequately reconcile conflicting precedent and warrants reversal on that ground alone.

Second, the unassailable fact is that people use words that could be construed broadly all the time, yet manage to make themselves understood. That is because words do not exist in a vacuum; they are informed by context and experience. Reasonable employees know that a work setting differs from a barroom, and they recognize that employers have a genuine and legitimate interest in encouraging civil discourse and non-injurious and respectful speech. Indeed, as the courts have reminded us, reasonable employees are quite capable of exercising their Section 7 rights within acceptable norms of behavior. See, e.g., *Adtranz*, *supra*, 253 F.2d at 26 (ridiculing the notion that employees cannot be expected “to comport themselves with general notions of civility and decorum” when engaging in protected speech). There is nothing in the record in this case to indicate that reasonable employees would feel incapable of exercising Section 7 statutory rights within the behavioral norms of the Respondent’s Courtesy rule. If the Respondent had *applied* the rule to punish such conduct, that would be a different case, analyzed under a different prong of the *Lutheran Heritage Village* test. However, in a “mere maintenance” case such as this, our precedent requires, and so should we, more than hypothetical and strained interpretations to make out a violation of federal law.

Dated, Washington, D.C. September 28, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

¹¹ My colleagues’ reliance on *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), *enfd.* in relevant part 916 F.2d 932, 940 (4th Cir. 1990), is misplaced. The rule held unlawful there prohibited “derogatory attacks” on others, including the employer. The Board has specifically distinguished that rule from lawful rules, such as the one at issue here, that prohibit using language that is actually damaging to the employer. *Tradesmen International*, *supra*, 338 NLRB at 462 fn. 4. My colleagues’ reliance on *Claremont Resort & Spa*, 344 NLRB 832 (2005), is similarly misplaced. There, a rule prohibiting “negative conversations about associates and/or managers” was held unlawful. That rule is far broader than the one here, was issued during an organizing campaign along with other work rules, and would have been read to restrict complaints about those rules. Further, the respondent there previously had been found to have unlawfully prohibited employees from discussing the union while at work. *Id.* at 836. *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000), *enfd.* 297 F.3d 468 (6th Cir. 2002), is also inapposite, as the rule there prohibited false statements, not injurious ones.

¹² 358 NLRB No. 106, slip op. at 1, 13–14.

¹³ Persisting in a mischaracterization that I have previously rejected, the majority ascribes to me the view that *Lutheran Heritage Village* stands for the proposition that an employer rule “must be upheld if employees could reasonably construe its language *not* to prohibit Section 7 activity,” quoting *Flex Frac Logistics*, *supra*, slip op. at 2. As I explained in my dissent in that case, I am quite aware that *Lutheran* says no such thing. See *id.*, slip op. at 4 fn. 5. I recognize that a rule is unlawful where employees reasonably would read it as such, even if that is not the only conceivable construction. My point here, as in *Flex Frac*, is that employees would not reasonably so read the rule at issue.

¹⁴ *Palms Hotel*, *supra* at 1367.

¹⁵ *Adtranz*, *supra*.

¹⁶ *Flamingo Hilton-Laughlin*, 330 NLRB 287, 287 (1999) (finding lawful a rule prohibiting failure to have or maintain a “satisfactory attitude . . . and/or relationships” with guests or other employees). Contrary to the majority’s attempt to distinguish *Palms Hotel* and *Adtranz* as involving rules aimed at serious misconduct, the finding in *Flamingo* shows that the Board has not required that a rule be limited to serious misconduct to pass muster under the Act.

Charles Muhl, Esq., for the General Counsel.
James Hendricks, Jr., Esq. and *Brian Kurtz, Esq.*, (*Ford & Harrison, LLP*), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on July 21, 2011, in Chicago, Illinois. The first amended complaint, which issued on July 21, 2011, and was based upon an unfair labor practice charge that was filed on November 30, 2010,¹ by Robert Becker, alleges that Karl Knauz Motors, Inc., d/b/a Knauz BMW, (the Respondent), discharged Becker on June 22 because he engaged in protected concerted activities, in violation of Section 8(a)(1) of the Act. The amended complaint (as amended at the hearing) also alleges that since at least August 28, 2003, the Respondent has maintained four rules in its Employee Handbook that contain language that makes them unlawful. They are entitled: (a) Bad Attitude, (b) Courtesy, (c) Unauthorized Interviews, and (d) Outside Inquiries Concerning Employees. While admitting that from August 23, 2003, these provisions were contained in its Employee Handbook, the Respondent defends that on July 19, 2011, it notified its employees that these provisions had been rescinded, and that this allegation has been remedied.

FINDINGS OF FACT

I. JURISDICTION

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

II. THE FACTS

A. Becker's Termination

The Respondent operates a BMW dealership in Lake Bluff, Illinois, called the facility, selling new BMW automobiles, as well as used cars. The Respondent also owns an adjoining dealership that sells Land Rover automobiles, as well as other nearby dealerships that are not relevant to this proceeding. Becker began working at the Land Rover dealership in 1998; he transferred to the Respondent's BMW facility in July 2004, where he was employed until his termination on June 22. His immediate supervisor at the facility was Phillip Ceraulo, the general sales manager; Peter Giannini and Robert Graziano were the sales director and sales manager at the facility, and Barry Taylor was the vice president and general manager.

There are three contributing elements to the pay of the Respondent's salespersons: the first is a 25 percent commission of the profit derived from the sale of the vehicle, the profit being the difference between the selling price and the cost of the vehicle. The second element is based upon volume; in order to qualify for this bonus, the salesperson must sell 12 cars in a month, including, at least, two used cars. The final element is

¹ Unless indicated otherwise, all dates referred to here relate to the year 2010.

the Customer Satisfaction Index, which is based upon survey questionnaires sent to customers who purchased a car: "It's based on how well we perform for our clients."

The event that precipitated the situation here was an Ultimate Driving Event, at times called the Event, held on June 9 to introduce a redesigned BMW 5 Series automobile. Everybody considered this to be a significant event, especially because the BMW Series 5 automobile is their "bread and butter" product. To make the event even more special, BMW representatives, rather than the Respondent's sales people, were to be present on June 9 to take the clients on test drives.

Becker testified that about a day or two prior to the Ultimate Driving Event, all the sales people met with Ceraulo in his office to discuss the event. In addition to Becker, the other sales people were Greg Larsen, Fadwa Charnidiski, Steve Rayburn, Chad Holland, Howard Krause, and Dave Benck. Ceraulo told them about the Event and what was expected of them. He told them that for food, they were going to have a hot dog cart serving the clients, in addition to cookies and chips. He testified that the sales people rolled their eyes "in amazement" and he told Ceraulo, "I can't believe we're not doing more for this event." Larsen said the same thing and added: "This is a major launch of a new product and . . . we just don't understand what the thought is behind it." Ceraulo responded: "This is not a food event." After the meeting the sales people spoke more about it and Larsen told him that at the Mercedes Benz dealership they served hors d'oeuvres with servers. Becker also testified that Larsen said, "we're the bread and butter store in the auto park and we're going to get the hot dog cart." As to why this was important, Becker testified:

Everything in life is perception. BMW[is] a luxury brand and . . . what I've talked about with all my co-workers was the fact that what they were going to do for this event was absolutely not up to par with the image of the brand, the ultimate driving machine, a luxury brand. And we were concerned about the fact that it would . . . affect our commissions, especially in the sense that it would affect . . . how the dealership looks and, how it's presented . . . when somebody walks into our dealership . . . it's a beautiful auto park . . . it's a beautiful place . . . and if you walk in and you sit down and your waiter serves you a happy meal from McDonald's. The two just don't mix . . . we were very concerned about the fact . . . that it could potentially affect our bottom line.

Larsen testified that the meeting with Ceraulo took place on the morning of the Event, June 9, telling them what was going to happen: "BMW comes up and they give us a tutorial of the new car, answer some questions that we may have. That's pretty much about it." There was no discussion of food being served, so Larsen asked, "what was going to be served and [I] hoped that they weren't going to use the hotdog cart." He thought that the Event should be catered: "It's our bread and butter car for BMW. I thought it should be more professionally done." There was "a little banter back and forth among the salespeople," and Becker said something about the food being offered, but he could not recollect more specifically what was said.

Ceraulo testified that prior to the Event a mailing was sent to

customers and potential customers notifying them of the Event; there was no mention of food in this mailing. He and Graziano met with the sales people about the Event at their regular Saturday sales meeting on June 5. At this event they discussed the car that was being introduced, the incentives that were being offered by BMW, and what was expected of the sales people. Sometime during this meeting Larsen asked what food was being served, but he could not recollect what was asked and what was said, and he cannot remember if anybody else asked about the food that was to be served.

On the day of the Event, there was the hot dog cart (with hot dogs), bags of Doritos, cookies and bowls of apples and oranges. Becker took pictures of the sales people holding hot dogs, water and Doritos and told them that he was going to post the pictures on his Facebook page.

As stated above, the Respondent also owns a Land Rover dealership located adjacent to the facility. On June 14 an accident occurred at that dealership. A salesperson was showing a customer a car and allowed the customer's 13-year-old son to sit in the driver's seat of the car while the salesperson was in the passenger seat, apparently, with the door open. The customer's son must have stepped on the gas pedal and the car drove down a small embankment, drove over the foot of the customer² into an adjacent pond, and the salesperson was thrown into the water (but was unharmed, otherwise).

Becker was told of the Land Rover incident and could see it from the facility. He got his camera and took pictures of the car in the pond. On June 14, he posted comments and pictures of the Ultimate Driving Event of June 9, as well as the Land Rover accident of June 14 on his Facebook page.³ The Event pages are entitled: "BMW 2011 5 Series Soiree." On the first page, Becker wrote:

I was happy to see that Knauz went "All Out" for the most important launch of a new BMW in years . . . the new 5 series. A car that will generate tens in millions of dollars in revenues for Knauz over the next few years. The small 8 oz bags of chips, and the \$2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch . . . but to top it all off . . . the Hot Dog Cart. Where our clients could attain a over cooked wiener and a stale bunn.

Underneath were comments by relatives and friends of Becker, followed by Becker's responses. On the following page there is a picture of Holland with his arm around the woman serving the hot dogs, and the following page has a picture of Holland with

² On the following day, the salesperson met with management and, as punishment for what had happened the prior day, her "demo" vehicle was taken from her, along with gas and insurance, and in lieu thereof, she was given a \$500 "demo allowance" and, until she was able to purchase her own car, the dealership gave her a used car for her use. She was told: "You need to slow down with your judgment and your decisions."

³ At the time, Becker had approximately 95 Facebook "Friends" 15 or 16 of whom were employed by the Respondent, who would be able to access his Facebook account. He testified that, at the time, his "Privacy Settings" allowed access, as well, to "friends of Friends," so that they could also see his postings.

a hot dog. Page four shows the snack table with cookies and fruit and page 5 shows Charnidski holding bottles of water, with a comment posted by Becker:

No, that's not champagne or wine, it's 8 oz. water. Pop or soda would be out of the question. In this photo, Fadwa is seen coveting the rare vintages of water that were available for our guests.

Page 6 shows the sign depicting the new BMW 5 Series car with Becker's comment below: "This is not a food event. What ever made you realize that?" The final two pages again show the food table and Holland holding a hot dog.

On June 14, Becker also posted the pictures of the Land Rover accident, as well as comments, on his Facebook page. The caption is "This is your car: This is your car on drugs." The first picture shows the car, the front part of which was in the pond, with the salesperson with a blanket around her sitting next to a woman, and a young boy holding his head. Becker wrote:

This is what happens when a sales Person sitting in the front passenger seat (Former Sales Person, actually) allows a 13 year old boy to get behind the wheel of a 6000 lb. truck built and designed to pretty much drive over anything. The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a \$50,000 truck. OOOPS!

There are a number of comments on the first page, one of which was from an employee of the Respondent in the warranty department, stating: "How did I miss all the fun stuff?" On the second page, under the photo of the car in the pond, Becker wrote: "I love this one . . . The kid's pulling his hair out . . . Du, what did I do? Oh no, is Mom gonna give me a time out?" Below, there were comments from two of Respondent's employees. Counsel for the General Counsel also introduced in evidence a Facebook page of Casey Felling, a service advisor employed by the Respondent, containing Becker's picture of the car in the pond with Felling's comment: "Finally, some action at our Land Rover store."

By the next day, the Respondent's representatives had learned of, and had been given copies of, Becker's Facebook postings for the BMW Event and the Land Rover accident. As a result, Ceraulo asked Becker to remove the postings, which he did, and Taylor decided that he wanted to meet with Becker on the following day to discuss the postings.

On June 16, at Taylor's request, Becker met with Taylor, Giannini and Ceraulo in a conference room at the facility. Becker testified that Taylor had the Facebook postings of the BMW Event and the Land Rover accident in his hand and tossed them to him and asked, "What were you thinking?" Becker responded that it was his Facebook page and his friends: "It's none of your business." Taylor asked, "That's what you're going to claim?" and Becker said, "That's exactly what I'm going to claim." Taylor again asked what he was thinking and Becker said that he wasn't thinking anything. Taylor said that they received calls from other dealers and that he thoroughly embarrassed all management and "all of your co-workers and everybody that works at BMW." Giannini then said, "You know, Bob, the photos at Land Rover are one thing,

but the photos at BMW, that's a whole different ball game." Becker responded that he understood. Taylor then said that they were going to have to think about what they were going to do with him, and that they would contact him. Meanwhile, he was told to hand in the key to his desk. On the way out, he told Ceraulo that there was no maliciousness on his part and Ceraulo told him to let things settle down, and he left. After he got home, he called Giannini and apologized for what had occurred; Giannini testified that he does not recall receiving any apology from Becker. Becker later called William Knauz and apologized to him as well. Knauz told him that he should have apologized during the meeting with Taylor, Giannini, and Ceraulo.

Notes of this June 16 meeting, taken by Giannini, state, inter alia, that the meeting was to discuss:

... several negative articles on his Facebook directly pertaining to situations which happened at the Knauz Automotive Group.

We were alerted to this action by receiving calls from other LR dealers who saw pictures/comments (negative) on the internet.

Mr. Taylor showed Bob Becker copies of the postings and posed the question what was Bob thinking to do such a . . . thing to the company. (One posting was regarding the accident at Land Rover when an LR4 was driven into the lake and the second was surrounding our new 5 Series BMW Ride and Drive Event.)

Taylor testified that at the June 16 meeting he handed Becker the postings and asked why he would do that and Becker said that it was his Facebook and he could do what he wanted. He ended the meeting by telling Becker to go home and that they would review this issue and get back to him. Taylor testified that he saw both postings, but:

I will tell you that the thing that upset me more than anything else was the Land Rover issues. The BMW issue, to me, was somewhat comical, if you will . . . if it had been that, that would have been it. But, no, it was the Land Rover issue.

Becker testified that he received a telephone call on June 22 from Taylor saying, "We all took a vote and nobody wants you back . . . and the only thing that we ask is that you never set foot on the premises." Becker said that he understood, and that was the end of the conversation. Giannini testified that on June 21 he attended a meeting with Taylor, Graziano, Ceraulo, Bill Knauz, and William Madden, Respondent's President. They discussed Becker's ". . . posting a dangerous situation that occurred on our premises on his Facebook and, it being damaging to the company, as well as the individuals involved, personally and . . . of making light of it." They also discussed the fact that Becker had shown no remorse about what he did, and they decided, unanimously, that he should be terminated. I asked Giannini if there was any discussion at the June 21 meeting of Becker's Facebook postings and pictures of the June 9 Ultimate Driving Event and the hot dog cart and he responded: "Only in a comical way . . . that really had no bearing whatever . . ." He testified that they all saw the pictures of the Event and the hot

dog cart and "we all concluded that . . . it was just somebody's personal feelings."

Ceraulo testified that during this meeting there was discussion about the June 9 Event and the hot dog cart, and the Land Rover accident, but: "The basis of the decision to terminate was the posting of the accident at the Rover store." Taylor testified that those present at the June 21 meeting decided unanimously that Becker should be terminated because of his posting about the Land Rover accident: "it was . . . making light of an extremely serious situation . . . somebody was injured and . . . doing that would just not be accepted." He called Becker to inform him of his termination. Taylor testified that the discussions at that meeting "centered" on the Land Rover postings:

. . . and that was, if you will, 90 percent of the discussion. Yes, the other one was mentioned because, we had that. But, again, it was nothing more than, you know hey this is part of Knauz is the hotdog cart. . . I mean we laughed about it. Unfortunately . . . that's not why we made a decision to terminate Bobby Becker.

Counsel for the General Counsel introduced into evidence a number of documents subpoenaed from the Respondent that relate to Becker's termination. A Memorandum to Becker's personnel file, dated June 22, from Taylor states, inter alia:

I told Bob [of the June 21 meeting] . . . that it was a unanimous decision to terminate his employment because he had made negative comments about the company in a public forum and had made light on the internet of a very serious incident (Land Rover had jumped the curbing and ended up in a pond) that embarrassed the company. I told him that we could not accept his behavior and he was not to return to work.

In a response to questions from the Board's regional office about how the Respondent learned of the Facebook postings, counsel for the Respondent stated that the manager of the Land Rover dealership received calls from two other Land Rover dealerships telling him of the postings. Counsel also attached notes written by Ceraulo and Graziano about the meeting prior to the June 9 Event. Ceraulo wrote that at the June 6 sales meeting to discuss the June 9 Event: "A couple of very brief, light hearted remarks were made by some of the sales staff at the meeting regarding the snacks being served during the event." In regards to the Land Rover incident, Ceraulo stated:

Mr. Becker had satirized a very serious car accident that occurred at our Land Rover facility on his Facebook page by posting pictures of the accident accompanied by rude and sarcastic remarks about the incident. His posting prompted a meeting on June 16th with Mr. Becker, Barry Taylor, Peter Giannini and myself to discuss his actions. The food comments were brought up in the meeting because he had coupled them with the Land Rover accident on his Facebook page. It was explained to Mr. Becker that the food comments albeit insulting to the company, were not the reason for his termination from the company. It was the postings of the Land Rover accident were unforgivable [sic] and justification for termination. When Mr. Becker was confronted with how serious his actions were regarding the Land Rover incident and asked how he could make fun of an accident that could have caused

serious harm to life and limb, not to mention harming the company's reputation, he simply shrugged his shoulders in a cavalier manner and said, "OK."

Graziano's notes regarding the Saturday meeting preceding the June 9 Event states that at the meeting "A few client advisers jokingly make comments hoping we would not be using the hot dog cart." Giannini's letter regarding the June 16 meeting states that Taylor asked Becker ". . . what he was thinking by placing negative and discouraging comments regarding our company on the internet, specifically surrounding the incident which occurred at Land Rover involving an LR4 being driven into our lake."

B. The Employee Handbook

The Complaint, which issued on May 20, 2011, alleged only that Becker's termination violated Section 8(a)(1) of the Act. On July 11, 2011, Counsel for the General Counsel filed a Notice of Intent to Amend Complaint which, in addition to adding supervisors and agents to Paragraph II of the complaint, alleged that certain portions of the Respondent's Employee Handbook, which were in effect from August 28, 2003 until July 18, 2011, violated Section 8(a)(1) of the Act. The alleged unlawful provisions are, as follows:

(a) Bad Attitude: Employees should display a positive attitude toward their job. A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers.

(b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

(c) Unauthorized Interviews: As a means of protecting yourself and the Dealership, no unauthorized interviews are permitted to be conducted by individuals representing themselves as attorneys, peace officers, investigators, reporters, or someone who wants to "ask a few questions." If you are asked questions about the Dealership or its current or former employees, you are to refer that individual(s) to your supervisor. A decision will then be made as to whether that individual may conduct any interview and they will be introduced to you by your supervisor with a reason for the questioning. Similarly, if you are aware that an unauthorized interview is occurring at the Dealership, immediately notify the General Manager or the President.

(d) Outside Inquiries Concerning Employees: All inquiries concerning employees from outside sources should be directed to the Human Resource Department. No information should be given regarding any employee by any other employee or manager to an outside source.

On July 19, 2011, Madden and Taylor sent a memorandum to all employees stating, inter alia:

Because our employee handbook has not been updated since 2003, we have been in the process of updating and amending

the KNAUZ employee manual for several months. We expect to have the finalized draft to you within the month. However, in the meantime, please be aware of the following areas in which significant changes are being made. If you have issues relating to these areas prior to the issuance of the new handbook, please see Julie Clement or Barry Taylor.

- Bad Attitude-this policy is being rescinded effective immediately.
- Courtesy-this policy is being rescinded effective immediately.
- Unauthorized Interviews-this policy is being rescinded effective immediately.
- Outside Inquiries Concerning Employees-this policy is being rescinded effective immediately.

While there may be some additional changes and/or additions, the foregoing lets you know, in general terms, where the changes will be. Again, please let me know if you have any questions or concerns.

III. ANALYSIS

Admittedly, Becker was terminated on June 22 for his Facebook posting(s) on June 14. The two crucial issues are, was he fired because of both postings, the hot dog cart incident of the Event and the Land Rover accident, or only for the postings of the Land Rover accident, and were these postings protected concerted activities.

The evidence establishes that at the pre-Event sales meeting both Becker and Larsen commented about what they considered to be the inadequacy of the food being served at the Event. Larsen commented that he hoped that they weren't going to use the hot dog cart and that they should cater the Event, and Becker told Ceraulo, "I can't believe we're not doing more for this event." Ceraulo's answer was that it was not a food event. On June 14, Becker posted his pictures and comments of the Event on his Facebook page.

Concerted activities does not require that two or more individuals act in unison to protest, or protect, their working conditions. In *Meyers II*, 281 NLRB 882, 887 (1986), the Board stated that concerted activities included individual activity where, "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." In *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969), the Court stated that the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." In *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995), the Court stated: "The fact that there was no express discussion of a group protest or 'common cause' is not dispositive . . . their individual actions were concerted to the extent they involved a 'logical outgrowth' of prior concerted activity. The lone act of a single employee is concerted if it 'stems from' or 'logically grew' out of prior concerted activity." As both Larsen and Becker spoke up at the meeting commenting on what they considered to be the inadequacies of the food being offered at the event, and the subject was further discussed by the salespersons

after the meeting, even though only Becker complained further about it on his Facebook pages without any further input from any other salesperson, other than the Facebook pictures of Holland and Charnidski, I find that it was concerted activities, and find that it was protected concerted activities as it could have had an effect upon his compensation. While it is not as obvious a situation as if he had objected to the Respondent reducing their wages or other benefits, there may have been some customers who were turned off by the food offerings at the event and either did not purchase a car because of it, or gave the salesperson a lowering rating in the Customer Satisfaction Rating because of it; not likely, but possible.

Counsel for the Respondent, in his brief, argues that it was not protected concerted activities because neither Becker nor any other employee made Respondent aware that their complaints about the food being served was really about their commissions. However, this is not a requirement of protected concerted activities.

The final issue is whether the tone of the Facebook account of the Event rose “to the level of disparagement necessary to deprive otherwise protected activities of the protection of the Act.” *Allied Aviation Service Company of New Jersey, Inc.*, 248 NLRB 229, 231 (1980). I find that it did not. Although Becker’s Facebook account of the Event clearly had a mocking and sarcastic tone that, in itself, does not deprive the activity of the protection of the Act. In *Pontiac Osteopathic Hospital*, 284 NLRB 442, 452 (1987), the discriminatee, along with other employees, authored a fake newsletter employing satire and irony to mock the employer and its administrators. The administrative law judge, as affirmed by the Board, stated: “the fact that the authors used the literary techniques of satire and irony to make their point, as opposed to a more neutral factual recitation of their dissatisfaction, does not deprive the communication that they produced of any protection under Section 7 of the Act to which it might otherwise be entitled.” Similarly, in *New River Industries, Inc.*, 299 NLRB 773 (1990), an employer announced that, to celebrate a partnership with another company, refreshments (ice cream) would be provided to the employees. A number of employees wrote sarcastic comments about this “reward,” and two were fired for the “demeaning and degrading” comments. The administrative law judge, as affirmed by the Board, citing *Pontiac Osteopathic Hospital*, supra, found that the sarcasm employed by the employees did not exceed permissible bounds, and found the terminations unlawful. The Court, however, at 945 F.2d 1290, 1295 (4th Cir. 1991), refused enforcement finding that the matters being publicized were not related to the employees’ mutual aid or protection, and was therefore not protected concerted activities. In *Timekeeping Systems, Inc.*, 323 NLRB 244, 249 (1997), the administrative law judge stated: “Unpleasantries uttered in the course of otherwise protected concerted activity does not strip away the Act’s protection.” Further, referring to supervisors as “a-holes” in *U.S. Postal Service*, 241 NLRB 389 (1979) and calling the company’s chief executive officer a “cheap son of a bitch” in *Groves Truck & Trailer*, 281 NLRB 1194, 1195 (1986) did not lose the Act’s protection, and neither did Becker in his Facebook comments on the Event.

On the other hand, I find that Becker’s posting of the Land

Rover accident on his Facebook account was neither protected nor concerted activities, and Counsel for the General Counsel does not appear to argue otherwise. It was posted solely by Becker, apparently as a lark, without any discussion with any other employee of the Respondent, and had no connection to any of the employees’ terms and conditions of employment. It is so obviously unprotected that it is unnecessary to discuss whether the mocking tone of the posting further affects the nature of the posting. It is therefore necessary to determine whether Becker was terminated because of the Event posting, the Land Rover posting, or for both.

Becker testified that at the June 16 meeting, Taylor told him that his posting embarrassed his coworkers and everybody working at BMW, and that Giannini said, “The photos at Land Rover are one thing, but the photos at BMW, that’s a whole different ball game.” On the other hand, according to the testimony and notes prepared by Taylor, Giannini, and Ceraulo, while the hot dog cart and the Event were discussed on June 16, they felt that it was “comical,” and that they laughed about it, but that Becker was fired solely for his Land Rover Facebook posting. While I found Becker to be a generally credible witness, I also found the Respondent’s witnesses to be more credible and can find no reason to discredit their testimony about the June 16 and June 21 meeting. Further, considering the nature of the June 16 meeting, I do not credit Becker’s testimony that Giannini downgraded the serious nature of the Land Rover posting while stressing the seriousness of the posting of the Event. The evidence establishes, and reason dictates, that both incidents were discussed on June 16 and June 21, but that doesn’t necessarily establish that both incidents caused his discharge. Rather, I find that Becker was fired on June 22 because of his Facebook posting of the Land Rover accident, and as a result, I find that Counsel for the General Counsel has not sustained his initial burden under *Wright Line*, 251 NLRB 1083 (1980).⁴

The final issue relates to paragraphs (a) through (d) of the Respondent’s Employee Handbook that was in effect from about August 28, 2003 until these paragraphs were rescinded on July 19, 2011. The issues are whether these provisions violate the Act and, if they did, since they were rescinded prior to the hearing, whether these violations need to be remedied. The allegedly unlawful provision of paragraphs (a) and (b) state: “A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers” and “No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.” Paragraphs (c) and (d) prohibit employees from participating in interviews with, or answering inquiries concerning employees from, practically anybody.

The Board has gone to great lengths in attempting to find the right balance between the exercise of employees’ rights guaran-

⁴ Counsel for the General Counsel, in his brief, argues the disparate treatment of Becker as compared to the Land Rover salesperson whose negligence cause the accident at the dealership, supports his case. I find no similarity between the two and find it not unreasonable that they resulted in different penalties.

teed them by Section 7 of the Act and an employer's right to operate his business without unnecessary restrictions. In *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), the Board stated: "The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice even absent evidence of enforcement." In *Lutheran Heritage Village- Livonia*, 343 NLRB 646 (2004), the Board stated:

Our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.

If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

In *Crowne Plaza Hotel*, 352 NLRB 382 (2008), the issue before the Board was the legality of a number of provisions contained in the employer's Employee Handbook, including one entitled Press Release and News Media, somewhat similar to (c) Unauthorized Interviews and (d) Outside Inquiries Concerning Employees. The provision provided that for any incident generating significant public interest or press inquiries, the release of information will be handled by the employer's general manager: "Under no circumstances will statements or information be supplied by any other employee." In finding this rule unlawful, the Board stated that the term "significant public interest" is broad enough to encompass a labor dispute, such as a strike, and "A rule that prohibits employees from exercising their Section 7 right to communicate with the media regarding a labor dispute is unlawful." The Board further found that the sentence quoted above, "would reasonably be construed as prohibiting all employee communications with the media regarding a labor dispute," and that this restriction violated Section 8(a)(1) of the Act. In the *NLS Group*, 352 NLRB 744, 745 (2008), the employer had the discriminatee sign an employment agreement containing the following confidentiality language:

Employee also understands that the terms of this employment, including compensation, are confidential to employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.

The Board found this provision unlawful as it reasonably could be construed to prohibit activity protected by Section 7: "Employees would reasonably understand that language as prohibiting discussions of their compensation with union representatives."

Paragraphs (c) and (d) clearly would be understood to restrict and limit employees in the exercise of their Section 7 rights, and Respondent does not appear to argue otherwise. If employees complied with the dictates of these restrictions, they would not be able to discuss their working conditions with union representatives, lawyers, or Board agents. I therefore find that the

restrictions contained in these paragraphs violate Section 8(a)(1) of the Act. The restrictions contained in Paragraphs (a) and (b) are not as obvious. As they do not explicitly restrict Section 7 rights, their legality is determined by the three criteria set forth in *Lutheran Heritage Village*, supra. As parts (2) and (3) have not been established, the test is whether employees would reasonably construe Paragraphs (a) and (b) to prohibit their exercise of Section 7 rights. In *Albertson's, Inc.*, 351 NLRB 254, 259 (2007), the Board stated: "In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of Section 7 rights, the Board will give the work rule a reasonable reading and refrain from reading particular phrases in isolation." In dismissing the allegations regarding certain work rules, the Board stated that they did not believe that the cited rules could reasonably be read as encompassing Section 7 activity. Citing *Lafayette Park Hotel*, supra, the Board stated: "To ascribe such a meaning to these words is, quite simply farfetched. Employees reasonably would believe that these rules were intended to reach serious misconduct, not conduct protected by the Act."

Based upon the above cited cases, I recommend that the allegation regarding Paragraph (a) be dismissed. I believe that the one sentence prohibition would reasonably be read to protect the relationship between the Respondent dealer and its customers, rather than to restrict the employees' Section 7 rights. As was frequently mentioned during the hearing, BMW is a top of the line automobile with, I imagine, an appropriate sticker cost. A dealer in that situation, I believe, has the right to demand that its employees not display a bad attitude toward its customers. On the other hand, I find that Paragraph (b) violates Section 8(a)(1) of the Act in that employees could reasonably interpret it as curtailing their Section 7 rights. In *University Medical Center*, 335 NLRB 1318, 1321 (2001) the allegedly offending rule prohibited "insubordination . . . or other disrespectful conduct towards service integrators and coordinators and other individuals." The Board found that this rule violated the Act as employees could reasonably believe that their protected rights were prohibited by this rule. In its finding, the Board stated that a problem with this rule was the word disrespectful: "Defining due respect, in the context of union activity, seems inherently subjective."

Although I have found that Paragraphs (b), (c), and (d) violate the Act, Counsel for the Respondent alleges that as the Respondent rescinded these provisions prior to the hearing, there should be no finding of a violation and that there is no need for a remedy. While, at first glance, one would assume that the Respondent's rescission effectively withdrew the unlawful provisions negating the violation, certain requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) were not met. In that case, the Board stated that to relieve itself of liability for unlawful conduct by repudiating the conduct, "such repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from proscribed illegal conduct." The Board further stated: "Such repudiation or disavowal of coercive conduct should give assurances to employ-

ees that in the future their employer will not interfere with the exercise of their Section 7 rights.”⁵ While the Respondent notified all of its employees of the rescission and did not commit any other unfair labor practices, the Respondent merely told the employees that the offending provisions were rescinded, without a further explanation and without telling the employees that in the future it would not interfere with their Section 7 rights. I therefore find that Paragraphs (b), (c), and (d), although subsequently rescinded, violate Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

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

2. The provisions contained in Paragraphs (b), (c), and (d) of its Employees’ Handbook from about August 23, 2003, to July 19, 2011, violate Section 8(a)(1) of the Act.

3. The Respondent did not further violate the Act as alleged in the amended complaint.

THE REMEDY

Having found that Respondent’s rescission of the offending paragraphs does not satisfy the Board’s requirements for rescission, I recommend that it be required to post the attached notice, and to notify the salespersons electronically, that it has rescinded these provisions of its Employee Handbook and that it will not interfere with the employees’ Section 7 rights. However, as all the unit employees were informed of the July 19, 2011 rescission, it is unnecessary to specifically order the Respondent to, again, rescind these provisions.

Upon the foregoing findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended⁶

ORDER

The Respondent, Karl Knauz Motors, Inc., d/b/a Knauz BMW, its officers, agents, successors and assigns, shall

1. Cease and desist from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights as guaranteed them by Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its Lake Bluff facility copies of the attached notice marked “Appendix.”⁷ Copies of the notice, on forms provided by the Re-

⁵ It should be noted that in *Claremont Resort, & Spa*, 344 NLRB 832 (2005), the Board while finding that a rule about “negative conversations” violated the Act, stated: “We do not necessarily endorse all the elements of *Passavant*.”

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

gional Director for Region 13, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physically posting the paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 23, 2003.

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

IT IS FURTHER ORDERED that the allegation that the termination of Robert Becker violated Section 8(a)(1) of the Act be dismissed.

Dated, Washington, D.C. September 28, 2011.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the following rules that had been contained in our Employee Handbook: “(b) Courtesy,” “(c) Unauthorized Interviews,” and “(d) Outside Inquiries Concerning Employees.”

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

KARL KNAUZ MOTORS, INC., D/B/A/ KNAUZ BMW