G4S Secure Solutions (USA) Inc. *and* International Union, Security, Police and Fire Professionals of America (SPFPA). Case 28–CA–023380

August 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On March 29, 2012, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief to the Acting General Counsel's cross-exceptions. The Acting General Counsel filed cross-exceptions, a supporting brief, a reply brief, and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.[2]

I. INTRODUCTION

The Respondent, G4S Secure Solutions, provides security services to clients throughout the United States. G4S contracts with Valley Metro Rail, Inc. (Metro) to provide security services along a portion of the Metro Light Rail, a mass transit system serving the greater Phoenix, Arizona area. The International Union, Security, Police and Fire Professionals of America filed a representation petition on January 31, 2011, seeking to represent a unit of G4S security officers assigned to work on the East Valley Metro Rail, a portion of the Metro Light Rail that runs between Tempe and Mesa, Arizona. The election, scheduled for March 1, 2011, was postponed indefinitely pending the resolution of the charges underlying this case.

The case involves allegations that the Respondent maintained several unlawfully overbroad work rules,[3] disciplined and discharged employees because of their protected concerted activity or union activity, and made certain other allegedly coercive statements to employees. We agree with the judge, for the reasons stated in her decision, that the Respondent violated Section 8(a)(1) by: (1) maintaining a handbook rule prohibiting employees from wearing "insignias, emblems, buttons, or items other than those issued by the company" without permission;[4] (2) maintaining a confidentiality policy that pro-

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) by transferring Danny Rice. Also in the absence of exceptions, we adopt the judge's findings that the Respondent did not violate Sec. 8(a)(1) by allegedly: creating the impression of surveillance when supervisor Clemons told employees not to talk about the Union at work; interrogating employees about Rice's union activity; creating the impression that employees other than Rice were under investigation; and maintaining and promulgating a rule prohibiting employees from discussing discipline.

[2] We shall modify the judge's recommended Order in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), and to conform to the Board's standard remedial language.

In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB 1153 (2016), we shall also order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). For the reasons stated in his separate opinion in *King Soopers*, supra, at 1161–1168, our dissenting colleague would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

[3] In evaluating the handbook rule allegations, we apply the Board's well-established standard that an employer violates Sec. 8(a)(1) of the Act by maintaining a work rule that would reasonably tend to chill employees in the exercise of their Sec. 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). If the rule explicitly restricts Sec. 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 Sec. 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Sec. 7 rights. Id. at 647. The dissent would overrule this court-approved standard. We disagree, for the reasons set forth fully in *William Beaumont Hospital*, 363 NLRB 1543, 1546–1548 (2016), and *Schwan's Home Service*, 364 NLRB 170, 172 (2016).

[4] The Board's standard for evaluating an employer's prohibition on wearing union buttons and other insignia is long standing and correctly set forth by the judge. See *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801–803 (1945); *Boch Honda*, 362 NLRB 706, 707–708 (2015), enfd. ___ F.3d ___ (1st Cir. June 17, 2016). We agree with the judge that the rule here is overly broad and note that it applies to all security guards, not only those who interface with the public. The dissent speculates that union or other buttons or insignia could interfere with the image the Respondent hopes to convey to its clients and the public. The Respondent and the dissent further argue that the mere possibility that a guard could come in contact with the public is sufficient to justify a total ban. But the burden here is on the Respondent to show that special circumstances exist to justify its broad rule. See *W San Diego*, 348 NLRB 372, 373 (2006). "[T]he 'special circumstances' exception is narrow," and "a rule which curtails an employee's right to wear union insignia at work is *presumptively* invalid[] . . . ." *E & L*

hibited employees from discussing "wages and salary information"; (3) instructing employee Donald Wickham, under threat of discipline, not to talk to Lieutenant Danny Rice, a supervisor who was suspended and demoted for his union activity;[5] (4) creating an impression of surveillance when supervisor Jason Armstrong told employee Sean Nagler that he knew that Nagler had talked to other employees about the Union; and (5) threatening employee Asucena Banuelos that at the expiration of the Respondent's contract with Metro, the Respondent would not rehire anyone who was in favor of the Union. We also adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by discharging Wickham, but did not violate Section 8(a)(1) by promulgating or reinforcing an overbroad confidentiality rule during Wickham's unemployment compensation hearing.[6]

For the reasons stated by the judge and for the additional reasons explained below, we find that the Respondent violated Section 8(a)(1) by: (1) instructing and threatening employees not to talk about the Union at work; (2) disciplining employee Debra Sterling because of her protected concerted activity; (3) maintaining a confidentiality rule that prohibits employees from "giv[ing] or mak[ing] public statements about the activities or policies of the company" without written permission; and (4) maintaining a social networking policy that prohibits employees from commenting on "work-related matters without express permission of the Legal Department."

We reverse the judge's findings as to two of the Respondent's work rules. Specifically, as explained below, we find that the Respondent did not violate Section 8(a)(1) by maintaining the portion of its confidentiality rule that restricts the use or disclosure of "G4S or client information." We find, however, that the Respondent violated Section 8(a)(1) by prohibiting employees from posting on any social networking site "photographs, images, and videos of G4S employees in uniform or at a G4S place of work." In doing so, we find that a federal contractor's posting of a required notice of employee rights under the Act by itself is insufficient to clarify an otherwise unlawful ambiguity in a challenged work rule.

Finally, contrary to the judge, we find that the Respondent did not violate Section 8(a)(1) by telling an employee that a supervisor had an issue with her because she "called off sick" on three occasions when she was scheduled to work overtime.

Discussion

1. No-talking Rule and Threat

In November 2010, Lieutenant D.J. Clemons, a shift supervisor, told a group of employees that the Union should not be discussed at work. The following week, Clemons similarly told employee Carol Taresh to be careful talking about the Union because it should not be discussed at work. The Respondent's handbook states that security officers must "[e]ngage in no unnecessary conversations."

The judge found that Clemons' conduct constituted an unlawful application of the Respondent's handbook rule and that Clemons' statement to Taresh constituted an unlawful threat. We agree with the judge that, in both instances, Clemons' statements were unlawful, but we find that the statements did not constitute an application of the Respondent's handbook rule.

The complaint contained two allegations relevant to this issue. The first alleged that the Respondent violated the Act by maintaining its "no unnecessary conversa-

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Transport Co., 331 NLRB 640, 640 fn. 3 (2000) (emphasis in original). The Board considers the appearance and message of the insignia in determining whether it reasonably would interfere with the public image the respondent desires to convey. *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). The Board has consistently held that "the mere possibility" that the employees may come into contact with a customer does not outweigh the employees' Sec. 7 right to wear insignia. *Escanaba Paper Co.*, 314 NLRB 732, 733 fns. 5 and 7 (1994), enfd. sub nom. *NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996). Here, the Respondent has provided no evidence that certain of its employees ever interact with the public.

We further agree with the judge that the rule is overly broad because it reasonably would be read to apply to guards whether they are on or off duty. The dissent construes the rule to apply only to on-duty guards, in part because, in his view, guards would not wear their uniforms off duty except during their commute. There is no evidence in the record that employees dress at the job site, so employees' commutes could include attending to errands or engaging in off-duty protected activity, such as rallies or meetings before their shift, while in uniform.

Finally, the dissent's statement that our decision prevents the Respondent from "imposing any prohibition" on security officers wearing buttons about "dogs, kittens, gelatin, or toast" is utterly false. The Respondent is free to maintain a professional image rule that does not interfere with employees' Sec. 7 rights.

[5] To the extent the judge implies that the violation did not occur until after Rice lost his supervisory position, and thus became a statutory employee, we disagree. Employees are engaged in statutorily protected activity when they talk to a supervisor about unionizing, as well as when they talk to fellow employees.

We find it unnecessary to pass on the judge's finding that the Respondent also violated the Act by issuing the same instruction to other employees without threatening discipline. This additional finding would not materially affect the remedy.

[6] In finding that Respondent violated Sec. 8(a)(3) by terminating Wickham, we agree with the judge that the Respondent's stated reason for the termination was a pretext. We need not, however, rely on the finding of pretext to infer animus because the Respondent's multiple 8(a)(1) violations establish animus. *Farm Fresh, Inc.*, 301 NLRB 907, 907 (1991). Moreover, in adopting the judge's finding of pretext, we do not rely on her discussion of the adequacy of the Respondent's investigation.

tions" rule. The second alleged that Clemons "orally promulgated and has since maintained a discriminatory rule prohibiting its employees from speaking about the Union."

With respect to the first allegation, the credited testimony does not establish that Clemons mentioned the rule to employees or otherwise indicated that the handbook prohibited discussion of the Union at work. Thus, we do not adopt the judge's finding that the instruction to employees was an unlawful application of the handbook rule.

As to the second allegation, we agree that Clemons promulgated a discriminatory no-talking rule in violation of Section 8(a)(1). The Board has recognized that "an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work . . . ." *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003); accord *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006). Further, in considering whether communications from an employer to its employees violate the Act, "the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Miller Electric Pump & Plumbing*, 334 NLRB 824, 824 (2001).

Applying those principles here, we find that the Respondent violated Section 8(a)(1) of the Act. The record establishes that, notwithstanding the rule prohibiting unnecessary conversations, the Respondent routinely allowed its employees to engage in social discussions during working time. Therefore, when Clemons announced to a group of employees that they should not talk about the Union at work, his statement constituted a discriminatory prohibition on discussing the Union.

We also agree that Clemons unlawfully threatened Taresh when he told her to "be careful" talking about the Union. The Respondent argues that both this and Clemons' earlier statement to employees are privileged under *Paintsville Hospital Co*., 278 NLRB 724 (1986). In that case, two supervisors engaged in conduct that would ordinarily violate Section 8(a)(1). The Board, however, dismissed the allegations because the supervisors were prounion, sought to protect employees from retaliation, and would have appeared to be acting not in behalf of management, but "in their own interest and in accordance with their own [prounion] sympathies, which were plainly contrary to those of management." Id. at 725. Here, the facts do not establish that Clemons was openly prounion. The record contains testimony that Clemons thought there was "possibly a need" for the Union, but there is also testimony that he provided a detailed report of supervisor Rice's union activity to the general manager. Unlike *Paintsville Hospital Co.,* there is no "extensive evidence" that Clemons was acting based on his prounion sympathies and in his own interest. Id. at 725 fn. 9. We find the facts presented here are more analogous to those in *Harmony Corp.,*[7] and *Greenwich Air Services*,[8] two cases in which the Board found statements made by arguably union-friendly supervisors to be unlawful where the supervisors at issue were not openly supportive of the union and where their statements were otherwise coercive when considered under an objective standard. As a result, we adopt the judge's finding that Clemons' statements to employees violated Section 8(a)(1) on the grounds discussed above.

2. Discipline of Debra Sterling

The judge found that the Respondent violated Section 8(a)(1) by disciplining employee Debra Sterling for pursuing a sexual harassment complaint. In reaching that conclusion, the judge found that Sterling was engaged in protected concerted activity and that the Respondent had knowledge of the activity. The Respondent does not except to those findings, and in fact concedes in its brief that Human Resources Director Janelle Kercher was aware of Sterling's protected concerted activity.[9] The Respondent, however, argues that Supervisor Jason Armstrong, who allegedly made the decision to discipline Sterling and who was working at another location at the time of Sterling's complaint, was not aware of it.[10] The Respondent also argues that, in light of the 5 months between the two events, the judge erred in finding a

[7] 301 NLRB 578, 579 (1991).

[8] 323 NLRB 1162, 1162–1163 (1997).

[9] The dissent argues that Sterling's only concerted activity was her collaboration with employee Asucena Banuelos on notes for a letter to the EEOC. Even if the issue of the extent of Sterling's concerted activity were before the Board on exceptions, which it is not, we would disagree that her concerted activity was so limited. The judge found that Sterling engaged in the following concerted activity: (1) discussing her complaints about Project Manager Major Robert Thario with Banuelos, including their collaboration on notes for a letter to the EEOC; (2) speaking with Kercher and General Manager Larry Pablo about her concerns; (3) filing a hotline complaint; and (4) filing an EEOC charge. The Respondent, on brief, acknowledges these unexcepted-to findings.

[10] The dissent argues that management was not aware that the activity was concerted. As stated above, the Respondent concedes that Kercher was aware of Sterling's protected concerted activity. Thus, the only issue before the Board is whether the knowledge was properly imputed to Armstrong. As explained below, the judge applied settled law in imputing knowledge to Armstrong.

causal connection between Sterling's protected activity and her discipline, and that, to the contrary, the Respondent has established that the discipline was motivated by Sterling's failure to report for an overtime shift.

We reject the Respondent's arguments. Regarding the Respondent's knowledge, it is well established that the Board imputes a manager's or supervisor's knowledge of an employee's protected concerted activities to the decisionmaker, unless the employer affirmatively establishes a basis for negating such imputation. See, e.g., *Vision of Elk River, Inc.* 359 NLRB 69, 72 (2012), reaffirmed and incorporated by reference in 361 NLRB 1395 (2014). Furthermore, in light of the evidence that Operations Manager Ed Martini—who was Armstrong's superior and who clearly knew about Sterling's protected conduct—told Armstrong that he wanted Sterling fired, it is not at all clear that Armstrong was, in fact, responsible for the decision to discipline Sterling. But even assuming that Armstrong was the decisionmaker, the evidence presented by the Respondent is insufficient to establish an affirmative basis for declining to impute knowledge.

We also reject the contention of the Respondent and the dissent that the passage of 5 months between Sterling's complaint and her discipline demonstrates that it did not act unlawfully. Even assuming that this temporal gap is significant, we note that the Respondent received a notice of Sterling's right to sue from the EEOC only days before it disciplined her. Accordingly, we adopt the judge's finding that the Respondent's discipline of Sterling violated Section 8(a)(1).[11]

3. Confidentiality Rule

The Respondent's handbook contains a confidentiality provision, which states:

> The protection of confidential information, trade secrets, and company-specific operating procedures is vital to the interests and success of G4S Secure Solutions USA. Additionally, in the line of duty, you may come into contact with our customers' confidential information.
>
> Employees who improperly use, reveal, copy, disclose or destroy G4S or client information will be subject to disciplinary action, up to and including termination of employment. They may also be subject to legal action even if they do not actually benefit from the disclosure. Such information includes any information considered proprietary by G4S or the client organization.
>
> Do not give interviews or make public statements about the activities or policies of the company or our client without written permission from G4S Secure Solutions USA.

The judge, relying on *Flamingo Hilton-Laughlin,* 330 NLRB 287 (1999), found the rule unlawful because it prohibits employees from disclosing confidential information and from giving interviews or making public statements about the Respondent's activities or policies without permission. The judge also found the rule unlawful because it does not define "confidential information" or the "activities or policies" it references, nor does it affirmatively state that the rule will not be used to restrict Section 7 activity. Although we agree that the third paragraph of the rule is unlawful, we find that the first two paragraphs are not.

In our view, there is a critical distinction between the language here and the rule found unlawful in *Flamingo Hilton-Laughlin*, which prohibited revealing confidential information regarding *fellow employees*. Id. at 288, fn. 3. Here, the rule does not restrict disclosure of employee information.[12] As a result, we find the language of the Respondent's rule to be more analogous to the rule at

[11] In finding this 8(a)(1) violation we note, however, that the judge's statement of the test of discriminatory motivation set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F. 2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983), confuses the General Counsel's initial burden of proof with evidentiary elements sufficient to meet that burden. As stated in *Fresh & Green's of Washington, D.C., LLC*, 359 NLRB 1314, 1315 (2013), reaffirmed and incorporated by reference 361 NLRB 362 (2014), "[u]nder the *Wright Line* test, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's adverse employment action. See, e.g., *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The General Counsel satisfies this burden by showing that (1) the employee was engaged in protected activity, (2) the employer had knowledge of the protected activity, and (3) the employer bore animus toward the employee's protected activity. Id. If the General Counsel meets his initial evidentiary burden, the burden of persuasion 'shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.' *Wright Line*, 251 NLRB at 1089."

[12] The rule is therefore also distinguishable from other confidentiality rules that we have found unlawful. See, e.g., *Rio All-Suites Hotel and Casino*, 362 NLRB 1690, 1691 (2015) (confidentiality provision prohibited employees from sharing "any information about the Company which has not been shared by the Company with the general public."); *DirecTV U.S. DirecTV Holdings*, 359 NLRB 545, 546–547 (2013) reaffirmed and incorporated by reference 362 NLRB 415 (2015) (confidentiality provision instructed employees to "[n]ever discuss details about your job, company business or work projects with anyone outside the company" and to "[n]ever give out information about customers or DIRECTV employees"); *Flex Frac Logistics,* 358 NLRB 1131, 1131 (2012), enfd. 746 F.3d 205 (5th Cir. 2014) (confidentiality provision prohibited employees from engaging in "[d]isclosure" of "personnel information and documents" to persons "outside the organization").

issue in *Super K-Mart*, 330 NLRB 263, 263–264 (1999). In that case, the Board found that employees would reasonably understand a rule stating that "company business and documents are confidential" as limiting the dissemination of proprietary information, rather than limiting employees' ability to discuss wages and working conditions. Id. at 263. Similarly, the rule here is limited to information that is "considered proprietary by G4S or the client organization," and nothing in the rule suggests that the Respondent considers employee information "proprietary." Accordingly, we find that the first two paragraphs of the confidentiality provision do not violate the Act.

Turning to the third paragraph, which prohibits employees from giving public statements about the activities or policies of the company without permission, we adopt the judge's finding that this paragraph is unlawfully overbroad. The Respondent argues that in the context of what precedes that language, employees would reasonably construe the provision to restrict only the discussion of proprietary information in public. We disagree. The prohibition against public statements broadly prohibits its employees from speaking about the "activities or policies" of the company, not about any particular types of information. The language used would clearly encompass subjects implicating Section 7 of the Act. For example, the Respondent uses the term "policies" throughout the handbook and other employee personnel documents to describe rules concerning employee conduct. Read in that broader context, employees would reasonably understand the prohibition against public statements about company "policies" to prohibit discussion of rules concerning employee conduct—terms and conditions of employment—without management's advance approval. See *DirecTV U.S. DirecTV Holdings*, supra, 359 NLRB at 347–348 (finding unlawful rule that prohibited employees from contacting the media).[13] We therefore find that the maintenance of paragraph three of the rule violates Section 8(a)(1).

4. Social Media Policy

Since November 22, 2010, the Respondent has maintained a written social networking policy that includes the following paragraphs:

> Photographs, images, and videos of G4S employees in uniform (whether yourself or a colleague) or at a G4S place of work, must not be placed on any social networking site, unless express permission has been given by G4S Secure Solutions (USA) Inc.
>
> Do not comment on work-related legal matters without express permission of the Legal Department.

For the reasons stated by the judge and the additional reasons below concerning the Respondent's disclaimer, we agree that the second paragraph is overbroad and therefore violates Section 8(a)(1). Contrary to the judge, however, we also find that the first paragraph is impermissibly overbroad.

In finding that the first paragraph did not violate the Act, the judge relied on *Flagstaff Medical Center*,[14] in which the Board found that a prohibition on "the use of cameras for recording images of patients and/or hospital equipment, property, or facilities" did not violate the Act. First, the judge reasoned that the rule found lawful in *Flagstaff* was broader than the Respondent's rule, which is limited to the *posting* on social media sites of pictures of employees in uniform or at a place of work but does not prohibit the taking of such pictures. Second, the judge found that the Respondent, although not a hospital, provides emergency medical technician (EMT) services for some clients, thereby implicating the same patient privacy concerns as in *Flagstaff*. The judge noted that the Respondent's other client services are varied, but she presumed that these clients have their own privacy and legal concerns.

Under *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), an employer violates Section 8(a)(1) when it maintains a work rule that employees would reasonably construe to prohibit Section 7 activity. Photography, including the posting of photographs on social media, is protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. *Whole Foods,* 363 NLRB 800, 802 (2015); *Rio All-Suites Hotel and Casino*, 362 NLRB 1690, 1693 (2015). See also *Bettie Page Clothing*, 359 NLRB 777 (2013) reaffirmed and incorporated by reference 361 NLRB 876 (2014) (posting on social media site constitutes protected concerted activity); *White Oak Manor*, 353 NLRB 795, 795 fn. 2 (2009) (photography was part of the res gestae of employee's protected concerted activity), reaffirmed and incorporated by reference at 355 NLRB 1280 (2010) enfd. 452 Fed. Appx 374 (4th Cir. 2011). In considering the legality of a rule prohibiting photography in *Flagstaff,* the Board emphasized the "weighty" privacy interests of the patients and the hospital's "significant interest

[13] For the reasons set forth below in our discussion of the Respondent's social media policy, we disagree with our dissenting colleague that the Respondent's obligation to post the Department of Labor notice alone ameliorates the adverse effect of the maintenance of this overbroad rule.

[14] 357 NLRB 659, 662–663 (2011), enf. granted in part, denied in part on other grounds 715 F.3d 928 (D.C. Cir. 2013).

in preventing the wrongful disclosure of individually identifiable health information," as required by Federal law. 357 NLRB at 663. The Board concluded that the rule in *Flagstaff* was lawful, finding that employees would understand the rule as a "legitimate means of protecting the privacy of patients and their hospital surroundings." Id.[15]

In analyzing the social media policy at issue here, the judge presumed that all of the Respondent's clients had privacy interests similar to those articulated in *Flagstaff*. The Respondent's security employees perform a wide range of services for a diverse clientele of businesses and government agencies nationwide. Even assuming, arguendo, that the federally mandated concern for patient privacy applies to those employees who perform EMT services for an unspecified number of clients, there is no basis in the record and no identifiable government policy to justify the judge's presumption that all other clients have common privacy concerns of comparable weight. Such a presumption cannot simply be founded on the fact that the Respondent provides "security" services. Moreover, the Respondent's assertion that the policy is designed to protect customer privacy is undercut by the language of the rule itself, which solely prohibits posting images of its own *employees* in uniform or at a workplace, but says nothing about the posting of images of the clients' customers or the clients' workplace in isolation from the Respondent's employees. In the absence of any basis for finding that the rule is tailored to protect a legitimate privacy concern of similar weight to the patient privacy concern in *Flagstaff,* we find that employees would reasonably interpret the policy to restrict Section 7 activity.[16]

The Respondent and the dissent also argue that employees would not reasonably construe any provision in the social networking policy to prohibit Section 7 activity because the policy includes an introductory bolded disclaimer stating that "[t]his policy will not be construed or applied in a manner that interferes with employees' rights under federal law." The Respondent argues that employees would understand that "rights under federal law" include Section 7 protections because, as a federal contractor, it is required by the U.S. Department of Labor (DOL) to post a notice informing employees of their rights under the Act.[17] See 75 FR 28368, 29 CFR Part 471 (2010). We agree that an employer's express notice to employees of their Section 7 rights may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule. But the social media policy's vague reference to "rights under federal law" is insufficient to inform employees that the policy does not prohibit conduct protected by Section 7. See *First Transit*, 360 NLRB 619, 621, 622 (2014).

8(a)(1) Threat of Unspecified Reprisal

The judge found that supervisor Jason Armstrong unlawfully threatened employee Debra Sterling by telling her that he had "an issue" with her because each of the three times she used sick leave during the previous 1-1/2 years, she had been scheduled to work overtime. The day before, Armstrong made the statement Sterling had left work early because she was sick. The judge found that, although the comment did not "inherently" threaten Sterling's exercise of her Section 7 rights, the timing of the comment—soon after the Respondent disciplined her for protected concerted activity and assertedly the day after the union election—would cause a reasonable employee to view the statement as threatening. We disagree. First, the judge erred about the timing.[18] Second, it is significant that Armstrong's statement does not reference the Union, the election, or Sterling's protected concerted activity. Third, the statement itself does not include any threat of reprisal. Under the circumstances, we find that the statement is not unlawful and we dismiss this complaint allegation.

AMENDED REMEDY

We amend the remedy as stated in footnote 2 above.

ORDER

The National Labor Relations Board orders that the Respondent, G4S Secure Solutions (USA) Inc., Phoenix, Arizona, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Maintaining in employee handbooks or policy statements rules that prohibit employees from (i) wearing

[15] Chairman Pearce dissented in relevant part from the majority's finding that the rule in *Flagstaff* was lawful. 357 NLRB at 670–671. However, for the reasons set forth here, he agrees with his colleagues that the Respondent has not asserted a privacy interest comparable to the patient privacy interest in *Flagstaff* and that the rule at issue is unlawful.

[16] The dissent concedes that the rule could be construed to interfere with Sec. 7 rights. Nevertheless, the dissent accuses us of preventing the Respondent from creating a rule that would prohibit employees from sharing training exercises or other security-related activities, and that we thereby place at risk the lives of the Respondent's security officers and client personnel. The accusation is as far-fetched as it sounds. Our finding simply prohibits the Respondent from maintaining an overly broad rule that would be construed to prohibit Sec. 7 activity. Nothing in our decision prevents the Respondent from promulgating a more narrowly tailored rule.

[17] The record does not clearly establish that the Respondent is a federal contractor obligated to post the notice. We do not, however, take issue with the Respondent's assertion that it posted the notice.

[18] The Board had postponed the election indefinitely before the statement was made.

"insignia, emblems, buttons, or items other than those issued by the company" without permission; (ii) discussing "wages and salary information"; (iii) commenting on "work related matters without express permission of the Legal Department"; (iv) "giv[ing] or mak[ing] public statements about the activities or policies of the company" without written permission; and (v) placing on any social networking site without express permission any "photographs, images, and videos of G4S employees in uniform (whether yourself or a colleague) or at a G4S place of work."

(b) Instructing employees, under threat of job loss, not to talk with employees or supervisors about disciplinary matters.

(c) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(d) Threatening employees with job loss for engaging in union or other protected concerted activity.

(e) Disciplining employees for engaging in union or other protected concerted activity.

(f) Discharging employees for engaging in union or other protected concerted activity.

(g) Prohibiting employees from talking about the Union while allowing other nonwork related discussions by employees.

(h) Threatening employees with unspecified reprisal for talking about the Union at work.

(i) 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 unlawful rules that prohibit employees from (i) wearing "insignia, emblems, buttons, or items other than those issued by the company" without permission; (ii) discussing "wages and salary information"; (iii) commenting on "work related matters without express permission of the Legal Department"; (iv) "giv[ing] or mak[ing] public statements about the activities or policies of the company" without written permission; and (v) placing on any social networking site without express permission any "photographs, images, and videos of G4S employees in uniform (whether yourself or a colleague) or at a G4S place of work."

(b) Furnish all employees nationwide with inserts for the current employee handbook and Social Networking Policy that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute to all employees nationwide a revised handbook and Social Networking Policy that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

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

(d) Make Donald Wickham whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the judge's remedy as amended in this decision, plus reasonable search-for-work and interim employment expenses.

(e) Compensate Donald Wickham for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

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

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Debra Sterling and within 3 days thereafter, notify her in writing that this has been done and that the unlawful action will not be used against her in any way.

(h) 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.

(i) Within 14 days after service by the Region, post at all of its facilities in Phoenix, Arizona, copies of the attached notice marked "Appendix A".[19] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employ-

[19] If this Order is enforced by a judgment of the 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."

ees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 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 24, 2010.

(j) Within 14 days after service by the Region, post at all of its facilities nationwide copies of the attached notice marked "Appendix B."[20] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on 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 24, 2010.

(k) 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 Employer has taken to comply.

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

[20] If this Order is enforced by a judgment of the 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."

MEMBER MISCIMARRA, concurring in part and dissenting in part.

My colleagues and I reach the same result on many of the issues in this case, but we do not always agree on the analysis to be applied. In particular, several issues involve whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by maintaining various work rules, policies and handbook provisions. To make that determination, the judge and my colleagues apply prong one of the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), under which the Board asks whether employees "would reasonably construe the language" of the rule "to prohibit Section 7 activity." Id. at 647.

I do not apply the "reasonably construe" standard. For the reasons I explained in *William Beaumont Hospital*, 363 NLRB 1543, 1549–1566 (2016) (Member Miscimarra, concurring in part and dissenting in part), which are summarized below, I believe the *Lutheran Heritage* "reasonably construe" standard should be overruled by the Board or repudiated by the courts. I also believe that the Board is required to evaluate an employer's workplace rules, policies and handbook provisions by striking a "proper balance" that takes into account (i) the legitimate justifications associated with the disputed rules and (ii) any potential adverse impact on NLRA-protected activity,[1] and that a "facially neutral" policy, rule or handbook provision—defined as a rule that does not expressly restrict Section 7 activity, was not adopted in response to NLRA-protected activity, and has not been applied to restrict NLRA-protected activity—should be declared unlawful only if the legitimate justifications an employer may have for maintaining the rule are outweighed by its potential adverse impact on Section 7 activity. Applying this standard, I concur with my colleagues' findings as to several of the rules at issue in this case, and I respectfully dissent as to others, as explained below.

This case also presents a number of other issues involving allegations that the Respondent violated Section 8(a)(3) and 8(a)(1) of the Act. These allegations are ad-

[1] See *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 33–34 (1967) (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"). In performing the balancing discussed in the text, I believe the Board must also take into account other considerations, which may include, depending on the case, reasonable distinctions between types of rules and justifications, evidence regarding the particular industry or work setting, specific events that may bear on the disputed rule, and the possibility that the rule may be lawfully maintained even though application of the rule against NLRA-protected conduct may be unlawful. See *William Beaumont*, supra, at 1557, 1560–1562 (Member Miscimarra, concurring in part and dissenting in part).

dressed following a summary of my rationale in *William Beaumont* and discussion of the Respondent's rules, policies and handbook provisions.

A. The Board's Lutheran Heritage "Reasonably Construe" Test Should Be Overruled by the Board or Repudiated by the Courts

As stated above, the judge and my colleagues apply *Lutheran Heritage*, under which facially neutral employment policies, work rules and handbook provisions violate NLRA Section 8(a)(1) if employees would "reasonably construe the language" of the rule "to prohibit Section 7 activity."[2] For reasons described at length in my partial dissenting opinion in *William Beaumont*,[3] I believe that the *Lutheran Heritage* "reasonably construe" test should be overruled by the Board or repudiated by the courts. The "reasonably construe" standard defies common sense and is contrary to the Act in numerous respects. Although Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the *exercise* of the rights guaranteed in section 7," the disputed work rules in the instant case (with one exception) do not expressly restrict Section 7 activity,[4] and none of the rules was adopted in response to NLRA-protected activity or applied to restrict NLRA-protected activity.[5] The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights—even though the risk of intruding on NLRA rights might be "comparatively slight"[6]—without taking into account the many legitimate justifications associated with particular policies, rules and handbook provisions, which may have as their purpose avoiding potentially fatal accidents, reducing the risk of workplace violence, and preventing unlawful harassment. As I explained in *William Beaumont*:

- *Lutheran Heritage* is contrary to Supreme Court precedent establishing that, whenever work requirements are alleged to violate the NLRA, the Board *must* give substantial consideration to the justifications associated with the rule, rather than only considering a rule's potential adverse effect on NLRA rights.[7]
- *Lutheran Heritage* is contradicted by the NLRB's own cases establishing that numerous work requirements and restrictions are lawful—for example, no-solicitation and no-distribution rules, off-duty employee access rules, "just cause" provisions and attendance requirements—notwithstanding the fact that

[2] *Lutheran Heritage*, 343 NLRB at 647. This standard is sometimes called *Lutheran Heritage* "prong one" because, in *Lutheran Heritage*, the "reasonably construe" test is enumerated as the first item, or "prong," in a three-prong standard for determining whether a challenged policy, work rule or handbook provision that does not explicitly restrict Sec. 7 activity is nonetheless unlawful. See *William Beaumont*, supra, at 1549 fn. 3 (Member Miscimarra, concurring in part and dissenting in part).

[3] *William Beaumont*, supra, at 1550–1552, 1553–1560 (Member Miscimarra, concurring in part and dissenting in part).

[4] The one rule that does expressly restrict Sec. 7 activity was the directive issued by Lieutenant Clemons when he told a group of employees that the Union should not be discussed at work. In general, no further analysis is necessary in order to find a rule that expressly restricts Sec. 7 activity is unlawful. As my colleagues point out, however, an employer *may* prohibit "union talk" during working time *if* the prohibition is nondiscriminatory. That is, "an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work . . . ." *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003). Here, Clemons' directive was discriminatory: Clemons told employees not to discuss the Union at work, and the record evidence demonstrates that the Respondent routinely allowed employees to discuss other non-work-related subjects during working time. Accordingly, I agree with my colleagues that Clemons' "no union talk" directive violated NLRA Sec. 8(a)(1).

[5] I agree with my colleagues that the judge erred in finding that when Clemons told employees that the Union should not be discussed at work, he was applying the Respondent's rule prohibiting "unnecessary conversations." The Respondent did *not* apply its "no unnecessary conversations" rule to restrict NLRA-protected activity. I emphasize that the judge did not find, and neither do my colleagues, that employees would reasonably construe the "no unnecessary conversations" rule to prohibit Sec. 7 activity.

[6] *Great Dane*, 388 U.S. at 34.

[7] See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945) (describing the need to balance the "undisputed right of self-organization assured to employees" and "the equally undisputed right of employers to maintain discipline in their establishments," rights that "are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee," because the "[o]pportunity to organize and proper discipline are both essential elements in a balanced society"); *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"); *Great Dane*, 388 U.S. at 33–34 (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."). Cf. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) ("[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved."). See generally *William Beaumont*, supra, at 1553–1554 (Member Miscimarra, concurring in part and dissenting in part).

each would fail the *Lutheran Heritage* "reasonably construe" test.[8]

- The Board has engaged in a balancing of competing interests—in the above cases and others spanning more than six decades—*without* disregarding the justifications associated with particular rules and requirements.[9]
- Under *Lutheran Heritage*, the Board has invalidated many facially neutral work rules merely because they are ambiguous. However, the Board's requirement of linguistic precision when applying *Lutheran Heritage* is contrary to the permissive treatment that Congress, the Board, and the courts have afforded to "just cause" provisions, benefit plans, and other employment-related requirements throughout the Act's history.[10] Moreover, given that many ambiguities are inherent in the NLRA itself, it is unreasonable to find that reasonable work requirements violate the NLRA merely because employers cannot discharge the impossible task of anticipating and carving out every possible overlap with some potential NLRA-protected activity.
- The *Lutheran Heritage* "reasonably construe" test stems from several false premises that are contrary to the NLRA, the most important of which is a misguided belief that unless employers formulate written policies, rules and handbooks that can never be construed in a manner that conflicts with some type of hypothetical NLRA protection, employees are best served by not having employment policies, rules and handbooks at all. In this respect, *Lutheran Heritage* requires perfection that literally has become the enemy of the good.[11]
- The *Lutheran Heritage* "reasonably construe" test improperly limits the Board's discretion, contrary to the Board's responsibility to apply the "general provisions of the Act to the complexities of industrial life."[12] It does not permit the Board to afford greater protection to those Section 7 activities that are central to the Act (as compared to other types of activity that may lie at the periphery of the Act or rarely if ever occur), to make reasonable distinctions among different types of justifications underlying particular rules, to differentiate between different industries or work settings, or to take into account discrete events that, if considered, may demonstrate that the justifications for certain work requirements outweigh their potential impact on some type of NLRA-protected activity.[13]
- If a particular work rule exists for important reasons that require the Board to conclude that "the rule on its face is *not* unlawful,"[14] *Lutheran Heritage* fails to recognize that the Board may find that the employer has violated Section 8(a)(1) by *applying* the rule to restrict NLRA-protected activity.[15] Here as well, *Lutheran Heritage* prevents the Board from discharging its duty to apply the "general provisions of the Act to the complexities of industrial life."[16]
- The *Lutheran Heritage* "reasonably construe" test has been exceptionally difficult to apply, many Board decisions have disregarded important qualifications set forth in *Lutheran*

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[8] See *William Beaumont*, supra, at 1554 (Member Miscimarra, concurring in part and dissenting in part).

[9] Id. at 1554–1555, 1562–1563 (Member Miscimarra, concurring in part and dissenting in part).

[10] Id. at 1550, 1555–1556 & fns. 29–31 (Member Miscimarra, concurring in part and dissenting in part).

[11] Id. at 1550, 1555–1557 (Member Miscimarra, concurring in part and dissenting in part).

[12] *NLRB v. Erie Resistor Corp.*, 373 U.S. at 236; see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[13] See *William Beaumont*, supra, at 1551, 1557 (Member Miscimarra, concurring in part and dissenting in part).

[14] *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996) (emphasis added).

[15] In *Aroostook County Regional Ophthalmology Center*, supra, the Court of Appeals for the D.C. Circuit stated:

> In the absence of any evidence that [the employer] is imposing an unreasonably broad interpretation of the rule upon employees, the Board's determination to the contrary is unjustified. If an occasion arises where [the employer] is attempting to use the rule as the basis for imposing questionable restrictions upon employees' communications, the employees may seek review of the Company's actions at that time. However, the rule on its face is not unlawful.

Id.; see also *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001) (stating that the Board cannot find a facially neutral policy unlawful based upon "fanciful" speculation, and the Board must "consider the context in which the rule was applied and its actual impact on employees"). See *William Beaumont*, supra, at 1561–1562 & fn. 60 (Member Miscimarra, concurring in part and dissenting in part).

[16] *NLRB v. Erie Resistor Corp.*, 373 U.S. at 236; *NLRB v. J. Weingarten, Inc.*, 420 U.S. at 266–267. See generally *William Beaumont*, supra, at 1554 (Member Miscimarra, concurring in part and dissenting in part).

Heritage itself,[17] and *Lutheran Heritage* has consistently produced arbitrary results.[18]

As I stated in *William Beaumont*, our experience with the *Lutheran Heritage* "reasonably construe" standard "has revealed its substantial limitations, as well as its departure from the type of balancing required by Supreme Court precedent and the Board's own decisions."[19] For the above reasons, *Lutheran Heritage* should be overruled by the Board, and if the Board fails to do so, it should be repudiated by the courts.

B. The Respondent's Rules, Policies and Handbook Provisions, Evaluated

1. Confidentiality rule prohibiting employees from discussing "wages and salary information"

The Respondent maintains a rule that prohibits employees from discussing "wages and salary information." The Respondent may have legitimate justifications for such a rule. It may wish to prevent other businesses from discovering its labor costs, which could give the Respondent's competitors in the security industry an edge in bidding for contracts. The Respondent may also wish to avoid conflicts that may arise when employees learn of discrepancies between what they are paid and what others are paid. On the other hand, discussions concerning wages and salary are central to many types of activity that are protected under NLRA Section 7, and that very feeling of dissatisfaction employees may experience upon learning of wage discrepancies may serve as the impetus to "concerted activities for the purpose of . . . mutual aid or protection," which NLRA Section 7 protects.

Balancing these rights and interests, I believe the potential adverse impact of the Respondent's rule on Section 7 activity outweighs any legitimate justifications for maintaining the rule. I recognize that the Respondent has a legitimate interest in keeping its wage and salary structure out of its competitors' hands. However, wage and salary information relates to core rights under the NLRA, especially in relation to the sharing of such information among employees or between employees and potential union representatives. The Board may take notice that restrictions on sharing wage and salary data have been relied upon by employers at various times to prevent employees from engaging in NLRA-protected activity.[20] Accordingly, for the above reasons, I concur in my colleagues' finding that the Respondent violated NLRA Section 8(a)(1) by maintaining a rule prohibiting employees from discussing "wages and salary information."

2. Confidentiality rule prohibiting employees from giving interviews or making public statements about the Respondent's activities or policies

The Respondent maintains a confidentiality rule that states, in part: "Do not give interviews or make public statements about the activities or policies of the company or our client without written permission from G4S Secure Solutions USA." This confidentiality rule serves especially substantial legitimate interests in the instant case because the Respondent is in the business of providing security services, and "interviews" and "public statements" could predictably disclose matters that bear on the effectiveness of those services, the safety of the Respondent's security officers, the well-being of its clients, and potentially national security. For example, such "activities" could include contingency planning in the event of, and training exercises in repelling, a terror-

[17] See *William Beaumont*, supra, at 1555–1556 fn. 29; id. at 1560 fn. 55 (Member Miscimarra, concurring in part and dissenting in part).

[18] Compare *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d at 27 (finding it *lawful* to maintain rule prohibiting "abusive or threatening language to anyone on company premises") and *Lutheran Heritage*, 343 NLRB at 646–647 (finding it *lawful* to maintain rule prohibiting "abusive or profane language") with *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (finding it *unlawful* to maintain rule prohibiting "loud, abusive or foul language"). Also, compare *Palms Hotel & Casino*, 344 NLRB 1363, 1363 (2005) (finding it *lawful* to maintain rule prohibiting "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees) with *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (finding it *unlawful* to maintain rule prohibiting "false, vicious, profane or malicious statements"), enfd. 203 F.3d 52 (D.C. Cir. 1999). See generally *William Beaumont*, supra, at 1557–1560 (Member Miscimarra, concurring in part and dissenting in part).

In part, the arbitrary results associated with application of the *Lutheran Heritage* "reasonably construe" standard have resulted from many Board decisions that have disregarded important qualifications set forth in *Lutheran Heritage* itself. See *William Beaumont*, supra, at 1560 fn. 55 (Member Miscimarra, concurring in part and dissenting in part).

[19] *William Beaumont*, supra, at 1560 (Member Miscimarra, concurring in part and dissenting in part).

[20] I believe that in carrying out its responsibility to determine whether particular work rules, policies and handbook provisions unlawfully interfere with NLRA-protected rights, the Board cannot appropriately instruct employers that particular wording must or should be contained in them. I also believe it is inappropriate for the Board to conclude that the mere maintenance of facially neutral work rules, policies and handbook provisions violates Sec. 8(a)(1) merely because there may be some ambiguity in the wording of a rule or overlap with potential NLRA-protected activity. See *William Beaumont Hospital*, 363 NLRB 1543, 1550, 1555 & fn. 29, 1556 & fns. 30–31 (Member Miscimarra, concurring in part and dissenting in part); cf. NLRA Sec. 8(d) (precluding the Board from imposing substantive contract terms on parties); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) (same). However, our cases make clear that an employer can lawfully maintain a rule requiring strict confidentiality from employees who work in payroll and have access to personnel records or other information concerning employees' pay, which may help prevent employment-related information from being inappropriately disclosed to third parties. See *Asheville School, Inc.*, 347 NLRB 877, 877 fn. 2 (2006); *Clinton Corn Processing Co.*, 253 NLRB 622, 623–625 (1980).

ist attack on a nuclear facility. See *WSI Savannah River Site*, 363 NLRB 977 (2016). No one can reasonably question the importance of preventing public disclosure of such "activities."

On the other hand, the Respondent's "policies" include policies concerning employees' terms and conditions of employment, and its "activities" could encompass activities that affect those terms and conditions, such as collective bargaining (if employees were to choose union representation) and litigation of work-related disputes against one or more of its employees. Section 7 protects employees' right to make communications to the public that are part of and related to an ongoing labor dispute. *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) (citing *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980)). This includes communications about labor disputes to reporters. Id. (citing *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995)). Thus, the Respondent's rule has the potential to adversely affect employees' exercise of their Section 7 rights.

Balancing these rights and interests, I believe the Board should find that the mere maintenance of this confidentiality rule does not unlawfully interfere with NLRA-protected activity in the instant case. Although the Board traditionally disfavors rules that require management approval or permission for taking particular actions, which in some scenarios could be interpreted as requiring management approval or permission to engage in NLRA-protected activity, I believe such an interpretation is unlikely here, given the sensitive nature of the Respondent's business. Also, there are two additional considerations that, in my view, make the legitimate interests associated with this rule outweigh the rule's potential impact on NLRA-protected activity.

First, this rule does not on its face restrict NLRA-protected activity; there is no evidence that the Respondent adopted this rule in response to NLRA-protected activity; and there is no evidence that the Respondent has applied this rule to restrict such activity. Thus, I believe the mere maintenance of the rule, which is facially neutral, is permissible given the other considerations referenced above, but the Board may determine that application or enforcement of the rule against NLRA-protected activity violates Section 8(a)(1) of the Act, if and when the rule were to be applied or enforced in this manner. See, e.g., fns. 14–15, supra.

Second, the Respondent, as a federal contractor, is required by the Department of Labor (DOL) to post a notice of employee rights under the National Labor Relations Act, and it complies with this requirement. This posted notice informs employees, among other things, that they have the right to "[d]iscuss [their] terms and conditions of employment or union organizing with [their] co-workers or a union" and to "[t]ake action with one or more co-workers to improve [their] working conditions by, among other means, raising work-related complaints directly with [their] employer or with a government agency, and seeking help from a union." I believe this posted statement of employee rights under the NLRA is a substantial consideration that, in conjunction with the other considerations discussed above, ameliorates the potential adverse effect of the mere maintenance of this rule.

As stated above, I do not believe the Board should evaluate facially neutral rules under the *Lutheran Heritage* "reasonably construe" standard. However, my colleagues apply this standard, and I believe the objective nature of the "reasonably construe" standard requires the Board to regard an employer's compliance with the DOL disclosure requirements applicable to federal contractors—or any other employer notification to employees of their NLRA-protected rights—as a substantial factor that makes it less likely that employees would "reasonably construe" an employer's mere maintenance of facially neutral rules to unlawfully interfere with NLRA-protected rights in violation of Section 8(a)(1) of the Act. And under the balancing standard that I believe the Board should apply to evaluate the lawfulness of an employer's mere maintenance of facially neutral work rules, I believe compliance with the DOL disclosure requirement or other means of notifying employees of their NLRA-protected rights should likewise be regarded as a substantial factor that militates against finding an 8(a)(1) violation.[21]

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[21] I do not believe that the Respondent's compliance with the DOL posting requirement provides blanket immunity from liability under Sec. 8(a)(1) for all its facially neutral rules. For example, I believe the confidentiality rule described above prohibiting employees from discussing "wages and salary information" violates Sec. 8(a)(1), notwithstanding the Respondent's compliance with the DOL posting requirement. In this regard, as noted above, it is significant that the rule against discussing wages and salary information prohibits discussions that relate to core rights that are often the focus of NLRA-protected activities, many of which include the sharing of wage and salary information. To take a more extreme example (which I mention here only as a hypothetical illustration), if an employer complied with the DOL posting requirement—advising employees of their right to discuss employment terms and union organizing with each other—this would not render lawful the maintenance of a rule that expressly *prohibited* employees from engaging in the very activities referenced in the DOL posting.

In short, regardless of what standard one applies, when addressing the legality of facially neutral rules that do not expressly prohibit NLRA-protected activities, were not adopted in response to such activities, and have not been applied against such activities, I believe compliance with the DOL posting requirement or other voluntary notifications

3. Confidentiality rule that restricts the use or disclosure of "G4S or client information"

In addition to the confidentiality-rule language discussed above, the Respondent's confidentiality rule also contains the following provisions:

> The protection of confidential information, trade secrets, and company-specific operating procedures is vital to the interests and success of G4S Secure Solutions USA. Additionally, in the line of duty, you may come into contact with our customers' confidential information.
>
> Employees who improperly use, reveal, copy, disclose or destroy G4S or client information will be subject to disciplinary action, up to and including termination of employment. They may also be subject to legal action even if they do not actually benefit from the disclosure. Such information includes any information considered proprietary by G4S or the client organization.

Unquestionably, the Respondent has a compelling interest in preventing the disclosure of its "confidential information, trade secrets, and company-specific operating procedures" as well as its clients' confidential information. And it is difficult if not impossible to perceive how the language of these confidentiality provisions would adversely affect the exercise by employees of their Section 7 rights. The above provisions make no reference to "employee information" or "personnel information" as being included within "G4S . . . information." To the contrary, the language of the rule makes clear that "G4S . . . information" consists of "confidential information, trade secrets, and company-specific operating procedures." I conclude that the legitimate justifications associated with these provisions in the Respondent's confidentiality rule clearly outweigh any potential adverse impact on Section 7 activity, and on this basis I concur in my colleagues' finding that the Respondent did *not* violate Section 8(a)(1) by maintaining the two above-quoted paragraphs in its confidentiality rule.

of NLRA-protected rights is a substantial consideration that weighs against finding the mere maintenance of such rules violates Sec. 8(a)(1). Similarly, I believe the use of "disclaimer" language in any rule, handbook or policy likewise warrants substantial consideration and weighs against finding that the mere maintenance of a facially neutral rule, policy or handbook provision violates Sec. 8(a)(1). See the discussion of Respondent's social media policy, below.

4. Social networking policy prohibiting employees from commenting on "work-related legal matters without express permission of the Legal Department"

The Respondent maintains a social networking policy that in part prohibits employees from commenting on "work-related legal matters without express permission of the Legal Department." I believe the Board should find the mere maintenance of this policy lawful, based on the following considerations.

First, considering the nature of the Respondent's business, I believe this aspect of its social networking policy has substantial legitimate justifications. Most businesses have a legitimate interest in providing for "Legal Department" involvement in "work-related legal matters," and a broad range of such "legal matters" would have nothing to do with NLRA-protected rights. For example, if an employer or one of its officers or other agents faces potential criminal charges or civil liability, or if the employer is engaged in a contract dispute with another party, the employer would legitimately wish to ensure that its employees post nothing on social networking sites that may be adverse to its legal position.

Second, it is also true that "work-related legal matters" may implicate employees' terms and conditions of employment and be associated—in some hypothetical future scenario—with NLRA-protected activity. For example, "work-related legal matters" could include potential or ongoing wage-and-hour lawsuits, or claims by employees alleging workplace discrimination on the basis of race, sex, religion, age, or other protected status. Section 7 protects employees' right to discuss such matters—on social networking sites and otherwise—provided that such discussions are not "mere griping" but rather "look[] toward group action." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Similarly, "work-related legal matters" could involve NLRA-protected activity associated with legal claims that employees intend to bring *against the Respondent*. Such situations do not inherently involve NLRA-protected activity, but in some circumstances they might. See, e.g., *Murphy Oil USA, Inc*., 361 NLRB 774, 796–798 (2014) (Member Miscimarra, dissenting in part), enf. denied 808 F.3d 1013 (5th Cir. 2015). In such circumstances, requiring employees to secure the permission of its Legal Department before commenting on such matters on social networking sites could substantially interfere with NLRA-protected rights.

Third, it is relevant, in my view, that the social networking policy includes an introductory disclaimer, in boldface print, stating that "[t]his policy will not be construed or applied in a manner that interferes with employees' rights under federal law." Also, as noted above,

the Respondent, as a federal contractor, is required by the DOL to post a notice of employee rights under the National Labor Relations Act, and it complies with this requirement. See supra fn. 21 and accompanying text. Balancing all of the above considerations, I believe the Board should conclude that this aspect of Respondent's social networking policy does not violate Section 8(a)(1).

Again, I do not believe the Board should evaluate facially neutral rules under the *Lutheran Heritage* "reasonably construe" standard. However, my colleagues apply this standard, and I believe the objective nature of the "reasonably construe" standard requires the Board to regard Respondent's disclaimer and its compliance with the DOL disclosure requirements applicable to federal contractors as substantial factors making it less likely that employees would "reasonably construe" its social networking policy to interfere with NLRA-protected rights in violation of Section 8(a)(1) of the Act. Thus, even under the *Lutheran Heritage* "reasonably construe" test, I believe these substantial factors warrant a conclusion that the Respondent's social networking policy does not violate Section 8(a)(1), and I dissent from their finding on this basis also.

Under the balancing standard that I believe the Board should apply to evaluate the lawfulness of an employer's mere maintenance of facially neutral work rules, the disclaimer included in the social networking policy and the Respondent's compliance with the DOL disclosure requirement are substantial factors that militate against finding a Section 8(a)(1) violation. I believe that the disclaimer and the posted statement of employee rights under the NLRA, taken together, ameliorate the potential adverse effect of this part of the social networking policy on NLRA-protected activity.[22] And the disclaimer and the posted statement of employee rights under the NLRA, together with the legitimate justifications discussed above, outweigh any potential adverse effect on Section 7 activity. Accordingly, I would find that the Respondent has not violated Section 8(a)(1) by maintaining language in its social networking policy prohibiting employees from commenting on "work-related legal matters without express permission of the Legal Department."

[22] Only the social networking policy contains a disclaimer, and the Respondent does not contend that the notice of employee rights under the NLRA is sufficient by itself to ameliorate the adverse impact of other rules and handbook provisions on potential Sec. 7 activity.

5. Social networking policy prohibiting employees from placing "photographs, images, and videos of G4S employees in uniform or at a G4S place of work" on a social networking site

The Respondent's social networking policy also contains the following provision:

> Photographs, images, and videos of G4S employees in uniform (whether yourself or a colleague) or at a G4S place of work, must not be placed on any social networking site, unless express permission has been given by G4S Secure Solutions (USA) Inc.

Contrary to my colleagues, I believe the Board should affirm the judge's finding that this aspect of the social networking policy is lawful. If the Board applies the *Lutheran Heritage* "reasonably construe" standard (to which my colleagues adhere), I believe the considerations discussed above in evaluating other language in the Respondent's social networking policy—specifically, the policy's disclaimer language together with the Respondent's compliance with the DOL requirement to post a notice of employee rights under the NLRA—warrant a finding that the social networking policy does not violate Section 8(a)(1).

Moreover, as noted above, I believe the Board must engage in a meaningful balancing of the legitimate justifications for maintaining a facially neutral policy against the potential impact of the policy on the exercise of NLRA-protected rights. See *William Beaumont Hospital*, supra. Here, the legitimate justifications associated with this policy are substantial. They are much the same as the justifications described above regarding the part of the Respondent's confidentiality rule that prohibits employees from giving interviews or making public statements about the Respondent's activities or policies. Indeed, the justifications for this policy are even more compelling, involving potential danger to the lives of the Respondent's security officers and its clients' personnel, and even to national security, if photos or videos of G4S employees engaged in training exercises or other security-related activities were to fall into the hands of terrorist organizations or their sympathizers. No matter how "farfetched" the majority believes the above examples of possible security breaches are, the Board can (and should) take notice that supposedly secure computer systems are frequently compromised, and it is reasonable that the Respondent would seek to avoid potential security problems that might arise from an employee's posting of photographs, images, or videos of "G4S employees in uniform . . . or at a G4S place of work" on Facebook or Instagram.

It is true that, in some circumstances, the above language could be construed as interfering with the ability of Respondent's employees to post photos or videos on social networking sites showing G4S employees engaged in union or other protected concerted activities, such as distributing union handbills or attending a union meeting. These types of activities—if they were to occur—could be protected under Section 7 of the Act, and any interference with such activities would violate Section 8(a)(1). However, we are addressing, at this point, Respondent's mere maintenance of this social networking policy, which is neutral on its face, which was not adopted in response to NLRA-protected activity, and which has not been applied to restrict such activity. See fns. 14–15, supra. Especially in this context, I believe the adverse impact of this policy on the potential exercise of Section 7 rights is "comparatively slight"[23] and far less substantial than the relevant legitimate justifications.

Although disseminating *depictions* of employees engaged in NLRA-protected activities may be encompassed within the protection of Section 7, the Act's more important rights attach to the activities themselves—*distributing* the handbills, *attending* the union meeting. I do not discount the importance of Section 7 protection, but the Board's application of the NLRA to the "complexities of industrial life"[24] renders inappropriate a one-size-fits-all analysis. Moreover, as the judge pointed out, the Respondent's social networking policy does not prohibit employees from *taking* photos or *shooting* videos of G4S employees in uniform. It simply prohibits employees from posting them to a social networking site where they are potentially viewable by anyone in the world who has internet access. Those who wish to disseminate to their coworkers images of G4S employees engaged in union or other protected activities may find other ways of doing so besides posting them on a social networking site.

Finally, as discussed above, the social networking policy contains a disclaimer in boldface print, stating that "[t]his policy will not be construed or applied in a manner that interferes with employees' rights under federal law," and the Respondent—in conformity with DOL obligations as a federal contractor—displays a posted notice of employee rights under the NLRA. For the reasons explained above, I believe the combination of the disclaimer and the posted DOL notice reduces even further the potential for any adverse impact on Section 7 activity.

[23] *Great Dane*, 388 U.S. at 34.
[24] Supra fn. 12.

In short, I believe my colleagues, applying the *Lutheran Heritage* "reasonably construe" test, erroneously conclude that this aspect of Respondent's social networking policy violates Section 8(a)(1). Moreover, I believe the Board is required to engage in a meaningful balancing of the policy's legitimate justifications against its potential interference with the exercise of NLRA-protected rights. Especially if one conducts this type of analysis, which is precluded by *Lutheran Heritage*, I believe the Board should affirm the judge's finding that this part of the social networking policy is lawful.

6. The prohibition on wearing "insignias, emblems, buttons, or items other than those issued by the company" on security officers' uniforms

The Respondent's Security Officer Handbook contains a "Professional Image" rule that reads, in relevant part, as follows:

> You must be neat and clean while on duty. You must wear only the complete uniform as
>
> prescribed by your supervisor. Any uniformed security personnel who become pregnant will be provided with appropriate uniform clothing to maintain a professional appearance. The area or branch office will be responsible for acquiring maternity pants and larger shirts through the Purchasing Department.
>
> Due to the public nature of our business and the business necessity that uniformed personnel represent figures of authority, we have established the following rules for personal appearance.
>
> . . . .
>
> No insignias, emblems, buttons, or items other than those issued by the company may be worn on the uniform without expressed permission.

My colleagues find unlawful the last part of this rule—prohibiting the wearing of "insignias, emblems, buttons, or other items" on security officers' uniforms—and they find it unlawful for the reasons stated by the judge. I respectfully disagree, and I believe the Board should find that the mere maintenance of this rule does not interfere with the exercise of NLRA-protected rights in violation of Section 8(a)(1).

Preliminarily, long-established case law already applies a balancing analysis to rules that have the effect of restricting the wearing of union insignia. As the judge states in her decision, the Supreme Court in *Republic Aviation*, 324 U.S. at 793, held that employees have a protected right to wear union insignia at work, *which must be balanced, however, against the employer's right to maintain production and discipline*. Id. at 801–803,

797–798. Refining this balancing analysis, the Board has specified certain "special circumstances" that privilege an employer to prohibit the wearing of union insignia, including when the wearing of such insignia "may . . . unreasonably interfere with a public image which the employer has established, as part of its business plan, through appearance rules for its employees." *United Parcel Service*, 312 NLRB 596, 597 (1993), petition for review granted 41 F.3d 1068 (6th Cir. 1994).[25]

The Board's Division of Advice has concluded that the "interference with a public image" special circumstance applies in "the security industry . . . to an even greater degree than . . . other industries where the Board has permitted limitations on union insignia," and it explained its reasoning as follows:

> The uniform that [security] employees wear is designed to enable them to easily command respect, so that they can protect lives and property, control unsafe situations, and apprehend criminals. The uniform sends a message to all people encountered by the security officer that an authority figure is present. Although the wearing of a [u]nion pin would not interfere with the public's recognition of the officers as security officers, it could interfere with the message of authority that the [e]mployer hopes its officers will convey. Furthermore, it is likely that the [e]mployer's business would suffer if its clients determined that its officers did not adequately convey a presence of authority.

Pinkerton's Inc., Nos. 18–CA–16257,–16332, 2003 WL 26072095 (Jan. 3, 2003). Based on these considerations, the Division of Advice concluded that Pinkerton's "may lawfully prohibit working security officers from wearing any pins/buttons, including [u]nion insignia, on their uniforms." Id. The Division further concluded that Pinkerton's rule, which applied to all its security officers, was "not overbroad" in that regard because "all of the Employer's security officers are in positions where they may need to assist or confront members of the public." Id. But the Division also concluded that Pinkerton's rule *was* overbroad to the extent that "it applie[d] to the off-duty wearing of union insignia." Id.

I find the Division of Advice's analysis persuasive. However, the judge, upon whose reasoning my colleagues rely, found the Respondent's "Professional Image" rule unlawful on two grounds: it does not specify that it applies only to security officers who are on duty, and it applies to all the Respondent's security officers, including those who work in the Passenger Assistance Area (PAA) and do not have face-to-face contact with the public. I respectfully disagree with this reasoning.

First, I believe it is apparent from the entirety of the "Professional Image" rule that the language prohibiting security officers from wearing on their uniforms "insignia, emblems, buttons, or items other than those issued by the company" applies only to officers when they are on duty. The "on duty" scope of the rule is stated in the rule's first sentence: "You must be neat and clean while on duty." And it is implicit in the rule's next sentence, which states: "You must wear only the complete uniform as prescribed by your supervisor." It goes without saying that this statement only applies to officers when they are on duty, since off-duty officers have no obligation to wear their uniforms and typically would not do so except when commuting to and from work. The "Professional Image" rule then introduces more specific rules, including the "insignia" rule, by invoking "the public nature of our business and the business necessity that uniformed personnel represent figures of authority." Again, this language reinforces the "on duty" scope of the rule because the Respondent has no interest in ensuring that its uniformed security officers "represent figures of authority" when they are off duty. Contrary to the judge and my colleagues, I believe the most reasonable interpretation of the "insignia" prohibition when read in the context of the rest of the "Professional Image" rule is that it applies to security officers only when they are on duty.

The judge's second reason for invalidating this rule presents a closer issue. The record does not establish that security officers assigned to the PAA—who monitor security cameras and control access to various areas of the client's property—regularly interact with members of the public. However, it is possible that members of the public may try to gain access to secure areas within the client's property, and one of the Respondent's security functions is to address such intrusions in an appropriate manner. In such circumstances, it would be important that security officers confronting those individuals "convey a presence of authority." *Pinkerton's*, supra. In addition, the record reflects that security officers working in the PAA regularly interact with the client's employees. As the Division of Advice reasoned—in my view, persuasively—"the wearing of a [u]nion pin . . . could interfere with the message of authority that the [e]mployer hopes its officers will convey," and "it is likely that the [e]mployer's business would suffer if *its clients* determined that its officers did not adequately

[25] The Board in *United Parcel Service* found that the union button at issue in that case did not unreasonably interfere with UPS' public image. Id. at 597–598. The Sixth Circuit disagreed and reversed the Board's decision.

convey a presence of authority." *Pinkerton's*, supra (emphasis added).

I believe it is also important to keep in mind two considerations that are relevant when evaluating the mere maintenance of a facially neutral work rule like the Respondent's prohibition against "insignias, emblems, buttons, or items other than those issued by the company."

First, because the Board focuses on the potential effect of such a rule on the exercise of Section 7 rights, there is a temptation to think that the world of buttons consists exclusively of buttons that display messages that involve union organizing, wage-related boycotts and other types of NLRA-protected activities. Obviously, this is not true. There is a near-endless variety of "insignias, emblems, and buttons" that have absolutely nothing to do with NLRA-protected activity. For example, a random image from the website "wackybuttons" displays buttons that state the following:

- "I am dog"
- "Just kitten" (with depiction of kitten)
- "There are monsters in the gelatin" (with depiction of monster)
- "I have super powers"
- "Nerd"
- "Stud" (with depiction of muffin, as in "Stud muffin")
- Yellow happy face (with red tongue sticking out)
- "I like ice cream"
- "Yay, Toast!" (with depiction of piece of bread)
- "Growing old is mandatory, growing up is optional."[26]

A security company has every right to prohibit security employees from wearing any and every one of the above "insignias, emblems, buttons, or other items," none of which implicates NLRA-protected rights.

Second, because my colleagues invalidate this aspect of Respondent's "Professional Image" rule, they prevent the Respondent—whose business involves extremely serious security and protective force responsibilities—from imposing any prohibition that would prevent security personnel from wearing the above buttons. I have nothing against dogs, kittens, gelatin, or toast. However, if armed terrorists are attacking a secure facility that is protected by G4S personnel, it would not instill confidence if the responsible security officers are wearing buttons that read "I am dog," "Just kitten," and "There are monsters in the gelatin." Perhaps it would be helpful if they wear the button that states "I have super powers," but that is not up to the NLRB to decide.[27]

Again, we are dealing here with the mere maintenance of a facially neutral rule that does not expressly restrict NLRA-protected activity, was not adopted in response to such activity, and has not been applied against such activity. It is unreasonable to assume that all "insignias, emblems, buttons, or other items" that might be worn by security officers involve NLRA-protected activities. Moreover, as noted previously, the Respondent has posted a notice advising employees of their rights under the NLRA, which the Board must consider when evaluating whether a facially neutral rule interferes with the exercise of Section 7 rights. See supra fn. 21 and accompanying text. If the Respondent were to *apply* its "Professional Image" rule against the wearing of union-related buttons by security officers who never see members of the public, the Board could reevaluate the legality of the Respondent's actions.

For these reasons, I believe special circumstances privilege the Respondent to prohibit the wearing of "insignias, emblems, buttons, or items other than those issued by the company" by all its uniformed security officers, including those assigned to the PAA.

C. The Non-Rule Allegations

1. Impression of Surveillance

I join my colleagues in finding that the Respondent created the impression that its employees' union activities were under surveillance, in violation of NLRA Section 8(a)(1), when supervisor Jason Armstrong told employee Sean Nagler that he (Armstrong) knew that Nagler had talked to other employees about the Union. My colleagues find this violation for the reasons stated by the judge. I concur, with the following qualification.

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[26] See http://www.wackybuttons.com/images/home/carousel/caro_img2.jpg (last viewed on August 10, 2016).

[27] My colleagues say that the Respondent is free to prohibit buttons like these through a professional image rule "that does not interfere with employees' Sec. 7 rights," and they make a similar point regarding the social networking policy's prohibition on posting photos or videos of G4S employees in uniform or at work on any social networking site. Easier said than done. No matter how carefully such a rule were drafted in an attempt to carve out and permit all, and only, Sec. 7 activities, chances are the rule would be susceptible to an interpretation that would overlap with potential future protected activities in some way. Taking the professional image rule, for example, one would think that a prohibition reasonably construed to encompass buttons that say "this place stinks!" or "just another wage slave" would be permissible, particularly on a security guard's uniform. However, a foul odor in a workplace is surely a condition of employment, and wages are central to Sec. 7 concerns, so such a rule would be unlawful under *Lutheran Heritage*. The impossibility of drafting rules that do not overlap in some way with potential Sec. 7 activity is one reason I favor abandoning the "reasonably construe" standard in favor of a balancing analysis. See *William Beaumont Hospital*, 363 NLRB 1543, 1556 & fns. 30, 31.

The judge stated that "whenever an employer reveals specific information about union activity that is not generally known, and does not reveal its source," this creates the impression of surveillance. I believe this is too broad a statement because it would encompass situations where an employer tells an employee that the employer "heard" something regarding its employees' union activities. Such a statement does not reasonably support a finding that the employer has created the impression of surveillance. It is no surprise that, in virtually every workplace, supervisors and managers hear many things "through the grapevine," including information that is volunteered by employees, coworkers and subordinates. Therefore, evidence that a supervisor or other agent of an employer has made an "I heard" statement does not sustain the General Counsel's burden to prove creation of an impression of surveillance by a preponderance of the evidence. See *SKD Jonesville Division L.P.*, 340 NLRB 101, 101–102 (2003).

However, in the instant case, the judge found that Nagler's union activity "was not open or publicized." Although the Respondent excepts to this finding, it does not contend in its supporting brief that the record evidence demonstrates to the contrary.[28] And Armstrong did not say he "heard" Nagler had talked to other employees about the Union. Armstrong stated that he "knew" Nagler had talked to other employees about the Union. This may seem like a minor difference in wording, and there is no evidence that Armstrong engaged in surveillance of Nagler's union activities. However, on these facts, existing Board case law (including the decisions cited by the judge) supports a finding that the Respondent created the impression of surveillance in violation of Section 8(a)(1) of the Act.

2. Discipline of employee Debra Sterling

The judge and my colleagues find that the Respondent violated Section 8(a)(1) of the Act when it issued a warning to employee Debra Sterling. For the following reasons, I respectfully disagree.[29]

Sterling began working as a security officer on the East Valley Metro Rail contract in November 2009. In June 2010, Sterling and employee Asucena Banuelos discussed the unwelcome behavior of Project Manager Major Robert Thario. Sterling shared with Banuelos notes she had drafted for a letter she intended to send to the Equal Employment Opportunity Commission (EEOC) alleging sexual harassment. Banuelos assisted Sterling with those notes. The Respondent provides its employees a complaint hotline, and Banuelos encouraged Sterling to call the hotline. (On June 29, Banuelos called the hotline and complained about Thario's behavior toward herself.) Sterling also shared her concerns with employee Carol Taresh, and Taresh encouraged Sterling to obtain legal counsel and contact the EEOC.

On June 30, Sterling informed Human Resources Manager Janelle Kercher of her complaints about Thario's behavior towards herself. Kercher informed Larry Pablo, the general manager of the Respondent's Phoenix-area office, and Sterling then met with Pablo. At that meeting, Sterling told Pablo that she had shared her concerns about Thario's behavior with Banuelos. On July 9, Sterling called the Respondent's hotline. Sterling's hotline complaint about Thario was referred to Pablo. Pablo interviewed Thario, who denied Sterling's allegations, and Pablo was unable to substantiate the allegations. On July 15, Sterling filed a charge with the EEOC.

On October 27, the EEOC mailed Sterling a Dismissal and Notice of Rights, also known as a "right to sue" letter. On November 1, the Respondent received a copy of Sterling's "right to sue" letter. That copy, which is included in the record as Respondent's Exhibit 15, is date-stamped received in the Respondent's Legal Department on November 1, and it indicates that two individuals were copied on the letter: Pablo, and an individual whose name is partly cut off but appears to be Marmon.

Sterling signed up on a whiteboard to work an overtime shift on November 9. A few days before November 9, Lieutenant Timothy Eggleston told Sterling that he had to cancel overtime. A notation was made on the whiteboard stating that all overtime was canceled, and Sterling's name did not appear on the typed schedule for November 9. Sterling did not report to work on November 9. Sterling had no unexcused absences prior to November 9.

Major Jason Armstrong became the new project manager for the East Valley Metro Rail contract in October 2010.[30] Before October, Armstrong had been assigned elsewhere. On November 10, Armstrong directed Eggleston to issue Sterling a final warning for no-call/no-

[28] Of course, if an employee *openly* engages in union activity in a readily observable location, a statement that reveals the employer's knowledge of that activity does not create an impression of surveillance. It merely creates the impression that the employer has observed open union activity, which is perfectly lawful. See *Sunshine Piping, Inc.*, 350 NLRB 1186, 1186–1187 (2007); *Michigan Roads Maintenance Co.*, 344 NLRB 617, 617 fn. 4 (2005).

[29] For the reasons stated by the judge as modified by my colleagues, I agree that the Respondent violated Sec. 8(a)(3) of the Act by discharging employee Donald Wickham.

[30] Although Pablo had been unable to substantiate Sterling's allegations in July regarding Project Manager Thario's behavior, Pablo later learned that Thario has admitted engaging in inappropriate conduct with another female officer. Thario was discharged in August, and Armstrong became project manager in October.

show on November 9. Armstrong told Sterling that Operations Manager Ed Martini had wanted to fire Sterling for missing her shift, but that he (Armstrong) had talked Martini out of it. Sterling checked the schedule and saw that her name had been penciled in for November 9.

Sterling protested to Human Resources Manager Kercher that she did not show up or call in on November 9 because she believed her November 9 overtime shift had been canceled. Kercher met with Martini, Armstrong, Eggleston, and Lieutenant Danny Rice. Armstrong defended the final warning on the basis that Sterling was no-call/no-show. Eggleston said he merely followed Armstrong's order to issue the final warning. Rice told Kercher about the note on the whiteboard stating that all overtime was canceled, and he added that all the names of employees who had signed up for overtime on the whiteboard had been erased. Kercher decided that there had been a misunderstanding, and she reduced the final warning first to a written warning and then to an oral warning.

The judge found that the Respondent conceded both that Sterling engaged in protected concerted activity and that the Respondent knew that Sterling engaged in protected concerted activity.[31] As evidence that the Respondent harbored animus against Sterling's protected concerted activity, the judge relied on two sets of facts: (i) evidence that two other employees had received either an oral or written warning for a first unexcused absence—lesser forms of discipline than the final warning Sterling initially received—and that a third employee had received a final written warning for three consecutive unexcused absences, and (ii) Martini's anger at Sterling and the fact that (quoting from the judge's decision) "Respondent has presented no evidence as to why Martini would be mad at her other than for her protected concerted activity." My colleagues add a third fact: the Respondent's November 1 receipt of a copy of Sterling's "right to sue" letter from the EEOC.

For the following reasons, I believe the evidence that the judge and my colleagues rely on is insufficient to sustain the General Counsel's burden to prove that Sterling's protected concerted activity was a motivating factor in her discipline.[32]

First, the Respondent concedes that Sterling engaged in protected concerted activity, and I believe she did. However, the *only* evidence that Sterling engaged in protected concerted activity is evidence that Sterling and Banuelos collaborated on Sterling's notes for a letter she intended to send to the EEOC.[33] After that, Sterling's activities were strictly individual.[34]

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[31] The Respondent did not except to these findings. However, to establish that Sterling's protected concerted activity was a motivating factor in her discipline, the General Counsel had the burden to prove, among other things, that the Respondent "knew of the concerted nature of the employee's activity." *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Even if the Respondent was aware of certain activity that was, in fact, concerted, this does not establish that the Respondent was aware of what *made* that activity concerted, i.e., the concerted nature of that activity. For the reasons discussed below, I do not believe the evidence supports a finding that the Respondent was aware of the concerted nature of Sterling's activity.

[32] *Wright Line*, 251 NLRB 1083, 1089 (1980) (subsequent history omitted).

[33] I believe Sterling's and Banuelos' collaboration on Sterling's notes constituted concerted activity. Their joint work on those notes was not "mere talk," *Mushroom Transportation Corp. v. NLRB*, 330 F.2d at 685, but was rather, in itself, concerted activity. See *Meyers Industries*, 268 NLRB at 497 ("In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."). Whether those meetings constituted concerted activity for the purpose of *mutual* aid or protection perhaps presents a closer question, since the contemplated EEOC letter/charge was Sterling's alone. However, Banuelos was also an object of Thario's unwelcome advances. If Sterling were successful in her efforts to stop Thario's behavior, Banuelos stood to benefit as well. Accordingly, I believe that when Sterling and Banuelos collaborated on Sterling's notes for Sterling's EEOC charge, they were engaged in concerted activity for the purpose of mutual aid or protection, which is protected by Sec. 7 of the Act.

I do not believe, however, that Sterling's conversation with Taresh qualifies as concerted activity. Sterling told Taresh about Thario's behavior, and Taresh encouraged Sterling to get legal counsel and talk to the EEOC. "Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity . . . ." *Mushroom Transportation*, supra. Sterling and Taresh engaged in "mere talk" that did not "look[] toward group action." Rather, Taresh advised Sterling "as to what [she] could or should do without involving fellow workers or union representation to protect or improve [her] own status or working position," id.—namely, to get legal counsel and talk to the EEOC. In contrast, Sterling and Banuelos engaged in more than "mere talk": they worked together on Sterling's notes for an EEOC charge.

[34] Sterling met with Kercher by herself, for herself. She told Kercher about Thario's behavior toward herself. She might have mentioned that she had spoken about Thario with Banuelos, since in a second meeting with Kercher, Sterling referred to the fact that Banuelos knew about Sterling's experiences with Thario, and she did so in a manner that suggested Sterling had previously disclosed that fact to Kercher. However, there is no evidence that Sterling told Kercher that Banuelos was also experiencing unwanted advances from Thario, and in particular, *there is no evidence that Sterling told Kercher that she and Banuelos had worked concertedly on Sterling's notes towards a potential EEOC charge*.

Next, Sterling met with Pablo—again, by herself, and for herself. Sterling mentioned to Pablo that she had shared her concerns about Thario with Banuelos, but there is no evidence she told Pablo that Ba-

Second, there is no evidence that either Martini or Armstrong—the two managers who were responsible for Sterling's initial discipline (before it was reduced to an oral warning by Kercher)—knew that Sterling had engaged in protected concerted activity. Armstrong was working on an entirely different contract at the time of the relevant events. As for Martini, the only evidence the General Counsel relies on to establish that Martini knew of Sterling's protected concerted activity is an email Martini was copied on, but that email would not have informed Martini that Sterling had engaged in protected concerted activity.[35]

Third, Pablo (at least) knew that Sterling had filed a charge with the EEOC, having been copied on the "right to sue" letter by the Legal Department. As stated above (supra fn. 28), Sterling filed the EEOC charge by herself, for herself. But even assuming that the filing of the EEOC charge was concerted activity,[36] the General Counsel must prove that the Respondent *knew* it was concerted,[37] and there is no evidence that anyone in the Respondent's supervisory or managerial ranks knew that the filing of the EEOC charge was concerted. If the filing of the charge was concerted, the basis of that finding would be that the charge grew out of Sterling's and Banuelos' collaboration on Sterling's pre-charge notes. See supra fn. 36. Accordingly, to establish that the Respondent was aware of the concerted nature of the EEOC charge filing (assuming that act *was* concerted), the General Counsel would have to show that Sterling or Banuelos disclosed to *some* supervisor or manager the fact that would make the filing of the charge concerted (assuming it was)—namely, that Sterling and Banuelos had collaborated on Sterling's precharge notes. As explained above, however, there is no evidence that Sterling disclosed to *any* manager or supervisor that she and Banuelos had worked together concertedly on Sterling's notes for a potential EEOC charge, see supra fn. 34, and there is also no evidence that Banuelos disclosed this fact to a manager or supervisor. Based on what Sterling told Kercher and Pablo, those two managers would have known that Sterling had spoken to Banuelos about Thario's behavior, period. That is insufficient to establish knowledge of concerted activity without evidence that Kercher, Pablo, or some other manager or supervisor knew that Sterling and Banuelos had engaged in more than "mere talk"—i.e., that they had engaged in talk that "look[ed] toward group action," *Mushroom Transportation*, supra—or alternatively, that Sterling and Banuelos had actually undertaken group action by collaborating in the drafting of Sterling's precharge notes. There is no such evidence.

Fourth, while there is abundant evidence that the Respondent harbored animus toward the security officers' *union* activities, there is no evidence that the Union ever came up in connection with Sterling's discussions with Banuelos regarding Thario, and there is no evidence that

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nuelos was also experiencing unwanted advances from Thario, and as with Kercher, *there is no evidence that Sterling told Pablo that she and Banuelos had worked concertedly on Sterling's notes towards a potential EEOC charge*. To the contrary, after mentioning that she had shared her concerns with Banuelos, Sterling told Pablo that she wanted to keep the matter confidential. (Sterling said the same thing to Kercher in their second meeting.)

Next, Sterling called the Respondent's hotline and said that Thario was sexually harassing her. There is no evidence she mentioned Banuelos. Finally, Sterling filed the EEOC charge by herself, for herself.

Contrary to the judge and the majority, Sterling's activities by herself, for herself, do not constitute *concerted* activities for the purpose of *mutual* aid or protection.

[35] The email, which is contained in the record as General Counsel's Exhibit 14, is from Pablo to Thario, copying Martini and Kercher. Pablo's email was preceded by an earlier email from Thario to Pablo, which is also shown in GC Exh. 14. Both emails are dated July 15, 2010. Thario's email has no connection with sexual harassment allegations. In it, Thario assures Pablo that if he were permitted to rehire two individuals, he would make sure they promptly enroll in weapons class. (One of the two individuals was Banuelos; I am unable to determine when she left the Respondent's employ.) Pablo responded: "OK, inform them both that they will be reassigned back to the Light Rail [i.e., East Valley Metro Rail]. Also, while I'm doing my investigations with the Hotline complaints submitted by both Sterling and Banuelos, please ensure they do not work the same shifts." Thus, Martini—who was copied on both emails—would know from Pablo's email that Sterling and Banuelos had each submitted a hotline complaint. However, Pablo's email did not inform Martini of the *subject* of those hotline complaints. And even if Martini knew what the complaints were about—there is no evidence that he did know—Pablo's email did not inform Martini that Sterling and Banuelos had spoken with each other about Thario's behavior. And specifically, Martini was not informed by Pablo's email that Sterling and Banuelos had collaborated on Sterling's notes for an EEOC charge. Indeed, as discussed above, there is no evidence that *Pablo* was aware of Sterling's and Banuelos' collaboration on those notes.

[36] Although Sterling filed the EEOC charge individually, an argument could be made that the filing of the charge was nonetheless concerted activity on the basis that it grew out of the shared concerns of Sterling and Banuelos about Thario's conduct and their resulting collaboration on Sterling's notes for an EEOC charge. See, e.g., *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992) ("We will find that individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [the] logical outgrowth of the concerns expressed by the group.") I express no views as to whether the filing by Sterling of her EEOC charge was or was not concerted activity. As I explain in the text, even if that act was concerted, none of the Respondent's managers or supervisors were aware of what made it concerted (assuming it was)—namely, Sterling's and Banuelos' prior collaboration on the pre-charge notes.

[37] "Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, *the employer knew of the concerted nature of the employee's activity*, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity." *Meyers I*, 268 NLRB at 497 (emphasis added).

the Respondent was hostile to protected concerted activities *other than* union activities.

Fifth, several months elapsed from the time Sterling collaborated with Banuelos on notes for a potential EEOC charge (June 2010) until the time she was disciplined (November 2010). That lapse of time further undermines any possible inference of a connection between Sterling's protected concerted activity and her discipline. My colleagues say that the Respondent's receipt of a copy of Sterling's "right to sue" letter from the EEOC on November 1 bridged the temporal gap. Preliminarily, there is no evidence that either Martini or Armstrong—who were involved in Sterling's discipline—was aware of the "right to sue" letter. But even assuming Sterling's discipline was motivated in part by the Respondent's discovery or reminder that Sterling had filed an EEOC charge, again, Sterling filed that charge by herself, for herself, and there is no evidence that any manager or supervisor was aware of what made the filing of the charge concerted activity (assuming for argument's sake that it was)—namely, Sterling's and Banuelos' prior collaboration in preparing Sterling's pre-charge notes.

Finally, I believe the judge's rationale, upon which my colleagues rely, does not withstand scrutiny. The judge cited evidence that a few employees were treated differently than Sterling for a first-time no-call/no-show. Depending on the circumstances of the particular case, disparate treatment may be probative of an unlawful motive. But it also may result from perfectly innocent sources, such as the heat of the moment, haste, and carelessness. That appears to have been the case here. On November 10, the day after Sterling's no-call/no-show, Armstrong ordered Eggleston to give Sterling a final warning. Armstrong's haste is best explained by the fact that Martini—Armstrong's superior—wanted to discharge Sterling immediately. Armstrong also apparently issued the final warning without consulting with Human Resources Manager Kercher. Once Kercher became involved, the discipline was reduced to an oral warning.

Additionally, the judge relied on the Respondent's failure to present evidence "as to why Martini would be mad at [Sterling] other than for her protected concerted activity." But we are talking here about the *General Counsel's* initial case under *Wright Line*, and the Respondent had no burden to present any such evidence. Moreover, there is no evidence that on November 10, either Martini or Armstrong knew why Sterling had not shown up on November 9—i.e., because she believed her overtime shift had been canceled. So far as the evidence shows, there is every reason to think that at the time Martini told Armstrong that he wanted Sterling discharged, Martini reasonably believed that Sterling had been no-call/no-show on November 9. That in itself would reasonably account for Martini's anger. Moreover, even assuming Martini reacted the way he did because he knew about Sterling's EEOC charge and was angry that Sterling had filed it, (i) Sterling filed that charge by herself, for herself; and (ii) even assuming the EEOC charge was concerted activity on the basis that it grew out of Sterling's earlier collaboration with Banuelos on the pre-charge notes, there is no evidence—as explained above—that either Martini, Armstrong, Kercher or any other manager or supervisor knew about that collaboration, and thus there is no evidence that the Respondent was aware of the concerted nature of the EEOC charge filing (assuming it was concerted).

In sum, I would find that the General Counsel failed to prove that Sterling's protected concerted activity was a motivating factor in the discipline she received, and I would dismiss the allegation that the Respondent violated Section 8(a)(1) when it disciplined Sterling.

3. The remaining unfair labor practice allegations

For the reasons stated by the judge and my colleagues, I agree that the Respondent violated Section 8(a)(1) of the Act when it threatened Banuelos that at the expiration of the Respondent's contract with East Valley Metro Light Rail, the Respondent would not rehire anyone who was in favor of the Union.[38] For the same reasons, I also agree that the Respondent violated Section 8(a)(1) of the Act when it instructed employee Donald Wickham, under threat of discipline, not to talk to Lieutenant Danny Rice, who was suspended and demoted for engaging in union activity. And I agree, for the reasons stated by my colleagues, that the Respondent violated Section 8(a)(1) of the Act when Lieutenant Clemons told a group of employees that the Union should not be discussed at work,[39]

[38] The judge additionally found that the statement made to Banuelos created the impression of surveillance. I find it unnecessary to reach or pass on this finding. Since I have found that the Respondent, by Supervisor Armstrong, created the impression that employee Nagler's union activities were under surveillance, an additional finding of the same type of violation with regard to employee Banuelos would be cumulative, i.e., it would not affect the remedy.

[39] See supra fn. 4. The Respondent maintains a rule in its Security Officer Handbook stating that security officers must "[e]ngage in no unnecessary conversations." The judge found that when Clemons told employees that the Union should not be discussed at work, he was applying the "no unnecessary conversations" rule to restrict the exercise of employees' Sec. 7 rights, and the judge therefore concluded that the "no unnecessary conversations" rule was unlawful under prong three of the *Lutheran Heritage* standard. See 343 NLRB at 647 (stating that a rule is unlawful if it "has been applied to restrict the exercise of Section 7 rights"). I agree with my colleagues that the judge erred in this regard. As my colleagues state, there is no credited evidence that Clemons mentioned the "no unnecessary conversations" rule or otherwise indicated that the rule prohibited employees from speaking about the Union at work. Finally, there is no issue before the Board as to

and also when Clemons told Taresh to be careful talking about the Union because it should not be discussed at work. Further, I join my colleagues in adopting the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by promulgating or reinforcing an overbroad confidentiality rule during Wickham's unemployment compensation hearing. Finally, I agree with my colleagues, for the reasons they state, that the Respondent did not violate Section 8(a)(1) when Supervisor Armstrong told Sterling that he had an "issue" with her because she had "called off sick" on three occasions when she had been scheduled to work overtime.

CONCLUSION

Accordingly, as to the issues and for the reasons discussed above, I respectfully dissent in part from my colleagues' decision, and I concur in part with other aspects of their decision.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain in employee handbooks or policy statements rules that prohibit employees from: (i) wearing "insignia, emblems, buttons, or items other than those issued by the company" without permission; (ii) discussing "wages and salary information"; (iii) commenting on "work related matters without express permission of the Legal Department"; (iv) "giv[ing] or mak[ing] public statements about the activities or policies of the company" without written permission; and (v) placing on any social networking site without express permission any "photographs, images, and videos of G4S employees in uniform (whether yourself or a colleague) or at a G4S place of work."

WE WILL NOT instruct employees, under threat of discharge, not to talk to employees or supervisors about disciplinary matters.

WE WILL NOT create the impression that we are engaged in surveillance of our employees' union or other protected concerted activities.

WE WILL NOT threaten employees with job loss for engaging in union or other protected concerted activity.

WE WILL NOT discipline employees for engaging in union or other protected concerted activity.

WE WILL NOT discharge employees for engaging in union or other protected concerted activity.

WE WILL NOT prohibit employees from talking about the Union while allowing other nonwork related discussions by employees.

WE WILL NOT threaten employees with unspecified reprisal for talking about the Union at work.

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

WE WILL rescind the unlawful rules that prohibit employees from (i) wearing "insignia, emblems, buttons, or items other than those issued by the company" without permission; (ii) discussing "wages and salary information"; (iii) commenting on "work related matters without express permission of the Legal Department"; (iv) "giv[ing] or mak[ing] public statements about the activities or policies of the company" without written permission; and (v) placing on any social networking site without express permission any "photographs, images, and videos of G4S employees in uniform (whether yourself or a colleague) or at a G4S place of work."

WE WILL furnish all employees nationwide with inserts for the current employee handbook and Social Networking Policy that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute to all employees nationwide a revised handbook and Social Networking Policy that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

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

WE WILL make whole employee Donald Wickham for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the amended remedy section of this decision,

whether the Respondent's "no unnecessary conversations" rule is unlawful on the basis that employees would "reasonably construe" the rule to prohibit Sec. 7 activity. (If there were, I would decide it under the balancing test that I described in *William Beaumont Hospital*, supra).

plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Donald Wickham for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

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

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline of employee Debra Sterling and within 3 days thereafter, notify her in writing that this has been done and that the unlawful actions will not be used against her in any way.

G4S SECURE SOLUTIONS (USA) INC.

The Board's decision can be found at www.nlrb.gov/case/28–CA–023380 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain in employee handbooks or policy statements rules that prohibit employees from (i) wearing "insignia, emblems, buttons, or items other than those issued by the company" without permission; (ii) discussing "wages and salary information"; (iii) commenting on "work related matters without express permission of the Legal Department"; (iv) "giv[ing] or mak[ing] public statements about the activities or policies of the company" without written permission; and (v) placing on any social networking site without express permission any "photographs, images, and videos of G4S employees in uniform (whether yourself or a colleague) or at a G4S place of work."

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

WE WILL rescind the unlawful rules that prohibit employees from (i) wearing "insignia, emblems, buttons, or items other than those issued by the company" without permission; (ii) discussing "wages and salary information"; (iii) commenting on "work related matters without express permission of the Legal Department"; (iv) "giv[ing] or mak[ing] public statements about the activities or policies of the company" without written permission; and (v) placing on any social networking site without express permission any "photographs, images, and videos of G4S employees in uniform (whether yourself or a colleague) or at a G4S place of work."

WE WILL furnish all employees nationwide with inserts for the current employee handbook and Social Networking Policy that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute to all employees nationwide a revised handbook and Social Networking Policy that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

G4S SECURE SOLUTIONS (USA) INC

The Board's decision can be found at www.nlrb.gov/case/28–CA–023380 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, D.C. 20570, or by calling (202) 273–1940.

Sandra L. Lyons, Esq. and *Christopher Doyle, Esq.*, for the General Counsel.
John D. McLachan, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Phoenix, Arizona, on October 18–20, 2011. The International Union, Security, Police and Fire Professionals of American (SPFPA or the Union) filed the charge in February 24, 2011. The General Counsel issued a complaint and notice of hearing on April 29, 2011. Respondent filed a timely answer on May 13, 2011, denying all material allegations in the complaint.

The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by (1) maintaining and promulgating an overly-broad confidentiality rule; (2) maintaining and promulgating a rule that employees must engage in no unnecessary conversations; (3) maintaining and promulgating a rule that prohibits employees from talking about their discipline; (4) maintaining and promulgating a rule prohibiting employees from discussing the Union; (5) threatening employees with unspecified reprisals for speaking about the Union; (6) threatening employees with unspecified reprisals for union and other protected concerted activities; (7) creating the impression that union activities were under surveillance; (8) threatening to not re-hire employees who supported the Union; and (9) disciplining employee Debra Sterling for her protected concerted activities. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by: (1) transferring employee Donald Rice to a different location and isolating him; and (2) suspending and subsequently discharging employee Donald Wickham. At the hearing, the General Counsel moved to amend the complaint to include an allegation that Respondent violated the Act by maintaining an overly-broad social networking policy. I granted the motion to amend because the allegation is closely related to the allegations in the charge and the original complaint, *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994).

On the entire record, including my observation of the witnesses' demeanor, and after considering the General Counsel and Respondent's briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Florida corporation, with places of business throughout the country, including the Phoenix, Arizona area, provides security services to clients in a variety of industries. During the past 12 months and at all material times it derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of Arizona. Respondent admits, and I find, that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find, and it is uncontested, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background and Respondent's Operations

Respondent provides security services throughout the country.[1] On a national level, its services include permanent manned security (both armed and unarmed), disaster response and emergency services, control room monitoring, special event security, security patrols, reception/concierge service, emergency medical technician (EMT) service, ambassador service, and transportation service. (GC Exh. 2; Tr. 34–35.)[2]

Larry Pablo is the general manager of Respondent's Phoenix area office, and has held that position since June 2008. In this capacity, he oversees roughly 60–65 individual jobsites. His duties include oversight of existing accounts, as well as acquisition of new clients. Pablo's direct reports are the operations manager, human resources manager, manager of business development, and training manager. Pablo is also second or third-line supervisor to many other managers and supervisors. (Tr. 22–23.) Respondent's clients in the Phoenix area are varied. For example, Respondent provides control room monitoring for the Bank of America and Target headquarters buildings. Respondent also provides security services for Cricket retail stores and U.S. Immigration and Customs Enforcement (ICE), among other clients. (Tr. 25–26, 31–33.)

1. The Metro Light Rail

Many of the issues in this case involve Respondent's contracts with the city of Tempe and the East Valley Metro Light Rail (Metro Light Rail), a mass transit system that runs from Mesa to Phoenix. Under these contracts, Respondent provides security services, detailed more thoroughly below, for the parts of the Metro Light Rail that lie within the cities of Mesa and Tempe. (Tr. 37–38.) To ride the Metro Light Rail, passengers purchase tickets from machines on platforms at the various stops. Unless a security officer is checking to see if passengers have tickets, there is no mechanism to prevent a passenger from boarding the train without a ticket. (Tr. 324.)

There are three park & rides, referred to as "kiosks," that Respondent's Metro Light Rail contract services. They are at (1) Sycamore and Main in Mesa; (2) McClintock and Apache in Tempe (McClintock kiosk); and (3) Apache and the 101 Price Freeway in Tempe (Price & Apache kiosk). Employees report to work and sign in at the McClintock kiosk, which is located within a parking garage.

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[1] Respondent was previously called Wackenhut, and some documents in the record refer to this prior name.

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief.

A project manager, assigned the rank of major, oversees security for the Metro Light Rail. The project manager, who reports to the operations manager, ensures proper scheduling and maintains a relationship with the client to make sure the client's needs are being met.[3] The project manager directly supervises three shift supervisors who are referred to as lieutenants. (Tr. 290.) Lieutenants oversee the jobsites in the project manager's absence, and they directly supervise the security officers. They can take disciplinary actions, other than suspensions and terminations, against their subordinate officers. There is generally one lieutenant per shift. (Tr. 44–45, 311–313.) There are three shifts: day, swing, and night. (Tr. 24.)

During the time period at issue, security officers could work one of four assignments, with some overlap among them: patrol officer, fare inspector, kiosk officer, or passenger assistant agent (PAA).[4] Patrol officers ride in vehicles along the rail routes to ensure safety and security. They also monitor electrical boxes to make sure nobody has tampered with them. Fare inspectors ride on the trains to ensure passengers have paid. If an individual who has not paid his or her fare is riding the light rail, fare inspectors issue citations but do not collect fines.[5] If a passenger refuses to get off the light rail, the officers are to call the police. They can only forcibly remove a passenger if he or she is threatening physical harm. Until the fall of 2011, kiosk officers staffed each of the kiosks. They were responsible for patrolling the park-n-ride, and monitoring the cameras in the kiosks. During the relevant time period, they were expected to be on the platform once an hour, for roughly 3 hours of a 10-hour shift. (Tr. 44–45, 294, 302–308.) Passenger assistant agents (PAAs) work in the control room at the McClintock kiosk. They do no have contact with passengers or other members of the general public. (Tr. 36–37, 423.) All of the security officers on the Metro Light Rail are unarmed, and they do not have arrest authority. (Tr. 44–45, 308.)

2. Security officer uniforms

Metro Light Rail officers are uniformed. The uniform requirement originated from the city of Tempe's June 10, 2008 Request for Proposal (RFP) for security services. Officers wear white button-down shirts with name tags and arm patches identifying them as Metro security, East Valley Sector. They wear dark pants with a duty belt to hold pepper spray, handcuffs, and radios. They also wear hats with pins depicting the Metro Light Rail logo, and black shoes. Majors wear gold leaf pins, roughly the size of a quarter, on their shirt lapels. (Tr. 310.) The RFP directs that an individual wearing anything other than the items specified in therein will be considered out of uniform and subject to disciplinary action. (Tr. 71–73; GC Exhs. 10–12; R. Exh. 1.) According to Pablo, permission from Respondent's corporate office is required if employees want to wear pins or other insignia that are not part of a prescribed uniform. (Tr. 75.)

3. National corporate hotline

Respondent maintains a national hotline system that allows employees to call a centralized 800 number to voice workplace complaints. The hotline employees receive the complaint, and then forward it to the appropriate general manager for resolution, as long as the general manager is not named in the complaint. The general manager or his/her designee investigates the allegations in the complaint, and reports his/her findings back to the referring hotline employee. Corporate headquarters, through the hotline staff, determines the final resolution of the complaint and conveys it to the complaining party and local management. An employee may make an anonymous complaint, or ask that a complaint remain confidential. (Tr. 120–122; GC Exh. 32.)

4. Disciplinary system and offenses that are grounds for immediate termination

Respondent utilizes a progressive discipline system. Its policy manual, standards of employee behavior (Behavior Standards Manual) applies to all employees, and describes the forms of discipline Respondent uses in progressive order: (1) oral reprimand, (2) written reprimand, (3) suspension, and (4) dismissal. The discipline system is reiterated in the security officer handbook, discussed more fully below. (GC Exhs. 7, 15.) Employees in the Phoenix area sometimes receive a "final warning" but this is not listed in the manual. (Tr. 65.)

Respondent's Behavior Standards Manual sets for the following noncomprehensive bullet-point list of infractions that are grounds for immediate dismissal:

- Refusal to work
- Extreme insubordination
- Fighting on the job
- Intoxication on the job or reporting to work un an intoxicated state (this applies to alcohol, drugs, narcotics, or any substance which alters perception/awareness and which inhibits normal human response)
- Theft
- Willful destruction of client and/or G4S Secure Solutions (USA) property
- Unauthorized or careless use of firearms or other weapons
- Malicious harassment of fellow employees, client employees, or members of the public
- "Horseplay" or any other activity with potentially serious consequences such as personal injury or property damage
- Any other acts which, by their nature and impact, severely limit the employee's ability to perform the essential elements of the job

(GC Exh. 7.) The security officer handbook sets forth a more comprehensive numbered list of prohibited conduct that may result in immediate dismissal, including but not limited to:

1. Refusal to work

[3] The project manager was Robert Thario until his termination in August 2010. The position was vacant until Jason Armstrong assumed it in October 2010.

[4] The PAA qualification requirements are not as stringent as those for other security officers. (Tr. 39.) As of late September/early October 2011, there are no longer kiosk officers because the customer wanted more officers riding the rails to do fare inspection. (Tr. 293.)

[5] Fare inspectors issue about 100–120 citations per month. (Tr. 329.)

2. Insubordination or other disrespectful conduct
3. Fighting or provoking a fight during working hours or on client or company property
4. Intoxication on the job or reporting to work in an impaired state (This applies to alcohol, drugs or any substance that alters perception or awareness and that inhibits normal human response.)
5. Theft, dishonesty, fraud or bribery
6. Removing or borrowing client or company property without prior authorization
7. Willful or reckless destruction of client or company property
8. Unauthorized or careless use of firearms or other weapons
9. Malicious harassment (including sexual or racial) of fellow employees, client employees or members of the public
10. Horseplay or other activity with potentially serious consequences such as personal injury or property damage
11. Unexcused no call, no show absence(s)
12. Job performance that is unacceptable
13. Conviction of or pleading guilty to any criminal act or engaging in criminal conduct
14. Falsification or fraudulent alteration of any company or client-provided document or record
15. Sleeping or gross inattentiveness while on duty
16. Failure to report immediately an arrest or conviction to your supervisor
17. Aiding a competitor or any other act that intends to inflict injury on the company or our clients
18. Unauthorized absence from assigned work area
19. Unauthorized use of telephone, cell phone, mail system, computer or other company or client-provided equipment
20. Any other acts which, by their nature and impact, severely limit the employee's ability to perform the essential elements of the job
21. Any other reason that the company feels, in its sole discretion, warrants termination

(GC Exh. 16, p. 32 of handbook.) Pablo makes all termination and suspension decisions for the Phoenix area office. (Tr. 60–61.)

B. Rules and Policies

1. Security officer handbook

Respondent maintains a security officer handbook (handbook) that is distributed to its security officers nationwide.[6] (GC Exh. 15.) Each security officer receives a handbook upon starting work. The handbook was most recently revised in January 2011.[7] Each time it is revised, officers must sign to indicate they received a copy of revised version. (Tr. 134–136.)

a. Professional image handbook provision

On pages 26–27, the handbook sets forth its "Professional Image" rule, in pertinent part, as follows:

Professional Image

> You must be neat and clean while on duty. You must wear only the complete uniform as prescribed by your supervisor. Any uniformed security personnel who become pregnant will be provided with appropriate uniform clothing to maintain a professional appearance. The area or branch office will be responsible for acquiring maternity pants and larger shirts through the Purchasing Department.
>
> Due to the public nature of our business and the business necessity that uniformed personnel represent figures of authority, we have established the following rules for personal appearance.
>
> . . .
>
> - No insignias, emblems, buttons, or items other than those issued by the company may be worn on the uniform without expressed permission.

(GC Exh. 15.)

Robert Inman is the business agent for the International Union Security Police and Fire (SPFPA), Locals 822, 827, 829, and 830. The SPFPA represents security guards at various facilities. Security guards at the Palos Verde Nuclear Facility in Tonopah, Arizona, wear a union patch that has a diameter of 3 inches. (Tr. 447; GC Exh. 53.) Inman has not received reports that the public failed to show respect or follow the directives of these security guards because of the union patch. (Tr. 447.) Security guards at other facilities wear union pins that are approximately 1 by 1 inch. (GC Exh. 52.) The type of pin or patch the guards wear is a matter negotiated between the companies and the Union. Inman believed that some of the companies where union members worked did not authorize its employers to wear any pin, patch, or other union insignia. (Tr. 449–450.)

b. "No Unnecessary Conversations" handbook provision

The handbook contains a provision stating, in relevant part, that security personnel must "[e]ngage in no unnecessary conversations." (GC Exh. 15.) The provision is on page 29 of the manual, in a section entitled "Conduct While on Duty," subsection "Enforcing Security Rules." It is part of a bullet-point list that follows the lead-in phrase "*Security personnel must*:". The list includes a variety of both required and impermissible items. For example, there are bullet items requiring security officers to be awake and alert, to perform their assigned duties, and to answer the phone and take messages. In addition to unnecessary conversations, listed prohibitions include accepting gifts or gratuities, using equipment for unauthorized purposes, borrowing money from coworkers, arguing controversial subjects, and removing, rearranging, or reading materials left on desks or cabinets. (GC Exh. 15.)

c. Handbook confidentiality provision

Page 31 of the handbook depicts the confidentiality provision for the security officers. It provides:

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[6] In addition to rules and policies that apply companywide, the Metro Light Rail employees also have so-called "Post Orders" that set forth their specific duties and responsibilities. (GC Exh. 9.)

[7] A copy of the March 2008 version of the handbook appears at GC Exh. 16.

CONFIDENTIAL MATERIAL

> The protection of confidential information, trade secrets, and company-specific operating procedures is vital to the interests and success of G4S Secure Solutions USA. Additionally, in the line of duty, you may come into contact with our customers' confidential information.
>
> Employees who improperly use, reveal, copy, disclose or destroy G4S or client information will be subject to disciplinary action, up to and including termination of employment. They may also be subject to legal action even if they do not actually benefit from the disclosure. Such information includes any information considered proprietary by G4S or the client organization.
>
> Do not give interviews or make public statements about the activities or policies of the company or our client without written permission from G4S Secure Solutions USA.

(GC Exh. 15.)

The handbook in place prior to January 2011 specifically included "wage and salary information" as an example of confidential material that could not be disclosed. (GC Exh. 16.)

2. Social networking policy

Respondent maintains a social networking policy. The current version is effective as of November 22, 2010. The contested provisions state:

- Photographs, images and videos of G4S employees in uniform, (whether yourself or a colleague) or at a G4S place of work, must not be placed on any social networking site, unless express permission has been given by G4S Secure Solutions (USA) Inc.
- Do not comment on work-related legal matters without express permission of the Legal Department.

(GC Exh. 13.)

C. Debra Sterling Alleged Protected Concerted Activity and Discipline

1. Background and protected concerted activity

Debra Sterling has been an officer on the Metro Light Rail since approximately November 2009. (Tr. 494.) During the spring and summer of 2010, her direct supervisor was Lieutenant Danny Rice and the project manager was Major Robert Thario. In March 2010, Sterling perceived that Thario began talking to her "very disrespectful with sexual comments." Examples of his comments were, "I bet you're very potent" and a reference to "deep throat" when Sterling was eating a tootsiepop. Sterling also stated that Thario had "smacked her backside" with a roll of paper. (Tr. 496.)

Asucena Banuelos[8] works for Respondent in Anaheim, California. She was previously assigned to the Metro Light Rail account, and worked with Sterling on the swing shift at the McClintock kiosk during the early part of summer 2010. In June 2010, Sterling and Banuelos discussed that they both felt Thario mistreated them and sexually harassed them. According to Banuelos, she and Sterling discussed Thario's treatment of them on "pretty much" a daily basis. (Tr. 426, 497–498.) Sterling and Banuelos met for lunch and coffee, and they went over notes Sterling had made to draft a letter to the Equal Employment Opportunity Commission (EEOC). Banuelos assisted Sterling, encouraged her to go to the EEOC and file a hotline complaint, and told her that she intended to do the same.[9] (Tr. 428, 498–500.)

In June 2010, Sterling told Officer Donald Wickham she felt harassed by Thario. She described sexual innuendos and told Wickham that Thario had twice shown up to her house unannounced. Wickham encouraged Sterling to call the company hotline. (Tr. 385.) Sterling also shared her concerns about Thario with Officer Carol Taresh, who encouraged her to get legal counsel and talk to the EEOC. (Tr. 555.)

On June 30, 2010, Sterling visited Human Resources Manager Janelle Kercher to complain about Thario's behavior. Sterling gave Kercher examples of how she believed Thario was sexually harassing her. Kercher told Sterling she was not the only one who had problems with Thario, and instructed Sterling to put her complaints in writing. Later that day, Sterling sent Kercher an email detailing her problems with Thario. She stated that Thario had been lewd and disrespectful toward her, and recounted the comments, set forth above, that he had made. She also referenced that Thario had "smacked her backside" with a roll of papers and threatened to fire her without saying why. Sterling reported that Thario had come to her house uninvited, failed to issue her OC spray, and treated her poorly after she sustained a dog bite while on duty. She concluded the email by stating that, while meaning no disrespect, she felt she must file a complaint with the EEOC. (Tr. 190–199, 496–500; GC Exh. 30.)

Kercher showed Sterling's email to Pablo, and instructed Sterling to come to meet with her and Pablo. (Tr. 84–86, 192.) Sterling and Pablo met when he returned from a trip, and she told Pablo about her problems with Thario. She told him that she had shared her concerns with Banuelos, but that she wanted to keep the matter confidential. Pablo told Sterling not to worry and that her job was safe. He offered to move her to another detail, and she declined.[10] (Tr. 502–503.)

Sterling filed a complaint with Respondent's hotline on July 9, 2010. She alleged that Thario was sexually harassing her, as described above. She further stated that she had notified Pablo, and that no action had been taken. Donna Holder, a manager in Respondent's corporate human resources, took the complaint and referred it to Pablo for investigation. Pablo interviewed Thario, who denied making the sexual comments or engaging in any inappropriate behavior. In Pablo's written response to Holder, he reported the only thing he could substantiate was that Sterling had commented to Thario that she wished he wasn't married. Pablo further noted that Thario said very posi-

[8] Banuelos is mistakenly referred to in the transcript as "Vanuelos."

[9] Banuelos filed a complaint with the EEOC toward the end of June, 2010, and a hotline complaint on June 29, 2010. Her hotline complaint set forth how she felt Thario was mistreating her, and expressed concern for Sterling. (Tr. 428.)

[10] Sterling believes Respondent had investigators follow her after this meeting. (Tr. 503, 524.) She also believes Clemons hides between cars and watches her. (Tr. 527.)

tive things about Sterling's job performance. He concluded his report with a final paragraph labeled, "NOTE," stating that Thario was reluctant to discipline Sterling for unauthorized parking in a handicap spot for fear it would be perceived as retaliation. Pablo informed Thario he would discipline Sterling for this infraction.[11] (R. Exh. 11.)

The same day Sterling filed her hotline complaint, July 9, 2010, Banuelos met with Pablo about her own hotline complaint. (Tr. 428–429.) The complaint involved issues with Thario, and also an issue with Respondent changing its standards to require greater law enforcement experience for officers on the Metro Light Rail. In a July 15 email to Pablo, Thario wrote that he had spoken with Jay Harper from the Metro Light Rail, who said that even if Respondent enforces a higher standard now, he did not see why individuals hired under the previous standards should be penalized, particularly if they were doing a good job. Thario concluded by stating if he could rehire Banuelos and Officer Jason Armstrong, he would ensure they were in weapons class by the end of the month.[12] Pablo responded the same day, stating that Banuelos and Armstrong could be assigned back to the light rail, and instructing Thario to have Banuelos and Sterling work different shifts pending his investigation into the hotline complaints each had filed.[13] (GC Exh. 14.) Banuelos was assigned to a different shift than Sterling, and did not work the same shift as her thereafter. (Tr. 428–431.)

Also on July 15, 2010, Sterling filed a charge with the EEOC.[14] (R. Exh. 14.) A week later, on July 22, she sent Kercher a second email expressing her dismay about Pablo's investigation.[15] She stated that she was willing to keep the matter confidential, and explained that the only reason "Susie B"[16] knew about it was because she had encountered her during a vulnerable moment. Sterling expressed her belief that she was being followed around, and that "they" were trying to fire her. She concluded by stating that she had filed an EEOC complaint. (GC Exh. 31.)

During the July/August 2010 time period, Officer Carol Taresh began having problems with Thario. She testified that he would come behind her and rub her shoulders, and he made some comments she perceived as inappropriate. Taresh initially brought her complaints to Kercher, who told her to keep her apprised of any new incidents. (Tr. 555–556.) In the second or third week of August 2010, Rice accidentally left the McClintock kiosk with his work cell phone. He called Thario, who was supervising that night, and told him he was on his way back with it. Taresh answered the phone, and conveyed the message to Thario. He responded, "He must've felt the bulge in his pocket and realized it wasn't from being happy." She wrote a memo on August 20, 2010, recounting this comment and other perceived inappropriate behavior, gave it to Rice, who in turn informed Pablo. (Tr. 455–456, 556–557; GC Exh. 55.) Thario was subsequently terminated. (Tr. 558, 580.) The project manager position was vacant for a couple of months until Jason Armstrong assumed it in October 2010. (Tr. 289–290.)

2. Discipline

Sterling was scheduled to work overtime as a fare inspector on November 9, 2010. A few days before, Lieutenant Timothy Eggleston apologized and told her that he had to cancel all the overtime and redistribute it to part-time employees. The dry-erase board said all overtime was canceled, and Sterling's name did not appear on the typed schedule for November 9.[17] (Tr. 460, 508–509.) Sterling did not show for work on November 9.

The next day, Major Armstrong told Sterling that Operations Manager Ed Martini had wanted to fire her for missing her shift, but he had talked him out of it. Instead, at Armstrong's direction, Lieutenant Eggleston issued Sterling a final warning. (Tr. 509–510; R. Exh. 12.) Sterling had no prior discipline. (Tr. 210.) Sterling looked at the schedule and saw that her name had been penciled in for November 9. (Tr. 511.) She met with Kercher to explain what had happened, and, though the testimony concerning the precise chain of events is somewhat confused, Kercher investigated the complaint. (Tr. 213–214, 217.) Sterling contacted the company hotline, and spoke with Holder on December 2, 2010, alleging that the discipline was retaliation for her prior sexual harassment complaint. (Tr. 512–513; R. Exh. 12.)

Kercher met with Sterling after receiving the hotline complaint. Sterling told Kercher she had signed up for overtime on November 9, but thought it had been canceled. Kercher met with Lieutenants Rice, Eggleston, and Nick Dotter, Operations Manager Martini, and Major Armstrong. Armstrong stated the discipline was written as a final warning because Sterling was a no-call/no-show and it cost hours on the contract. Eggleston stated that he acted under Armstrong's direction. Rice told Kercher that there was a note on the whiteboard where overtime was posted that all overtime was canceled, and the names of the employees who had signed up for overtime were erased. (Tr. 460–462.) Kercher initially reduced the final warning to a written warning on December 9, 2010 (Tr. 213). She changed the discipline to an oral warning on December 17, based on her determination that there had been a misunderstanding. Kercher noted in a December 14 "Memo to File" that Sterling never misses work and is always on time, and therefore a final warn-

[11] Sterling apparently was not disciplined for this alleged infraction.

[12] At this point, Armstrong was a security officer, not a supervisor or manager.

[13] I do not credit Pablo's testimony that he could not recall why he made the decision to separate Sterling and Banuelos. Both women came to him around the same time period with similar complaints about Thario. He was evasive during this testimony and seemed focused on Banuelos' complaint about the credentials rather than any complaint she made about Thario. (Tr. 88.)

[14] The EEOC issued a "right to sue" letter to Sterling, informing her that, after investigation, they were unable to conclude that the information submitted established a violation of the statues they enforce. Sterling filed a suit in U.S. District Court that was still pending at the time of hearing. (Tr. 273; R. Exh. 15.)

[15] The email is a rant of sorts, and touches on many topics, in a confusing manner, which are not directly relevant here.

[16] This is an obvious reference to Susie Banuelos. (Tr. 194.)

[17] Respondent contends that it was Eggleston's view that overtime had been canceled only for patrol officers and not for fare inspectors. Respondent cites to a portion of Kercher's testimony to support this contention, and Kercher's testimony does not purport to rely on what Eggleston told her. (R. Br. 14, citing to Tr. 209.). Eggleston testified, but was not asked about Sterling's discipline.

ing was not justified. (Tr. 316–318; GC Exhs. 34–35; R. Exh. 12.) According to Kercher, Sterling conceded that some type of discipline was appropriate, and she was satisfied with the oral warning. (Tr. 247.) Sterling testified that she did not agree to an oral warning. She believed she should not have been written up at all. (Tr. 516.)

Juan Castro received an oral warning on March 10, 2010, for an unexcused absence, and a written warning on September 22, 2010, for another unexcused absence. (GC Exh. 36.) On April 10, 2010, Keegan McManus received a discipline with the boxes for both oral and written warnings checked for an unexcused absence. (GC Exh. 37.) Carlton Snead received a final warning on April 14, 2010, after failing to call or show for work the prior 3 consecutive days (GC Exh. 38).[18]

D. The Union Organizing Campaign

During the summer of 2010, Sterling talked to Lieutenant Rice and Officers Banuelos, Wickham, and Taresh about bringing in a union because she felt the office was "out of control." In October 2010, Sterling told Wickham that he would be a great choice to start communications with a union. (Tr. 516–518.)

In early October 2010, Wickham called the Union and spoke with Mary Mulvaney. She sent him signup cards, newsletters, and information packets. Wickham received a box of material at his house in early November. He put the box in his truck, took it to work, and distributed the union material to coworkers at the three kiosks.[19] Rice saw the union materials on the counter at the McClintock kiosk and told Wickham they could not stay there. Rice took the remaining materials, put them in his car, and told Wickham to take them home after his shift. (Tr. 382–384, 465.) Wickham's main contact at the Union was Duane Phillips. Wickham and Phillips talked roughly once a week, often to have Phillips answer questions officers had posed to Wickham about the Union. (Tr. 390–391.) The officers used the code name "Mickey Mouse Club" when referring to the Union. They tried to keep the organizing campaign confidential, and spoke of the Union in the hypothetical. (Tr. 482, 558–560.)

Gilberto Robles, a security officer working on the Metro Light Rail, recalled that union discussions started around November 2010. He recalled discussions with Wickham and Rice in the parking structure outside the McClintock kiosk. These usually took place during breaktime. (Tr. 364–365.) Robles did not talk about the Union with others because Rice and Wickham had cautioned him against it. (Tr. 377.) Banuelos also first heard about the union campaign in November 2010. (Tr. 430.)

Sean Nagler, who worked as a security officer on the Metro Light Rail from May 2010 through January 2011, recalled discussing the Union with coworkers in November 2010.[20] He learned of the organizing campaign when Wickham sent him a text asking him if he wanted to join the Union. Nagler recalled discussing the Union with Armstrong in mid-December 2010 at the McClintock kiosk. According to Nagler, Armstrong said, "I know you've been talking to several officers about joining a union." Nagler responded, "I talked to several officers, yes, and I had put a bug in their ear if they would like to join a union, here's the person you need to speak to." (Tr. 542–545.) Armstrong replied that he could not join the Union in his position, but he had nothing against it. (Tr. 547–548.)

Carol Taresh worked for Respondent on the Metro Light Rail from January 2010 through February 2011. She voluntarily resigned, and currently works for another company. She recalled discussions of the Union started in March or April 2010, and generally occurred outside the McClintock kiosk. The discussions waned, and then began again in August or September 2010. (Tr. 550.) In the fall of 2010, she discussed the Union with Rice, Sterling, Wickham, and Officer Brett McAlister outside the McClintock kiosk. (Tr. 549–551.) In November 2010, there was a discussion of the Union at the McClintock kiosk with Lieutenants Clemons and Rice, and Officers Joe Shipp, Taresh, and Sterling. According to Taresh, Clemons said he would take some literature, but the Union shouldn't be discussed at work. (Tr. 551–552.) The following week, Clemons cautioned Taresh to be careful who she talked to about the Union, and where she did it, because it shouldn't be discussed at work. (Tr. 552.) Clemons recalled that he told employees not to discuss the Union in the kiosk, because that was his office and he could not be privy to these discussions. He denied that he otherwise instructed anyone not to discuss the Union. (Tr. 572.)

Rice spoke to the other supervisors about the Union. Lieutenant Tim Taylor asked Rice about the Union in October 2010. Rice informed Eggleston that there were "rumblings" about a union movement and he wanted him to be aware of it. (Tr. 467–468.) In January 2011, Taylor asked Wickham if he had heard anything from the Mickey Mouse Club. Wickham responded that he didn't know anything about it. (Tr. 392–393.)

Pablo testified he first learned the Metro Light Rail officers were looking into joining a union on January 31, 2011, when he received an email notice from Respondent's corporate labor attorney.[21] (Tr. 46–47.) The Metro Light Rail supervisors discussed the Union at a meeting on February 1. (Tr. 570–571.) Pablo sent a letter, dated February 4, 2011, addressed to the "Officers," stating the SPFPA had filed a petition and requested an election. He informed the officers that they were not obligated to vote one way or the other. He also stressed that the election was an important decision for the officers, their families, and the Company, and urged the officers to be well informed prior to voting.[22] (GC Exh. 4.) Pablo instructed the project manager, Major Armstrong, to distribute the letter to each employee and post it on the bulletin board at the McClintock kiosk. (Tr. 57.)

[18] Christopher Schemer was not disciplined for failing to show up for a shift, but he did receive progressive discipline, starting with an oral warning, for multiple instances of being late for work along with some other infractions. (GC Exh. 39.)

[19] Wickham estimated the box was roughly 3'x 3'. (Tr. 383.)

[20] Nagler was terminated in January 2011 for having too many writeups. (Tr. 543.)

[21] Kercher also testified she learned of the union activities at this point by viewing the same email.

[22] Robles perceived the references to effects on family, pay, and the Company as "key words that really try to strike a nerve to try to discourage people into wanting to go to Union." (Tr. 378.)

Also on February 4, Pablo convened a meeting in his office with the supervisors and managers in his chain-of-command except for Rice and Taylor. He informed them of the dos and don'ts of management's involvement with union organizing. Each attendee received a handout utilizing the acronym "TIPS" to explain that they cannot threaten, interrogate, promise, or use surveillance in connection with the upcoming election. The handout also contained tips for making unions unnecessary, using simple standards such as fairness, honesty, friendliness, courtesy, openness, evenhandedness, and the like. (Tr. 95–96; R. Exhs. 2, 3.) Armstrong held a separate meeting with all of his direct reports, including Taylor and Rice, to convey the information he learned at the meeting. (Tr. 319.)

On February 21, 2011, Pablo sent another letter addressed to the "Officers." He informed them of the March 1 election, including its time and location. He again stressed the importance of the decision to the officers, their families, and the Company. Pablo encouraged employees to do their own research rather than blindly accept information from any source. He encouraged everyone to vote, noting that with 15 officers qualified to vote, one vote could make a difference. (GC Exh. 5.) This letter was delivered to the employees in the same manner as the previous one. (Tr. 58.)

In an undated notice, the officers were informed that they were required to attend a meeting on February 22, 2011, at the Comfort Inn, the same place the union election was to take place the following week. Each officer was scheduled either at 12 p.m. or at 3 p.m. The notice did not indicate the meeting's topic. (GC Exh. 6.) Pablo was the only person who spoke at the meeting. He read verbatim from a prepared script.[23] Pablo once again reminded employees of the importance of the election to them, their families, and the Company. He described the election process, reminded employees that they had not obligated themselves even if they signed a card or petition, and again stressed the importance of voting. Pablo then described what it would mean to be unionized, stating that employees would no longer be able to come directly to management with concerns, informing them of the requirement to pay dues, and encouraging employees to investigate the rules and obligations of being unionized. Next, Pablo explained collective bargaining, and informed employees that the Company was not required to agree to any particular demand. He reminded them that if wages increase too much, clients will look elsewhere and the Company will lose contracts. Finally, Pablo urged the officers to educate themselves before voting. (Tr. 98; R. Exh. 4.)

1. Danny Rice transfer and isolation

Respondent hired Danny Rice on October 6, 2008, to work on the Metro Light Rail contract. He worked as a patrol officer and was promoted to lieutenant a year later. As lieutenant, he supervised the swing shift, from 2 to 10 p.m. (Tr. 451–453.)

On February 3, 2011, Officer Joe Shipp wrote a memo recounting that Rice had informed him earlier that day that the Union wanted to set things up as early as the following week. Shipp quoted Rice as saying, "[Y]ou didn't hear this from me, because I'm a supervisor and I'm not supposed to be involved with this." (R. Exh. 6.). On February 4, 2011, Clemons wrote a memo to Armstrong regarding the Union. He explained that Rice approached him and Shipp a few weeks prior and asked if they would be interested in signing a petition for union representation. He recounted Rice's description of the Union, and opined that Rice was the "driving force" behind the movement to organize.[24] (Tr. 573; R. Exh. 5.) Shipp and Clemons provided Pablo with their respective memos. Officer Robles also observed Rice asking employees to sign union cards, and perceived that Rice was engaged in union-organizing efforts. (Tr. 375.) Rice denied being involved with union organizing. (Tr. 482.).

Pablo and Kercher met with Rice on February 7, 2011, and issued him a suspension. Rice signed the suspension, and stated in "comments" section that it would only be acceptable upon him being allowed to state his side of the story. (R. Exh. 8; Tr. 108, 110.) Pablo informed him that he could prepare a rebuttal letter. Rice did not submit any rebuttal or other comments regarding the suspension. (Tr. 110.) According to Pablo, he instructed Rice not to communicate with any officers assigned to the Metro Light Rail account while he was doing his investigation. (Tr. 125.) Rice did not recall this instruction as limited to the time of the investigation, and testified that it had not been rescinded as of the hearing. (Tr. 480.)

Pablo sent Armstrong an email, dated February 10, 2011, instructing him to ask three or four officers if Rice had approached them about union activity, and to report back to him the following day. Pablo sent a followup email, dated February 11, 2011, telling Armstrong to ask "Carol, Taylor, Dotter and one more person." (Tr. 107; R. Exh. 7.) Armstrong recalled speaking with Officers Nick Dotter, Gilbert Robles, Carol Taresh, and Lieutenant Tim Taylor.[25] (Tr. 317.) Armstrong responded to Pablo with an email later that same day, informing Pablo that Taresh had stated Rice advocated the Union, Dotter and Robles had heard nothing, and he had not heard back from Taylor. (Tr. 554; R. Exh. 7.) Robles informed Armstrong that he had heard nothing about the Union, when in fact he had, because he wanted to protect Rice. (Tr. 369.)

Armstrong informed officers present at the McClintock kiosk on February 11, 2001, that Rice had been suspended and that nobody should make contact with him. (Tr. 370, 553.) Armstrong also informed Wickham that Rice had been suspended and that he was to have no contact with him. According to Wickham, Armstrong stated that if he found out employees had contact with Rice, they would be terminated. (Tr. 394.)

On February 14, 2011, Pablo and Kercher met with Rice again. Pablo stated that, based on the information he received about Rice's union activity, he was removing him from the Metro Light Rail account. (Tr. 112.) Rice was demoted from his supervisory position, with an attendant loss in pay. Rice

[23] The script at R. Exh. 4 contains a statement from "Larry" and a place for comments from "Dean," which refers to Dean Hemstreet, the former Metro Light Rail project manager. They did not speak at the meeting, however. (Tr. 101–102.)

[24] Clemons testified that he did not contemporaneously inform upper management about Rice approaching him regarding the Union in December 2010. (Tr. 571.)

[25] Tim Taylor was a supervisor; the other employees were not.

protested that he was never asked his side of the story. (Tr. 478.) Operations staff initially assigned Rice to the Tempe Water Treatment facility. He was only scheduled part time the first 2 weeks on the job. He called Pablo to complain, and was reassigned to a Cricket cell phone retail store on February 24, 2011. The assignment at Cricket was to armed position with better pay than the Tempe Water Treatment facility.[26] Rice was the only security officer assigned to that particular Cricket store. (Tr. 55–57, 452; GC Exh. 41.) Rice made $17.25 per hour at the Metro Light Rail, and he makes $14 per hour at Cricket. (Tr. 480.)

2. Donald Wickham's termination

Donald Wickham worked as a security officer for Respondent from April 2009 to February 2011. He began working on the Metro Light Rail contract in May 2010. He generally worked as a kiosk officer, and by the fall of 2010, he worked at the McClintock kiosk all 4 of his regularly scheduled days. (Tr. 380–382.)

As detailed above, Wickham became involved in the union organizing campaign in October 2010. He contacted the Union, obtained and distributed union informational material, and served as the liaison with the Union for purposes of answering employees' questions and conveying information about the Union.

In November 2010, Wickham wrote a memo to Major Armstrong requesting Christmas and New Years off in order to pick up his sick mother in Pahrump, Nevada, and take her to his house for the week. Armstrong stated he did not receive the request. Wickham was scheduled for work that week, and wrote a second memo telling management to disregard the first request, since they apparently already had. Armstrong told Wickham he wished he would not have done this, since it left a paper trail. In late November or early December 2010, Armstrong cleared the McClintock kiosk except for Wickham, Clemons, and himself. Armstrong told Wickham that if he wanted to keep his job, he would have to start working special events such as football games, the New Years' Eve party in downtown Tempe, the Fourth of July, etc. Wickham stated that Armstrong would have trouble getting officers to volunteer for these events because they paid straight time rather than overtime if the holiday fell during the officer's regularly-scheduled shift. (Tr. 386–390.)

Wickham worked overtime on February 3 and 4, 2011, at the Price & Apache kiosk. He recalled that a cold front had come through the area, and the temperature had dipped into the 30s. The heat was not working, and Wickham recalled it was very cold in the kiosk. (Tr. 397.) Security officers keep reports detailing what took place during their shifts. Wickham's security officer report for February 3, 2011, notes that upon arrival at 4 a.m., the heat was not working in the Price & Apache kiosk, and the computer would not recognize the memory stick.[27] Wickham emphasized, "EXTEMELY COLD IN KIOSK." (GC Exh. 50.) Eggleston did not look at this report. That same day, Wickham told Eggleston and Clemons the heat was not functioning.[28]

Wickham was assigned to work 4 a.m. to 2 p.m. at the Price & Apache kiosk on February 4, 2011. At 7 a.m., Wickham recalled he was sitting in front of his monitors, bundled up in winter gear because the heat was still not working.[29] Lieutenants Eggleston and Clemons arrived at the kiosk at approximately 7:25 a.m. There is normally one lieutenant per shift. Clemons stated that he had just finished graveyard shift the prior evening, and it did not make sense to go home before the meeting Pablo had scheduled for later that morning, so Armstrong advised him to ride with Eggleston. (Tr. 565–566.) Eggleston testified that Clemons was there because he was working overtime. Eggleston stated he did not find out about the union meeting Pablo had scheduled until after his arrival at the G4S main office following his work shift.[30] (Tr. 339–342.) Eggleston recalled that Wickham was wearing a jacket, and was seated in his chair facing out the window, not in the direction of his computer screen.[31] (Tr. 355.) Eggleston viewed him from the glass window on the entrance door. (Tr. 341, 355–356.) He said to Clemons, "Look Dave. Come here. He is sleeping." (Tr. 359.) Clemons also viewed Wickham from the window on the door. According to Eggleston, Clemons then went around to the window adjacent and perpendicular to the door to view Wickham, which was the direction Wickham was facing. (Tr. 360–361; GC Exh. 49.) Clemons testified that he was standing behind Eggleston the entire time, and that he only looked into the kiosk from the door. (Tr. 577.) Eggleston stated he beat on the door, at which point Wickham woke up, got out of his chair, and let him in the kiosk. (Tr. 361.) According to Clemons, Eggleston jiggled the door's handle, and Wickham slid over in his chair to open the door. (Tr. 577–578.)

Wickham denied he was sleeping. Clemons asked Wickham if he needed an energy drink, and Eggleston asked if he needed to get coffee. Wickham responded that he did not feel well, he had a sinus infection, and it was freezing cold in the kiosk. Eggleston and Clemons left, and Wickham completed his shift. (Tr. 403–404, 568; GC Exh. 51.) After leaving, Eggleston and

[26] Rice had the option to accept or decline this reassignment (Tr. 243).

[27] At the beginning of their shifts at the kiosks, officers plug memory sticks, or thumb drives, into their computers. (Tr. 395.)

[28] The security officer report for February 3 shows Eggleston, who has the code "711", was in the kiosk from 11:59 a.m. until 12:28 p.m. (GC Exh. 50.)

[29] Eggleston testified that he did not perceive it as cold outside. (Tr. 339–340.) Officer Robles visited the Price & Apache kiosk on February 4, and observed the heater wasn't working, it was cold, and Wickham was dressed in winter gear, including a scarf, hat, and heavy jacket. (Tr. 371–372.). The General Counsel requests that I take administrative notice of historical weather data compiled by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, and National Climatic Data Center, showing a low temperature of 30 degrees on February 4, 2011. (R. Br. 22, fn. 16.). I take administrative notice of this fact. Alamanc.com likewise reports the temperature that day at Phoenix Sky Harbor ranged from a low of 30 degrees to a high of 54 degrees F. http://www.almanac.com/weather/history/AZ/Tempe/2011-02-04.

[30] When a lieutenant works overtime, he assumes the role of a non-supervisory officer. (Tr. 311.)

[31] This would have given Eggleston a side view of Wickham. (R. Exh. 21; GC Exh. 49; Tr. 355–356, 360.).

Clemons attended Pablo's union meeting, described above. (Tr. 341.)

Later that afternoon, Wickham called Eggleston because he was nervous that two lieutenants had shown up at the kiosk when usually only one was on duty. Wickham asked Eggleston if there were going to be any repercussions based on what had occurred earlier, and Eggleston told Wickham, "No, I wouldn't think so." Wickham finished his shift and worked 4 more days after that (Tr. 404–406). Eggleston asked Wickham if he wanted to work two additional overtime shifts the following Thursday and Friday. Eggleston called Wickham back an hour later and told him he needed to go to the corporate office in Phoenix. (Tr. 407.)

Eggleston wrote a memo dated February 4, 2011, reporting that, at approximately 7:25 that morning, he and Clemons had seen Wickham sleeping on duty at the Price/Apache kiosk. According to Eggleston, when he told Wickham he was not supposed to be sleeping, Wickham replied that he was resting his eyes and had not gotten much sleep. (R. Exh. 9.) On February 9, 2011, Clemons wrote a memo, per Armstrong's request, recounting the events on the morning of February 4. Clemons' memo states essentially the same thing as Eggleston's. (Tr. 567; R. Exh. 10.)

After consulting with Pablo, Kercher issued Wickham a 3-day suspension on February 10, 2011, for sleeping on duty.[32] She informed him of this in a meeting in her office, and told him to return the following Monday. (Tr. 407–408.) Wickham wrote on the suspension that he did not say he was resting his eyes, but instead said he had been sick with a head cold. (Tr. 408–409; GC Exh. 17.)

Kercher testified that she based the suspension on a review of the memos Clemons and Eggleston provided, as well as review of the security videotape at the Price & Apache kiosk. (Tr. 145–147; GC Exh. 17.) The Price & Apache kiosk has light sensors that respond to body movement. (Tr. 373–374, 400.) When she viewed the tape with Dustin Jiminez, supervisor at the passenger assistant area (PAA), Jiminez was able to point out when the lights in the kiosk went off and on, but Kercher was not able to make this distinction on her own. (Tr. 242–243, 275.) Kercher testified that at one point during the videotape, when the lights came on in the kiosk, she could see the word "security" on the back of Wickham's jacket. (Tr. 146.) Upon reviewing the videotape at the hearing, Kercher was not able to see Wickham, Eggleston, or Clemons, and she could not see Wickham's computer monitor. She also did not see the light go on at the Price & Apache kiosk at any point, including when Eggleston and Clemons entered it at approximately 7:25 a.m. (Tr. 235–240; GC Exh. 42.)

Wickham was discharged effective February 14, 2011. Pablo made the decision, and Kercher signed the paperwork. Pablo did not view the videotape. In the "reason for disciplinary action(s)" section, the termination notice states:

> Based on HR review of the taped footage of the Kiosk at Park and Apache on 2/4/11, it clearly showed that the kiosk was dark from 0657 until at least the end of the tape at 0714.[33]
>
> This tape clearly showed no movement inside the Kiosk for this duration of time indicating that the officer inside was asleep or not attending to his duties. The light should always be on in the Kiosk so Security presence is noted at all times.

(Tr. 84, 115, 147–149; GC Exh. 18.) After viewing the video at the hearing, Kercher then testified that the video played very little role in the decision to terminate Wickham, and that the final decision had already been made before she viewed it. (Tr. 242.)

Kercher and Armstrong met with Wickham to give him his termination notice. Kercher informed him that they had reviewed video evidence, and that the light did not come on in the kiosk, which indicated that he was asleep or remiss in his duties. (Tr. 409.) Wickham mentioned that other employees had been caught sleeping on duty and had not been terminated. Armstrong replied, "Well I guess now we are following the rules." (Tr. 410.) Kercher noted that Wickham was insubordinate during the meeting. She perceived him as angry. Wickham recalled he spoke in a louder voice than normal because he was blindsided. Both parties agree that Wickham did not make any threats. At the end of the meeting, Wickham said that Respondent was "dirty." (Tr. 150–152, 272, 410–411; GC Exh. 18.)

Pablo testified that he has never authorized a penalty shy of termination for sleeping on duty since he has been the general manager of the Phoenix area. (Tr. 115.) He testified he did not know Wickham prior to February 4, he did not know about his union activity, and was not aware of any complaints from Wickham about wages or working conditions. (Tr. 114–116.) Kercher denied knowledge of Wickham's involvement in any union activities, and Wickham had not complained to her about wages or other working conditions. (Tr. 259, 271.)

The General Counsel introduced evidence regarding the discipline of other employees who were caught sleeping on duty or engaging in other conduct that can be grounds for immediate termination, who received treatment more favorable than Wickham.[34]

On November 12, 2009, Lieutenant Rice found Officer Gerald Hill sleeping on duty at the Sycamore kiosk. He called for a witness, and Officer Trueblood arrived, they woke Hill up, and Rice called Major Thario to ask what to do. Thario said to write Hill up and give him an oral warning, and Rice complied. Trueblood signed as a witness. The warning was in Hill's personnel file. (Tr. 154, 472–474; GC Exh. 19.) Kercher testified she was not aware of the warning until she reviewed Hill's

[32] Wickham testified it was a 5-day suspension because he was told to return 5 days later. (Tr. 407.)

[33] The tape ends after 7:29 a.m.

[34] The disciplinary action involving Nicholas Young is incomplete and does not appear to have been effectuated. The type of action contemplated by the disciplinary notice is not checked, and there is no employee or witness signature. Moreover, Kercher's testimony that it was not in Young's personnel file is unrefuted. I therefore find that it does not have sufficient evidentiary value to warrant consideration of Young as a comparative employee. (Tr. 254; GC Exh. 20.)

personnel file in preparation for Wickham's unemployment compensation hearing.[35] (Tr. 256–257.)

Timothy Causey was initially discharged for sleeping on duty on January 15, 2010. At the time, he was working at the McClane Sunwest jobsite. As of March 3, 2010, Causey still worked for Respondent at the Union Pacific Railroad jobsite. On March 3, two individuals filled out incident reports relating that Causey had an accident with his truck. He had said he was sleepy and could not drive. According to the reports, Causey had left the jobsite suddenly without telling anyone. Kercher changed Causey's termination to a 90-day suspension on April 16, 2010, after learning that Causey had been prescribed pain medication for dental problems. Kercher instructed him not to take pain medication while on duty. (Tr. 165, 255; GC Exh. 21.)

Brian Pike was terminated on January 25, 2010, for sleeping on duty. On January 20, the Bank of America team manager, "Toni," went to notify security that an associate had passed out and paramedics had been called. She saw the security officer, Pike, asleep, and she "literally walked out of the door and spoke to him before he opened his eyes." In a January 22, 2011 email, Colin Millan from Bank of America, sent a letter to Brandi Stokes,[36] copied to Pablo, stating that this was the second time security had been found sleeping on day shift. Pike had initially received a final warning on January 22, but that was changed to a termination after Pablo reviewed videos from a security camera that clearly showed him sleeping. Kercher wrote a memo to file on January 25, stating that after reviewing photos from a security camera, the decision was made to terminate him. Pike attempted to attribute his sleeping to having low blood sugar, but this medical condition was not substantiated. He had previously received a written warning on June 18, 2009, for using foul language and being disrespectful. (Tr. 253–254, 591; GC Exh. 22.)

Jon D'Ancona was terminated effective January 29, 2010, for sleeping on duty. Prior to that, D'Ancona had been disciplined numerous times. He received a 3-day suspension on January 23, 2010, for leaving his post of duty without authorization. He was issued a written warning on January 15, 2010, for putting out cat food on Bank of America's property despite site supervisor's order to stop feeding the cats. The warning notes that further reprimand will be grounds for removal. D'Ancona received an oral warning on June 1, 2009, for wearing his badges in the incorrect place and refusing to correct the matter when first informed. On September 22, 2008, he received an oral warning for failing to follow access control procedures. On July 9, 2008, D'Ancona was issued a first written reprimand for violating captain's orders not to drive a cart on the street. He received a final warning on August 8, 2008, for dozing off while sitting at his computer desk. In the comment section, it notes that "sleeping on duty is a most serious offense and cannot be tolerated anytime" and warns that termination may result if the issue is not corrected.[37] On March 30, 2008, he received a second written reprimand for failing to unlock all employee doors and arguing with the shift supervisor when she tried to help him. Three days prior, on March 27, 2008, D'Ancona received a first written reprimand for failing to rearm two emergency doors after contractors left the jobsite. (GC Exh. 23.)

John Stone received an oral warning on March 24, 2010, for sleeping on duty after being observed on three occasions during the week of March 15 sleeping while sitting in his golf cart. At the client's request, Stone was moved to a different jobsite. In the "supervisor's remarks" section, Kercher noted that the allegations were unfounded. (GC Exh. 24.)

Marcus Oglesby was terminated on August 6, 2010, for sleeping on duty. He was suspended for 3 days pending investigation on August 3. On the suspension document, his supervisor remarked that while she had not received any negative reports about Oglesby, a review of his file showed previous writeups for sleeping on duty. (GC Exh. 25.) Kercher was not aware Oglesby had received any prior writeups for sleeping on duty, and she did not see any when she reviewed the file a week before the hearing. (Tr. 252–253.)

Enoch Harmon was terminated on July 13, 2010, for sleeping on duty. He was suspended pending investigation on July 7. On the suspension document, his supervisor remarked that Harmon had received a corrective action notice for sleeping on duty in February 2008, and a suspension for no-call/no-show on November 2, 2009. As a result, he had been placed on probation through February 2010. (GC Exh. 26.)

Benjamin Berry was terminated on July 16, 2010, for using abusive language and behaving disrespectfully. At the request of Ken Deist, the Bank of America site manager, Operations Manager Dean Hemstreet conducted a career development review of Berry's past discipline. The March 22, 2010 review notes that Berry had been late four times in the last 8 months, he had called off less than 4 hours prior to the start of his shift, he violated post orders twice, threatened to harm another officer, and was caught sleeping on duty and given a second chance. Hemstreet warned that any further disciplinary actions would lead to termination. Pablo did not review or sign the career development review (Tr. 593–594; GC Exh. 27.)

Kalin Trotter was discharged on August 19, 2009, for taking an executive chair from an unauthorized location, plugging in an ipod, and putting his feet up on his desk. He had previously received a written warning on September 3, 2008, for sleeping on duty, in addition to other infractions between 2004–2006.[38] (GC Exh. 28.)

Sheletha Randell was terminated on April 29, 2010.[39] On April 28, 2010, Randell had received an oral warning for taking a personal call and talking for several minutes while on duty 2 days prior. Also on April 28, she was issued a suspension pending investigation for sleeping on duty. She had previously received a final warning on April 6, 2010, for excessive tardiness.

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[35] Wickham had also stated Hill was not fired for sleeping on duty during his termination meeting with Kercher.

[36] Stokes' job title was not identified.

[37] Pablo was on vacation the first 2 weeks of August 2008. (Tr. 591.)

[38] Pablo testified he was unaware of the prior entry for sleeping on duty. (Tr. 594.)

[39] The personnel action change states the termination is effective April 29, 2010. It lists her last day worked as April 25, 2010, which is clearly an error.

She was issued a written warning on April 5, 2010, for being tardy three times since her assignment date of March 17, 2010. Major Amber Stewart had reported to operations that her shift supervisor had observed Randell nodding off in March and April 2010. During February 2010, Randell had fallen asleep several times during training class. (GC Exh. 29.)

Between September 1, 2008, and October 5, 2011, 32 officers were terminated for sleeping on duty. (R. Exh. 21.)[40]

3. Alleged threats, surveillance, and interrogation

Many of the allegations regarding surveillance and threats are discussed in context above. I will address the remainder in this section.

During Wickham's hearing for unemployment compensation, Kercher testified that Officer Hill and Young's discipline was confidential (Tr. 162).

Banuelos worked in the PAA from February through April 2011 because she was pregnant and could no longer work with the public. According to Banuelos, in March 2011, her supervisor at the PAA, Dustin Jiminez, told her that Pablo had stated that after expiration of the Light Rail contract, he was not going to rehire anyone who supported the Union. (Tr. 432.) Pablo denied ever telling anyone that he would not rehire employees who supported the Union (Tr. 119–120.)

According to Rice, in or around October 2010, he and Taresh found a tape recorder attached with duct tape under the corner of the desk where the computer sits at the McClintock kiosk. (Tr. 469–470.) Taresh testified that in July/August 2010, she, Sterling, Rice, and perhaps Brett McAlister, found what appeared to be fresh tape under the computers at the McClintock kiosk, impressed with "little bitty holes" consistent with a recorder. (Tr. 562–564.)

Armstrong denied knowing about any union activities in the December 2010 time period. (Tr. 335.) He denied saying anything about union activities being investigated or under surveillance, and denied threatening reprisals. (Tr. 335–336.)

III. DECISION AND ANALYSIS

A. Rules and Policies

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

The General Counsel has the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. 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. A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. Id. The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity. *Firestone Tire & Rubber Co.*, 238 NLRB 1323, 1324 (1978).

1. Professional image rule

For the reasons detailed below, I find the professional image rule set forth in Respondent's security officer handbook is overly-broad and violates Section 8(a)(1).

In *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 801–803 (1945), the Supreme Court held that employees have a protected right to wear union buttons at work. This right is balanced against the employer's right to maintain order, productivity, and discipline. The Board has struck this balance by permitting employers to prohibit employees from wearing union insignia where "special circumstances" exist. Id. at 797–798; see also *Sam's Club,* 349 NLRB 1007, 1010 (2007). "The Board has found special circumstances justifying the proscription of union insignia when its display may jeopardize employee safety, damage machinery or products, exacerbate employee dissention, or unreasonably interfere with a public image which the employer has established as part of its business plan, through appearance rules for its employees." *United Parcel Service*, 312 NLRB 596, 597 (1993), enfd. denied 41 F.3d 1068 (6th Cir. 1994) (citing *Nordstrom, Inc*., 264 NLRB 698, 700 (1982)). A rule based upon special circumstances must be narrowly drawn to restrict the wearing of union insignia only in areas or under circumstances which justify the rule. *Sunland Construction Co.*, 307 NLRB 1036 (1992). Customer exposure to insignia is not, by itself, a special circumstance, nor is the requirement that an employee wear a uniform. *United Parcel Service,* supra.

In support of its position that its rule is valid, Respondent points to three Advice Memoranda: *Pinkerton's Inc*, Cases 18–CA–16257–1 and 18–CA–16332-1 (January 3, 2003); *Allied Barton Security Services*, Cases 4–CA–34212, 1–CA–42870, 5–CA–32694, 19–CA–30048, and 20–CA–32724 (March 3, 2006); and *Hannon Security Services*, Case 18–CA–18047 (August 11, 2006). In all three instances, the Associate General Counsel, Division of Advice, opined that special circumstances existed permitting the employer to bar on-duty security officers from wearing buttons or other insignia that deviated from the officers' uniforms. Advice Memoranda are not legal precedent, and are dependent on the specific factual circumstances presented by the cases they address. In all three cases cited above, however, it is worth noting that the rulings contemplated that

[40] It is unknown as to whether any of these officers had prior discipline.

the security guards would interface with the public.[41] As discussed above, the security officers working in the passenger assistance area do not have any face-to-face contact with the public. Any concerns about commanding authority with the public or presenting a certain public image would not apply to these employees. Respondent has pointed to no authority to establish a special circumstance with respect to the PAA officers. I find, therefore, that the rule is overly-broad.

Moreover, the "no insignias, emblems, buttons" rule does not specify that it is limited to officers who are on duty. Respondent argues that because the professional image section begins by stating "You must be clean and neat while on duty," the limitation to duty status may be inferred. Looking at the rule as a whole, it is within a section entitled "Duties, Personal Appearance and Conduct." Within this section is a prohibition on violating Federal, State, and local laws, and an employee's duty to inform his/her supervisor if arrested. Obviously, these rules apply to off-duty conduct. The professional image subsection delineates the type of haircuts security officers must have, as well as male facial hair parameters, which by their nature cannot be confined to duty hours. Moreover, with regard to facial jewelry, the professional image subsection states that these must not be worn during working hours or anytime when in uniform. The *Lutheran Heritage* principle provides that the Board must give the rule under consideration a reasonable reading, 343 NLRB at 647, and ambiguities are construed against the its promulgator. *Lafayette Park Hotel*, 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007). Read in context and construed against Respondent, its promulgator, it is not clear the rule is restricted to on-duty security officers. Accordingly, I find it is overly-broad and it violates Section 8(a)(1) of the Act.[42]

2. No unnecessary conversations rule

I find the "No Unnecessary Conversations" rule violates Section 8(a)(1) for the reasons articulated below.

The rule does not explicitly restrict Section 7 rights. Accordingly, one of the other *Lutheran Heritage* criteria for establishing a violation must be present. My conclusion relies on the third criteria, i.e., the rule has been applied to restrict the exercise of Section 7 rights. On this point, there is conflicting testimony. Officer Taresh testified that in November 2010, Lieutenant Clemons told a specified group of employees in the McClintock kiosk that the Union should not be discussed at work. She further testified that the following week, Clemons cautioned her to be careful talking about the Union because it shouldn't be discussed at work. (Tr. 551–552.) Clemons recalled that, sometime after February 4, 2011, he told some unspecified employees not to discuss the Union in the kiosk, because that was his office and he could not be privy to these discussions. He denied that he otherwise instructed anyone not to discuss the Union, and denied knowledge of any union activity. (Tr. 568, 572.) I credit Taresh over Clemons for a couple of reasons. First and foremost, Taresh's demeanor was confident, open, and straightforward. Clemons, by contrast, was less straightforward, and his testimony at times seemed confused. In addition to her demeanor, I credit Taresh's testimony because she has nothing to gain or lose by being forthcoming and truthful. She left Respondent's employment voluntarily to pursue another job. There was nothing in her demeanor or in the evidence presented to indicate she harbored a grudge against Respondent.[43] Clemons on the other hand, has a vested interest in keeping his job and maintaining his status as a lieutenant.

Respondent contends that Clemons' testimony is more reliable because he wrote a memo to his boss, Armstrong, on February 4, 2011, informing him that Rice had approached him a few weeks ago about signing a petition for union representation. (R. Exh. 5.) The memo, however, does not reference Taresh, and does not contradict her testimony. Significantly, February 4 is the same date that Pablo sent his first memo to the officers notifying them of the petition; Pablo met with the managers and supervisors regarding the dos and don'ts of how management should be involved; and Wickham was caught sleeping. Clemons' memo is an after-the-fact recollection of Rice's involvement with the Union written to comport with the unfolding events. Under these circumstances, I do not find it to be very reliable.

The Board has held that it is unlawful to restrict conversation about union matters during worktime while permitting conversations about other nonwork matters. *Emergency One, Inc*., 306 NLRB 800 (1992); *Sam's Club*, 349 NLRB 1007, 1009–1010 (2007). Taresh's testimony that employees regularly talked about things like "sports, buying cars, houses, what was on TV last night" at work is unrefuted.[44] (Tr. 562–563.) Clemons' statements not to talk about the Union at work, as described by Taresh, whom I credit, were not limited to duty time or any particular work area. Based on the foregoing, I find the rule was applied to restrict Section 7 rights, and it therefore violates the Act.[45]

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[41] The *Pinkerton's* Memorandum stated that the rationale behind the employer's rule applied both to day security guards, who would more frequently interact with the public, and night security guards, who were less likely to interact with the public. It noted, "Since all of the Employer's security officers are in positions where they may need to assist or confront members of the public, the rule is not overbroad in its application to all officers."

[42] Both parties' briefs address the rule as it pertains to Respondent's on-duty officers on the Metro Light Rail who deal with the public. The complaint, however, is not restricted to these officers, or even to the officers within the Phoenix area. Given the many different types of security Respondent provides nationwide, I cannot speculate about which situations may involve special circumstances and which may not. The evidence presented shows that some security officers do not deal with the public, and the rule can be reasonably read to apply to off-duty officers. On this evidence, I find it is overly-broad, but I cannot, at this juncture, specify where special circumstances may apply throughout Respondent's operations.

[43] Respondent, in fact, took quick action to fire Thario after Taresh complained of unwanted touching and comments.

[44] Not only is Taresh's testimony unrefuted, it is a matter of undeniable collective experience that people talk about things other than work while at work.

[45] Because I find that the rule was applied to restrict Sec. 7 activity, I decline to address Respondent's argument that employee's would not reasonably construe the rule as restricting Sec. 7 activity.

3. Confidentiality provision

I find the confidentiality provision violates Section 8(a)(1) for the reasons articulated below.

The handbook's confidentiality provision that existed prior to January 2011 explicitly prohibited employees from disclosing wage or salary information, and threatened employees with discipline, up to termination, for violating it. The Board has consistently held that a confidentiality provision that expressly prohibits employees "from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment" violates Section 8(a)(1) even if it was never enforced and was not unlawfully motivated. As such, the rule was unlawful under *Lutheran Heritage*. See *Waco, Inc*, 273 NLRB 746, 748 (1984); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004).

The handbook provision in place effective January 2011 does not explicitly reference wage or salary information. Respondent contends that by removing this language, it brought the rule into compliance. The provision, however, still prohibits employees from disclosing confidential information and giving interviews or making public statements about the Company's activities or policies without Respondent's permission. The handbook does not define "confidential information" or the "activities or policies" it references, nor does it affirmatively state that the rule will not be used to restrict Section 7 activity. I find it is very similar to the confidentiality provisions in *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). There, the company prohibited employees from revealing confidential information regarding customers, fellow employees, or the hotel's business. It further stated:

> Much of the Hotel business is confidential and must not be discussed with any party not associated with the Hotel. You should use discretion at all times when talking about your work. The Hotel considers all information not previously disclosed to outside parties by official Hotel channels to be proprietary information. Questions or calls from news media should be immediately transferred and responded to by the Marketing Department or the President of the Hotel. At no time should you talk to the media about Hotel operations.
>
> If you should discuss or disclose proprietary information, you may be subject to disciplinary action, up to and including termination.

Id. at 291–292. The Board found the rule in *Flamingo Hilton-Laughlin* would be reasonably construed as restricting employee's from discussing terms and conditions of employment, and held it was overly-broad. The rule at issue here is similarly vague and overly-broad, and I therefore find it violates Section 8(a)(1).

4. Social networking policy

The General Counsel alleges that two provisions in Respondent's social networking policy violate the Act. I find that one contested part of the social networking policy violates Section 8(a)(1), but the other does not.

Since November 22, 2010, Respondent has maintained a social networking policy. The contested provisions prohibit commenting on work-related legal matters without permission from the legal department, and placing photographs of employees at work or in uniform on social networking sites. In its opening section, labeled "Discussion," the policy recognizes employees' rights to share work experiences, and sets forth rationale for imposing some restrictions on work-related social networking. The section concludes by stating, in bold print, "This policy will not be construed or applied in a way that interferes with employees' rights under federal law."

I will first address the provision that prohibits commenting on any legal matter without permission from the legal department. This rule does not expressly restrict Section 7 activity, nor was evidence presented that it was promulgated in response to it, or that it was applied to restrict the exercise of Section 7 rights. Accordingly, I must determine whether it would reasonably be construed as prohibiting protected activity. For the reasons set forth below, I find that it would.

The term "legal matters" is not defined. It cannot be assumed that lay employees have the knowledge to discern what is a Federal law, and thus permitted under the disclaimer, as opposed to what is a prohibited "legal matter." I find the rule is reasonably interpreted to prevent employees from discussing working conditions and other terms and conditions of employment, particularly where the discussions concern potential legal action or complaints employees may have filed. Social network discussions can vary from postings everyone in the public can see, to messages between specific individuals only. The rule at issue here would reasonably be read to prohibit two employees, such as Sterling and Banuelos, from sending messages to each other about their issues at work and their EEOC and hotline complaints via a social networking site. Likewise, it would reasonably prohibit a discussion group among concerned employees on a social networking site. Because this part of the policy is reasonably interpreted to thwart protected discussions, I find it violates the Act.[46]

Regarding the prohibition on placing photographs on social networking sites, this rule does not expressly restrict Section 7 activity, nor was evidence presented that it was promulgated in response to it, or that it was applied to restrict the exercise of Section 7 rights. As such, I must determine whether it would reasonably be construed as prohibiting protected activity. For the reasons set forth below, I find that it would not.

In *Flagstaff Medical Center,* 357 NLRB 659, 664 (2011), the employer adopted a rule prohibiting the "use of cameras for recording images of patients and/or hospital equipment, property, or facilities." In finding that employees would not reasonably interpret the rule as restricting Section 7 activity, the Board noted that the hospital had significant privacy concerns, and found that employees would reasonably interpret the rule as legitimately protecting patient privacy. There are two key differences between the instant case and *Flagstaff Medical Center*.

[46] The prohibition's venue, which is limited to social networking sites, does not render the rule valid. See, e.g., *Valley Hospital Medical Center*, 351 NLRB 1250, 1252–1254 (2007), enfd. sub nom. *Nevada Service Employees Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990).

First, the prohibition here only applies to posting photographs of the worksite or uniformed employees on social networking sites, whereas in *Flagstaff Medical Center,* the rule banned all photography of hospital equipment and property. As the rule at issue here is less restrictive, this difference obviously weighs in Respondent's favor.

Second, the Board found significant management's legal duty at *Flagstaff Medical Center* to protect patient privacy, a concern largely unique to a hospital setting. While patient privacy is not as great a concern in this case, Respondent clearly has legitimate reasons for not having pictures of uniformed employees or employees who are at work posted on Facebook and similar sites. Starting with the worksite, Respondent does have patient privacy concerns for the EMT services it provides. Moreover, Respondent serves a variety of clients on a national basis. The various businesses and Government agencies where its employees work can be presumed to have their own rules centered on privacy and legal concerns. I find the rule at issue here is reasonably construed as protecting Respondent's clients. To read it as a prohibition on Section 7 activity strikes me a stretch, particularly considering the rule does not ban photographs but merely prohibits employees from posting them on social networking sites. As for the prohibition on posting pictures of uniformed employees, this would not reasonably seem to be an inherent component of the more generalized fundamental Section 7 rights. What readily comes to mind is a desire to avoid broad dissemination of photos of uniformed employees engaging in unprofessional behavior. Again, this is not a ban on taking and using photographs; it is a prohibition on posting them on social networking sites that are potentially accessible to employees and nonemployees alike.[47] This does not amount to "an unreasonable impediment to self-organization." *Republic Aviation*, 324 U.S. at 803.

The General Counsel asserts that the rule would essentially bar an employee from posting a photograph about an unsafe working condition, concerns about uniform appearance and safety, as well as pictures of concerted activities such as handbilling or picketing in front of Respondent's facilities. It is true that Respondent may not interpret the policy to prohibit employees from engaging in legitimate union-related activity such as, for example, taking photos unsafe working conditions or other concerted activities unless patient privacy or a similar privacy right is compromised. See *Lutheran Heritage Village-Livonia*, 343 NLRB at 646–647; *Lafayette Park Hotel*, 326 NLRB at 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Because I find, however, this part of the policy is not reasonably construed as a prohibition on Section 7 activity, I shall recommend dismissing the attendant part of the amended complaint.

5. Scope of remedy

As a remedy for the rule/policy violations, the General Counsel requests nationwide posting and revocation of the unlawful rules. In *2 Sisters Food Group,* 357 NLRB 1816 (2011), the Board modified the judge's recommended Order to conform with *Guardsmark, LLC,* 344 NLRB 809, 811–812 (2005). It ordered the company to rescind the unlawful provisions and republish its rules of conduct and employee handbook without them. The Board in *2 Sisters Food Group,* supra, recognized, however, that this could entail significant costs, and therefore ordered the following:

> Respondent may supply the employees either with Rules of Conduct and handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the Rules of Conduct and handbook without the unlawful provisions. Thereafter, any copies of the Rules of Conduct and handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees.

Id. at fn. 32, citing *Guardsmark*, supra at 812 fn. 8. I find the *2 Sisters Food Group* remedy to be appropriate here. For the reasons set forth in *Fresh & Easy Neighborhood Market*, 356 NLRB 88, 89 (2011), and *Technology Service Solutions*, 334 NLRB 116, 117 (2001), I also find a nationwide posting is appropriate in the manner detailed below.

B. Alleged Threats, Surveillance, and Interrogation

The Board's well-established test to determine if there has been a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. *American Freightways Co.*, 124 NLRB 146 (1959). It is the General Counsel's burden to prove that a statement or conduct constitutes an unlawful threat, interrogation or act of surveillance.

1. Lieutenant Danny Clemons

The General Counsel alleges that in November 2010, Clemons threatened unspecified reprisals and gave employees the impression their union activities were under surveillance. As detailed below, I find Clemons' comments did threaten reprisals for union activity but they did not create the impression of surveillance.

For the reasons discussed above in the *No Unnecessary Conversations* analysis, I credit Taresh's testimony that, in November 2010, Clemons told her and others at the McClintock kiosk not to discuss the Union at work. During the first conversation, in the presence of Officers Taresh, Shipp, and Sterling, Clemons told Rice he would take some union literature, but said that the Union should not be discussed at work. (Tr. 551–552.) About a week later, Clemons warned Taresh to be careful who she talked to about the Union and where she did it, because the Union should not be discussed at work. (Tr. 552.) The General Counsel asserts that these comments were veiled threats that if union discussions continued, employees could be disciplined. The comments, on their face and taken in context, are more cautionary than explicitly threatening. In fact, Rice testified that Clemons was an advocate for the Union, and that he had stated there was possibly a need for it. (Tr. 468.) This does not, however, make Clemons' comments lawful. In *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462–463 (1995), the Board found that cautionary advice from a supervisor to an

[47] As in *Flagstaff Medical Center,* the General Counsel here does not argue, much less establish, that posting of any photographs predating the rule's promulgation was protected by Sec. 7.

employee to watch her back "might have been all the more ominous" coming "from a friend sincerely concerned for the employee's job security." See also *Olney IGA Foodliner*, 286 NLRB 741, 748 (1987), enfd. 870 F.2d 1279 (7th Cir. 1989) (threats possibly intended as "friendly advice" found violative); *Trover Clinic*, 280 NLRB 6 fn. 1 (1986) ("keep a low profile" and "be quiet about it"); *Union National Bank*, 276 NLRB 84, 88 (1985) ("watch yourself"). Clemons' comments to be careful about where and with whom to discuss the Union are very similar to the comments above, which were found to constitute threats of unspecified reprisals. Accordingly, I find these comments violate Section 8(a)(1) of the Act.

I find, however, that Clemons' comments did not create the impression of surveillance. The test for whether an employer's statement creates an impression of surveillance is whether the employee would reasonably assume from the statement that her union activities were under surveillance. *United Charter Service*, 306 NLRB 150 (1992). No evidence was presented that Clemons was in any way spying on employees' union activity. The only evidence of activity that could arguably be labeled surveillance related to a possible recording device at the McClintock kiosk. Taresh testified that in July/August 2010, she and some others, including Rice, found what appeared to be fresh tape under the computers at the McClintock kiosk, impressed with "little bitty holes" consistent with a recorder." (Tr. 562–564.) Rice recalled that in October 2010, he, Taresh, and some others found a tape recorder attached with duct tape under the corner of the desk where the computer sits at McClintock & Apache. (Tr. 469–470.) Regardless of the inconsistency between Rice and Taresh's testimony, Clemons has not been linked to any type of recording. He never stated employees were being monitored, nor do his comments, taken in context, imply such. The comments occurred when employees were voluntarily discussing the Union in Clemons' presence. It is clear from both Taresh's and Rice's testimony that they were not uncomfortable mentioning the Union to Clemons. This separates the instant situation from cases where a supervisor, unbeknownst to employees, gains knowledge about union organizing efforts and confronts employees with it. Moreover, prior to Clemons' comments, employees used the code Mickey Mouse Club, spoke of the Union in the hypothetical, and cautioned potential members not to discuss the organizing campaign. Clemons' comments are in line with the general discretion employees already had determined was appropriate. Based on the totality of the evidence, I find Clemons' comments did not create the impression of surveillance.

2. Major Jason Armstrong

The General Counsel asserts that in December 2010, Armstrong created the impression of surveillance when he told Officer Nagler that he knew Nagler had been talking to several other officers about joining a union. I must first address Armstrong's testimony, and Respondent's argument, that he did not know about the union organizing campaign until January 2011. In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950). I found Armstrong to be a credible witness on many points, based on his forthcoming and engaging demeanor. His testimony was more cautious and equivocal, however, when addressing his knowledge of the Union, and had characteristics of toeing the company line. For example, he testified that he learned of the Union "[a]round maybe the middle of January 2011." (Tr. 315.) Referring to himself and Pablo, he testified, "We received a letter and that is how Larry was actually notified that there was a union attempt to be started." Armstrong did not receive a letter, but rather Pablo received an email. I don't find the semantic distinctions important, but instead find this testimony illustrative of how Armstrong's testimony at times took on characteristics of being not only his own, but that of the Company.[48]

Nagler's testimony was brief and very straightforward regarding his conversation with Armstrong at the McClintock kiosk in mid-December 2010. There was nothing in his voice or his actions to indicate that he was fabricating the content or timing of the conversation. His testimony that Armstrong approached him and stated he knew Nagler had been discussing the Union is obviously more favorable to the General Counsel. On the other hand, Nagler's testimony that Armstrong, in this same conversation, stated he had nothing against unions, but as manager he could not join one, is more favorable to the Respondent. This is an indication that Nagler was not exaggerating or embellishing his testimony to make it more favorable to one party's side.[49] On cross-examination, his recollection regarding a different conversation he had with Rice required refreshing, but this does not, in my view, diminish his overall credibility. Armstrong did not specifically deny having this conversation with Nagler, but rather gave a blanket denial as to his knowledge of union activity prior to January 2011. Nagler is a disinterested witness who worked for another employer at the time of the hearing. Armstrong, by contrast, is the project manager, with a vested interest in maintaining his position of power at the Metro Light Rail. Based on the foregoing factors, I credit Nagler's testimony over Armstrong's, and find the conversation in question took place in December 2010.

Turning to the question of whether the comment created the impression of surveillance, I find that it did. The Board has found that an employee would reasonably assume that his union activities were under surveillance when an employer reveals specific information about union activity that is not generally known, and does not reveal its source. As the Board stated in *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB 633, 635 (2011), affd. sub nom. *Odwalla, Inc.,* 357 NLRB 1608 (2011):

> When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employer violates Section 8(a)(1). This is because employees are left to speculate as to how the employer ob-

[48] See also Tr. 335, LL. 12–15. The tone of Armstrong's voice noticeably changed when specifically asked if he had knowledge of Union activity in December 2010. Tr. 335, L. 16.

[49] Nagler was terminated for having too many writeups, but there was no evidence presented to establish that he thought this was unjust or that he otherwise held a grudge against Respondent in general or Armstrong in particular. As of the hearing, he was working for a different employer.

tained its information, causing them reasonably to conclude that the information was obtained through employer monitoring.

See also *North Hills Office Services*, 346 NLRB 1099, 1103 (2006) (employer's failure to identify employee source of information was the "gravamen" of an impression of surveillance violation); *Sam's Club,* 342 NLRB 620, 620–621 (2004) (store manager told employer he had heard the employee was circulating a petition about wages without revealing how he came by the information); *Conley Trucking,* 349 NLRB 308, 315 (2007); *Dallas & Mavis Specialized Carrier Co*., 346 NLRB 253, 254 (2006). In the instant case, Nagler's union activity was not open or publicized. Under these circumstances, employees, including Nagler, would reasonably assume that their union activities were under surveillance, and therefore Armstrong's statement violated Section 8(a)(1).

The General Counsel next alleges that on February 11, 2011, Armstrong told employees that union activities would be investigated, threatened employees with reprisals for engaging in union activities, interrogated employees about concerted protected activities, and threatened employees with discharge for speaking about discipline.

I will begin by discussing the alleged interrogations. Pablo instructed Armstrong to investigate whether Rice approached employees about union membership. In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. As to the fifth factor, employee attempts to conceal union support weigh in favor of finding an interrogation unlawful. See, e.g., *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005). The Board also considers whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997). These factors "are not to be mechanically applied"; they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House,* supra, 269 NLRB at 1178 fn. 20.

While some of the *Bourne* factors weigh against Respondent, the overwhelming evidence shows that Armstrong's inquiries were part of a narrowly-tailored and legitimate investigation to determine whether a supervisor was involved in union organizing activities. The General Counsel asserts that by asking employees if they had discussed the Union with Rice, Armstrong also interrogated employees as to whether they discussed the Union. (GC Br. 42.) This is not so. No evidence was presented that any of the employees were asked whether they discussed the Union with Rice, whether supported the Union, whether they accepted any material from Rice or anyone else, or any other information unrelated strictly to Rice's involvement. Evidence from Respondent, by contrast, shows that the inquiry was limited only to whether Rice approached the employees to advocate for the Union. (Tr. 554; R. Exh. 7.)

The General Counsel's reliance on *Campbell Soup Co.*, 225 NLRB 222, 226 (1976), is misplaced. In that case, the employer asserted it had a good-faith belief that two individuals it questioned about union activities were supervisors. It provided no justification, however, for questions directed at determining which other employees were engaging in statutorily protected activities. Here, there were no questions asked whether any employees, other than Rice, a known supervisor, engaged in union activities. The General Counsel also relies on *Lindsay Newspapers, Inc*., 130 NLRB 680, 687 (1961). There, however, the company's attorney, in transcribed interviews, asked questions about who started the union's organizing campaign, who passed out union pamphlets and authorization cards, the extent to which each employee participated in passing out union authorization cards, and various other questions that ultimately revealed the identity of the principal employee union advocate. Nothing even approaching this type of interrogation took place here. Because I find that Armstrong's inquiries were not unlawful interrogations, but instead were part of a legitimate and narrowly-tailored investigation, I recommend dismissal of these complaint allegations.

The General Counsel alleges that on the same date, February 11, 2011, Armstrong threatened employees, under penalty of discharge, not to talk to Rice.[50] In determining whether statements amount to threats of retaliation, the Board applies the test of "whether a remark can reasonably be interpreted by an employee as a threat." The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992). The Board has held that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. See *Caesar's Palace*, 336 NLRB 271 (2001); see also *Verizon Wireless*, 349 NLRB 640, 658–659 (2007) (prohibiting employee discussion of workplace concerns relating to discipline abridges Section 7 rights). Armstrong's instruction to employees not to speak with Rice, which were not rescinded after Rice was demoted from supervisor to employee, explicitly interferes with that right and violates Section 8(a)(1).[51] I also find that, given all that was going on with respect to the union organizing campaign, employees, and partic-

[50] Wickham is the only employee who testified that this threat was under penalty of discharge. Taresh and Robles both testified that they were simply told not to have contact with Rice. For reasons discussed herein, however, this distinction is immaterial.

[51] This finding explicitly does not address the General Counsel's allegation that Respondent maintained and promulgated a rule against discussing discipline. Instead, I find that Armstrong's statement interfered with the right of employees to discuss discipline or other Sec. 7 topics with their fellow employee Rice. I do not find it was a rule.

ularly Wickham, would reasonably perceive the comment as a threat.

The last allegation related to Armstrong's February 11 conduct is that by telling employees Respondent was investigating Rice's union activities, a reasonable employee would believe his or her union activities were also being investigated. This allegation is not supported. Wickham, Robles, and Taresh all testified that Armstrong told them Rice had been suspended and they were not to have contact with him. (Tr. 370, 394, 553.) No evidence was presented regarding an investigation. Accordingly, I recommend dismissal of this complaint allegation.

Finally, the General Counsel asserts that on March 2, 2011, Armstrong threatened Sterling for her union and/or protected concerted activities by telling her he had an issue with her because each of the three times she used sick leave during the previous year and a half, she had overtime scheduled. Sterling had left her shift early the prior day, which was the day of the union election. Sterling responded that she always worked overtime. (Tr. 520–521.) Respondent does not dispute that Sterling engaged in protected concerted activity and that Armstrong knew about it. (R. Br. 12.) While the comment alone is not inherently threatening, I find its timing would cause a reasonable employee to perceive it as such. Accordingly, I find the comment violates Section 8(a)(1) of the Act.

3. PAA Supervisor Dustin Jiminez

The General Counsel alleges that on March 29, 2011, PAA Supervisor Jiminez threatened employees and created the impression of surveillance when he told Officer Banuelos that Pablo said he would not rehire union supporters. Jiminez was not called as a witness to refute this statement. Pablo denied he made any such comment. Regardless of whether Pablo made the comment, Jiminez conveying it to Banuelos is reasonably construed as a threat and creates the impression of surveillance.[52] I found Banuelos to be a very credible witness based on her steady and open demeanor, and her clear recollection of the events at issue. Moreover, the Board has recognized that the testimony of a current employee which contradicts statements of her supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co*., 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries, Inc*., 197 NLRB 489, 491 (1972). Accordingly, I credit Banuelos' testimony and I find Jiminez' comments violated the Act.

4. Human Resources Manager Janelle Kercher

The General Counsel alleges that on April 7, 2011, Kercher promulgated and reinforced the unlawful confidentiality rule when she testified, at Wickham's unemployment compensation hearing, that information related to employee discipline was confidential.[53] Kercher explained that any documentation related to employee discipline is in the employee's personnel file, which is confidential. (Tr. 162–163.) Kercher's comment must be viewed in light of her position as human resources manager. In that capacity, she must maintain and secure employee personnel files which, as Respondent correctly asserts, are confidential. As a general rule, Kercher is not permitted to share information in employee personnel files with others. There is no allegation that she stated employees cannot discuss discipline with each other. Viewed in context, I find this comment was not promulgation or reinforcement of Respondent's overlybroad confidentiality provision.[54] I therefore recommend dismissal of this complaint allegation.

C. Employee Discipline

1. The 8(a)(1) allegation: Debra Sterling warnings

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by issuing a final warning and then a written warning to Debra Sterling. The General Counsel has the burden to prove this allegation by preponderant evidence.

Respondent concedes, and I find, that Sterling engaged in protected concerted activity, which is detailed fully in the statement of facts. Once the activity is found to be concerted, the General Counsel can establish a prima facie case by proving the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue was motivated by the employee's protected concerted activity. *Meyers Industries*, 268 NLRB 493, 497 (1984); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line,* supra at 1089; See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

Respondent concedes knowledge of Sterling's protected concerted activity. The first contested issue is whether the General Counsel has met its burden to prove that Respondent was motivated by Sterling's protected concerted activities. Improper employer motivation is often established by circumstantial evidence and may be inferred from several factors, including: the Respondent's known hostility toward unionization coupled with knowledge of an employee's union activities; pretextual and shifting reasons given for the employee's discharge; the timing between an employee's union or other protected activities and the discharge; and the failure to adequately investigate

[52] Banuelos' testimony is not hearsay as it is an admission of a party opponent under Fed.R.Ev. 801(d)(1). See *Kamtech, Inc*., 333 NLRB 242, 242 fn. 4 (2001).

[53] The revised employee handbook, which removed employee discipline from the confidentiality policy, had been issued at this point in response to the charges filed. Kercher was clearly aware that employees were not prohibited from discussing discipline.

[54] The General Counsel alleged that Kercher's testimony at Wickham's unemployment compensation hearing reaffirmed and enforced the confidentiality provision in the security officer handbook (complaint allegation 5(b)) and that it reaffirmed and enforced a rule prohibiting employees from speaking about their discipline (complaint allegation 5(g)). Since there was no evidence of a separate rule prohibiting discussion of discipline (either oral or written), aside and apart from the handbook confidentiality provision, I find the latter subsumes the former.

alleged misconduct. *Temp Masters, Inc*., 344 NLRB 1188, 1193 (2005); *Promedica Health Systems,* 343 NLRB 1351, 1361 (2004). Discriminatory motive may also be established by showing departure from past practice or disparate treatment. See *JAMCO*, 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999). As stated in *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966), "it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book."

Respondent asserts that evidence of animus is absent because, after looking into the matter, Kercher reduced Sterling's final warning to an oral warning. This explanation, however, does not show why Sterling received the final warning in the first place. It is clear, and Kercher conceded, there was confusion over whether all overtime was canceled for everyone, or whether it was canceled only for patrol officers during the week at issue. Sterling's testimony that Eggleston told her all overtime was canceled is unrebutted, despite the fact that Eggleston testified at the hearing. Rice's testimony that the whiteboard where overtime was posted had a notation stating "No overtime this week" for the week at issue is likewise unrebutted, as is his testimony that Sterling was not listed in the schedule book for the date in question.[55] Rice's testimony was very specific in this regard. He recalled that Clemons told him there was a new hire, and that was the reason the overtime was canceled. In addition, Rice informed Armstrong that he did not think Sterling was a no-call/no-show. (Tr. 459–461.)

Notwithstanding the confusion over whether Sterling was scheduled to work, Respondent has not identified other employees who received a final warning for their first no-call/no-show. The General Counsel, by contrast, presented evidence of disparate treatment in that: (1) Juan Castro received an oral warning for his first unexcused absence and a written warning for his second; (2) Keegan McManus received either an oral or written warning for his first unexcused absence; and (3) Carlton Snead received a final warning after three consecutive unexcused absences. (GC Exh. 38.) Sterling's receipt of a final warning, when she previously had a clean record with no history of discipline, shows she was treated less favorably than comparative employees.

In addition, Rice testified that Armstrong told him Operations Manager Ed Martini was mad at Sterling and wanted her fired.[56] (Tr. 463.) This is corroborated by Sterling, who testified that Armstrong told her Martini had wanted her fired for the no-call/no-show, but Armstrong had talked him out of it. (Tr. 509–510.) Martini did not testify to rebut this, and Armstrong did not rebut this during his testimony. Respondent has presented no evidence as to why Martini would be mad at her other than for her protected concerted activity, including the hotline complaint she had filed 5 months prior to her discipline, and her still-active sexual harassment lawsuit against Respondent. Based on the foregoing, I find the General Counsel has established, by preponderant evidence, the animus required to establish a prima facie case.

Respondent must now prove that it would have issued the warnings even absent Sterling's protected concerted activity. Armstrong's explanation for the discipline was that Sterling's no-call/no-show cost Respondent money on the contract. Given that other employees did not receive a final warning for this infraction, however, this explanation does not hold up. Respondent argues that no harm occurred because Sterling's discipline was reduced to a final warning, to which Sterling agreed. There is no dispute that the discipline was reduced to an oral warning. Sterling does dispute that she agreed to it, however. Kercher testified that Sterling was satisfied with the oral warning. That may have been Kercher's impression at the meeting where she reduced Sterling's discipline. Regardless, the fact that charges ensued, a complaint was filed, and the issue of Sterling's discipline went to hearing, demonstrates that this could not reasonably have remained Kercher's impression. In any event, the fact that the discipline was reduced does not provide an explanation as to the motivation behind the original discipline. *Airborne Freight Corp.*, 343 NLRB 580, 621 (2004), presented a similar issue and is instructive on this point. In that case, the employee was issued a letter of warning that was, upon further inquiry, rescinded. The Board upheld the judge's finding that the letter of warning violated the Act despite its later rescission. Similarly, the later reduction of the discipline in Sterling's case does not negate it. Because Sterling's discipline was tainted by retaliatory animus, I find it violates the Act and should be rescinded.

2. The 8(a)(1) and (3) allegations

a. Danny Rice transfer and isolation

The General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act when it transferred Rice away from the Metro Light Rail account and isolated him from other employees. The *Wright Line* analysis, set forth above, applies to allegations of retaliation under Section 8(a)(3). Rather than protected concerted activity, however, the knowledge and motivation to establish a prima facie case for this allegation relate to union activity.

Because Rice was a supervisor when he was demoted from his lieutenant position, the General Counsel concedes he was not, at that point, covered by the Act. The decision to transfer Rice away from the Metro Light Rail was contemporaneous with the decision to demote him, both occurring at the February 14, 2011 meeting with Pablo and Kercher. (Tr. 112.) The transfer away from the Metro Light Rail therefore is likewise not covered by the Act because of Rice's supervisory status at the time of the decision.

The remaining question is whether Respondent isolated Rice in response to his union activity or in a manner that might reasonably tend to interfere with the free exercise of employee rights under Section 7. I find the General Counsel has not met

[55] Sterling corroborates Rice's testimony about the whiteboard and schedule book. (Tr. 508–509.)

[56] Martini's statements are not hearsay under Fed.R.Evid. 801(d)(2)(A). That it is hearsay within hearsay does not change this. Fed.R.Evid. 805. See *Kamtech, Inc*., 333 NLRB 242, 242 fn. 4 (2001).

its burden of proof on either score. Rice was initially placed at the Tempe Water Treatment facility, and then when he complained he was not getting enough hours, he was transferred to a Cricket store where he is the only officer on his shift.[57] Of the roughly 60 accounts in the Phoenix Metro area, there was no evidence presented regarding how many accounts other than the Metro Light Rail have multiple officers assigned per shift. Without this evidence, it is not possible to determine whether this decision was a retaliatory attempt to isolate Rice. There was likewise no evidence presented to show which assignments the officers generally viewed as desirable, neutral, or punitive. Such a showing would indeed be hard to make given the high degree of subjectivity involved. The Cricket store officers, unlike the Metro Light Rail officers, are armed, which some may associate with greater status, but some may see as an unwanted added degree of responsibility. In any event, without evidence to show the Cricket store assignment was objectively punitive or was generally subjectively viewed as punitive, Respondent's assignment of Rice there does not send the message, as the General Counsel contends, that prounion employees will be dealt with adversely.

The General Counsel points to *Masiongale Electrical-Mechanical*, 331 NLRB 534 (2000), for support. In that case, the employee was removed from the jobsite, directed to work in a storage garage where there was no workstation. The employee made his workbench from some sawhorses and plywood. The supervisor then approached him and said he "did not want him talking about the union to his employees, handing out literature, and did not want him to talk to his employees about the union on the job, in his office or on his property." He also said, "that he did not want the union, they messed with me before." The employee responded that he was going on strike, and when he returned to the garage, it was again being used as a storage facility. I need not belabor contrasting this with the Cricket store assignment. The General Counsel also points to *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106, 114 (1997), where the employee was reassigned to the same jobsite as the owner's son, who also became his supervisor. This is readily distinguishable from the instant case, as are the two other cases the General Counsel points to for support. *St. Regis Paper Co.*, 255 NLRB 529 (1981) (personnel manager admitted he transferred two mechanics based on their union membership); *Triangle Publications, Inc*. 204 NLRB 651 (1973) (two employees transferred to another plant that shut down 2 months later).

Based on the foregoing, I find that Respondent did not violate the Act by transferring and isolating Rice, and I therefore recommend dismissal of these complaint allegations.

b. Donald Wickham termination

The final allegation is that Donald Wickham was terminated because of his union and/or protected concerted activity in violation of Section 8(a)(1) and (3) of the Act. I find the preponderant evidence shows Wickham's termination was retaliatory for the reasons discussed below.

As noted, the elements commonly required to support a finding of discriminatory motivation are union or other protected activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

I will first address the General Counsel's assertion that Wickham's statement to Armstrong and Clemons in late November/early December 2010, that Respondent would have trouble getting officers to cover special events because of how they paid, was protected concerted activity. I find that it was not. The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887. In this case, Wickham was not acting "with or on the authority of" other employees. He was responding to Armstrong's statement that he needed to work special events. Wickham testified that he and other employees had discussed their disapproval of the pay scale for special events. The General Counsel has not shown, however, that Wickham expressed to Armstrong or Clemons that this was his fellow employees' viewpoint or that he was acting on behalf of other employees when he told Armstrong that he would have trouble getting employees to work special events. There is no evidence that Wickham was seeking to initiate or to induce others to prepare for group action. Accordingly, I find that Wickham was not engaged in protected concerted activity when he told Armstrong and Clemons it would be difficult to find employees to work special events because of the pay.[58]

Turning to Wickham's union activity, there is no dispute that Wickham was in charge of the campaign to unionize the employees at the Metro Light Rail. Respondent asserts, however, that Pablo, who decided to terminate Wickham, did not know of his union activity. It is well settled that knowledge of an employee's union activity may be established by reasonable inference. *Windsor Convalescent Center of North Long Beach,* 351 NLRB 975, 983 fn. 36 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009). See also *Clark & Wilkins Industries*, 290 NLRB 106 (1988). Circumstantial evidence, including the timing of the alleged discriminatory action and the submission of pretextual reasons in support of it will support a finding of employer knowledge even in the absence of direct evidence of such. See *Medtech Security, Inc*., 329 NLRB 926, 929–930

[57] The transfer to the Cricket store resulted in a pay raise, but Rice still made less than when he was a supervisor at the Metro Light Rail.

[58] I find, however, that the meeting in late November or early December, where Armstrong cleared the room and lectured Wickham about the need to work special events, is further evidence that Wickham was not, in management's eyes, the innocuous employee he was claimed to be. Why Wickham, Eggleston's "go to guy" for overtime, was singled out for this meeting is not explained.

(1999) (circumstantial evidence, including timing, general knowledge of union activity and pretext, supported finding of employer knowledge); *Darbar Indian Restaurant*, 288 NLRB 545 (1988) (finding of knowledge based on employer's general knowledge of union activity, the timing of the discharge, the 8(a)(1) violations found, and pretext given). The Board has held that a supervisor's knowledge of union activities is imputed to an employer absent a credible denial of such knowledge. See *State Plaza, Inc*., 347 NLRB 755, 756–757 (2006); and *Dobbs International Services*, 335 NLRB 972, 973 (2001).

For the reasons detailed above, I find that Lieutenants Taylor and Clemons were aware of Wickham's union activity, and that Major Armstrong was aware of the union campaign in general. Eggleston, who testified, did not refute Rice's testimony that he had told him about the union campaign prior to the time Respondent officially acknowledged it. The testimony that Lieutenant Taylor knew about the Wickham's union activity, and asked Wickham if he had heard from the Mickey Mouse Club, is likewise unrefuted. Rice also obviously knew about Wickham's union activity. Accordingly, the evidence establishes that three lieutenants knew about Wickham's union activity specifically, and two other lieutenants and the major knew about the union organizing campaign generally.

As Respondent points out, Rice was clearly not acting on management's behalf with regard to the organizing campaign. There can be no doubt that Rice did not communicate Wickham's involvement to higher management. I find, nonetheless, that Pablo's denial of knowledge cannot be credited. Beginning with Armstrong, he knew about the union campaign at least as of December 2010. As Pablo's project manager for the Metro Light Rail, this is plainly the type of information he would convey up the chain if he was minimally doing his job. The same holds true for the lieutenants. If they were doing their jobs, they would have informed higher management of the union organizing campaign. Clemons' February 4, 2011 memorandum to Armstrong is particularly troubling. It shows Clemons had known that Rice, a supervisor, has been involved in the union campaign for the past few weeks. (R. Exh. 5.) Given that Rice was a supervisor, Clemons would have had a duty to report his involvement in union organizing, as it amounted to misconduct.[59] His decision to wait 4 weeks to do so is not explained. Clemons wrote his memo on February 4, the same day he reported finding Wickham sleeping. That same day, Pablo sent the memo to the officers about the union petition and held his "TIPS" meeting with the supervisors. The timing of Clemons' memo is thus highly suspicious. The credible, specific and corroborated evidence of knowledge, detailed above, simply outweighs the many blanket denials of knowledge at all levels of management, particularly in light of the implausible lapses by supervisors and managers that would have needed to occur for Pablo to remain in the dark. Under these circumstances, I cannot credit Pablo's denial of the union campaign in general or Wickham's involvement in particular.[60] Based on the foregoing, I find the General Counsel met its burden to prove that knowledge of Wickham's union activity is properly imputed to Respondent.

The General Counsel next must establish union animus. The legal standards for proving animus based on circumstantial evidence, articulated above in the analysis of Debra Sterling's discipline, apply here.

Looking at the evidence as a whole, I find the General Counsel has persuasively established unlawful motivation. First, the timing of Wickham's termination occurred on February 4, 2011, just 4 days after Pablo received official word from the Corporate legal department about the union petition, and less than a month before the upcoming union election. In addition, as the General Counsel points out, there are problems with Eggleston and Clemons' accounting of events.[61] Most significantly, Eggleston testified that Clemons walked around to the front window where he had a direct view of Wickham sleeping. Clemons testified he only stood behind Clemons and looked in the window on the door, which was not a head-on view. They differed on their accounts of how Wickham came to the door. Did he slide over on his chair, as Clemons recalled, or did he stand up and walk over, as Eggleston recalled? Wickham was wearing a winter jacket and a winter hat, and the lieutenants viewed him from the side through a window. Given that Eggleston and Clemons differed on how Wickham answered the door, which would be much more discernible than whether he was sleeping, I find that the reliability of these eyewitness accounts is shaky.

There is also significant evidence of pretext. Pablo justified Wickham's termination by stating it was his policy, as general manager, to terminate all employees caught sleeping on duty. This is problematic on several fronts.

First, the General Counsel pointed to evidence that other officers were not terminated the first time they were caught sleeping on duty. Thus if Pablo's policy existed, it was either not effectively communicated, inconsistently enforced, or both. Lieutenant Rice and Major Thario apparently were unaware that sleeping on duty automatically meant termination as of November 12, 2009. On that date, Rice, at Thario's direction, issued Hill an oral warning for sleeping on duty.[62] (Tr. 154, 472–474; GC Exh. 19.) In the face of this evidence, Respondent points to Rice's testimony admitting that he knew only Pablo could authorize terminations. (Tr. 484.) This argument is off point, however. Rice's immediate supervisor, Thario, instructed him to issue the oral warning. There was no testimony that either Rice or Thario, despite knowing only Pablo could authorize terminations, perceived Hill's infraction of sleeping on duty as warranting or requiring termination.

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[59] In his memo, Clemons notes that Rice was "taking the approach as if he's not involved because he is a supervisor." (R. Exh. 5.)

[60] As the General Counsel points out, the union conversations and distribution of union information took place at the kiosks, which have security cameras.

[61] The General Counsel points to testimony at Wickham's unemployment compensation that contains details not set forth in the reports. Presumably the testimony was responsive to specific questions asked, and therefore would tend itself to be more specific. I therefore don't find this evidence persuasive in and of itself.

[62] Rice was not yet involved in union organizing at this point in time.

John D'Ancona's supervisor (whose signature is illegible) issued him a final warning on August 8, 2008, for sleeping at his desk. (GC Exh. 23.) Kalin Trotter's supervisor issued him a written warning for sleeping on duty on September 3, 2008. (GC Exh. 28.) Sheletha Randell and Benjamin Berry were also caught sleeping on duty but not terminated for it on the first offense. (GC Exhs. 27, 29.) Even if Pablo was somehow not aware of these incidents, there is no evidence that any of these supervisors were disciplined for failing to abide by Pablo's policy once the infractions were discovered. I therefore infer that they did not know about it, or they knew it was amenable to selective enforcement.[63]

The evidence also shows that Eggleston did not think Wickham's sleeping on duty would result in automatic termination. The afternoon of February 4, Wickham asked Eggleston if there were going to be any repercussions based on what occurred earlier, and Eggleston told Wickham, "No, I wouldn't think so." Wickham worked four more regular shifts. A few days after the February 4 events, Eggleston called Wickham and offered him two more overtime shifts, which Wickham accepted. Eggleston's actions are not those of a supervisor operating under a belief that his employee is facing certain imminent termination.[64]

With regard to Brian Pike, he was given a final warning after the client sent a letter, copied to Pablo, that he had twice been seen sleeping on duty. Pike received a final warning initially, as opposed to Wickham's suspension. He was only removed after Pablo investigated and reviewed videos from a security camera that clearly showed Pike sleeping. Here, Pablo never reviewed the video camera footage, and that footage did not show Wickham at all, much less clearly establish that he was sleeping. In addition, unlike Wickham, Pike had a prior infraction for using foul language and being disrespectful, and was seen sleeping twice. Pike's situation is therefore meaningfully distinguishable from Wickham's.

Some of the explanations about why certain employees were not terminated for sleeping on duty also indicate pretext. Timothy Causey was initially discharged on January 15, 2010, for sleeping on duty while working at McClane Sunwest. For reasons unexplained, as of March 3, he was working for Respondent at the Union Pacific Railroad jobsite. That day, he had an accident with his truck, said he was sleepy and could not drive, and left the jobsite without telling anyone. Causey's termination was changed to a 90-day suspension because Kercher learned he was taking pain medication for dental problems. This chain of events makes no sense. Causey slept on duty on January 15, ostensibly due to being medicated. He therefore committed infractions that are grounds for termination under the security officer handbook for sleeping or gross inattentiveness while on duty, as well as intoxication on the job or reporting to work in an impaired state. Then, on March 3, he got in an accident, said he was too sleepy to drive, and left the jobsite without authorization. The explanation for treating Causey, who had several infractions, including sleeping on duty, more favorably than Wickham, who had a single infraction, seriously strains credibility.

John Stone was observed sleeping on duty on three occasions during the week of March 15, 2010, and the client, Lowes, asked that he be removed from the jobsite. Under supervisor's remarks, the typewritten note states, "Removed from the site and given a written warning. Any violations of the rules will cause your termination from the company." Beneath the typewritten remarks, Kercher wrote, in pen and ink, "Allegations were unfounded—No proof." (GC Exh. 24.) Clearly, the initial discipline contemplated was removal from the site and a written warning, not suspension pending investigation as in Wickham's case. As for Kercher's comment that there was no proof Stone was sleeping, this introduces an inconsistency with Wickham's situation, and casts a highly suspicious light on Respondent's shifting explanations for Wickham's termination. Kercher wrote that she did not have proof that Stone was sleeping on duty, despite the notation that he was observed sleeping on duty three times. The individual who observed him either was a supervisor or had reported it to one of Respondent's supervisors, hence the writeup. This report was sufficiently believable to have Stone removed from the jobsite. Yet Stone was not terminated.

The explanation Respondent provided contemporaneous with Wickham's termination was that the security videotape at the Price & Apache kiosk showed him sleeping. Specifically, the termination notice, in the section entitled "Reason(s) for Disciplinary Action," states, "This tape clearly showed no movement inside the Kiosk for this duration of time indicating that the officer inside was asleep or not attending to his duties. The light should always be on in the Kiosk so Security presence is noted at all times." (GC Exh. 18.) It was clear, however, after viewing the tape at the hearing, that the lighting never changed in the kiosk, even when Clemons and Eggleston entered it.[65] Thus, the reliance on the light sensors' failure to activate the lights to prove Wickham's lack of movement no longer held up. Kercher then testified that, contrary to the reason stated on the termination notice, the video played very little role in the decision to terminate Wickham. Such shifting of rationales is evidence that the Respondent's proffered reasons for terminating Wickham are pretextual. See *Approved Electric Corp.*, 356 NLRB 238, 239–240 (2010) (citing *City Stationery, Inc.*, 340

[63] Kercher's testimony that she had trouble getting operations to follow policies pertaining to personnel actions does not negate this inference. Had Respondent been serious about ensuring compliance, there would logically have been consequences for noncompliance.

[64] At the time of the hearing, Eggleston was still employed by Respondent, but had been removed from his duties for alleged insubordination. At the time he offered Wickham the overtime shifts, however, this had not yet occurred.

[65] Kercher testified that Jiminez had pointed out to her where the light came on when the two of them viewed the tape together. At the hearing, there was no change in lighting discernable to the naked eye, and Kercher testified she and Jiminez did not use any enhanced equipment. Jiminez did not testify at the hearing, and therefore could not corroborate this testimony. When relevant evidence which would properly be part of a case is under the control of the party whose interest it would be to produce it and this party fails to do so without satisfactory explanation, the trier of fact may draw an inference that such evidence would have been unfavorable to that party. See *Martin Luther King, Sr. Nursing Center*, 234 NLRB 15 (1977).

NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive."). Kercher's testimony after viewing the videotape at the hearing was that she based Wickham's termination on Clemons' and Eggleston's accounts of what occurred. Other individuals, including Stone, were given the benefit of the doubt absent objective proof. The failure to accord Wickham the same, particularly in light of the other evidence discussed above, amounts to disparate treatment.

Another factor to consider is the adequacy of the Respondent's investigation. *Alstyle Apparel*, 351 NLRB 1287, 1287–1288 (2007). The General Counsel conclusively proved that the videotape at the Price & Apache kiosk did not show Wickham sleeping, and Kercher's most recent testimony is that the decision to terminate Wickham was made before she even viewed the videotape. Therefore analysis of the investigation turns to Respondents' other actions. Kercher issued Wickham's suspension before giving him an opportunity to give his side of the story. He was then given his termination notice in a meeting with Kercher and Armstrong on February 14, 2011. He was not interviewed about what happened that day. Respondent solicited statements from Clemons and Eggleston for statements, but did not solicit one from Wickham. Pablo, the decisionmaker, did not speak with Clemons, Eggleston, or Wickham, nor did he review the videotape. Respondent merely accepted as fact the lieutenants' reports, one of which was solicited 5 days after the fact. I find, therefore, that the investigation was not adequate.

Finally, Pablo offered no explanation as to why he singled out sleeping on duty as the infraction that would, as a matter of his own policy, result in automatic dismissal. The behavior standards manual and security officer handbook set forth at least 21 types of prohibited conduct that can lead to immediate dismissal. The General Counsel has established that, during Pablo's tenure as general manager beginning in June 2008, other officers were not terminated for engaging in conduct that per company policy is grounds for immediate dismissal. These are detailed below, followed by reference to the corresponding number assigned to the violation in the security officer handbook (SOH).

Brian Pike received a written warning on June 18, 2009, for using foul language and being disrespectful. (SOH #2). John D'Ancona was disciplined for numerous offenses that could be grounds for immediate termination prior to his termination in January 2010. He had slept on duty (at a time when Pablo was on vacation), disobeyed orders multiple times both from Respondent's supervisors and the Bank of America site supervisor (SOH #2), and left his post of duty without authorization (SOH #18). Enoch Harmon received a suspension for a no-call/no-show (SOH #11). Benjamin Berry was given three warnings for unacceptable job performance (SOH #12), threatening to harm another officer (SOH #3); a warning for dishonesty by attempting to call off on the first 4 hours of his shift (SOH #5); a final warning for unacceptable job performance and unauthorized opening of drawers/cabinets (SOH #12), and a suspension for another no-call/no-show (SOH #11). Sheletha Randell received a written warning for taking a personal call and talking on the phone for several minutes (SOH #15). Respondent did not explain why strict termination attached to sleeping on duty but not to other offenses listed as grounds for immediate dismissal in the handbook and behavior standards manual.

Based on the foregoing, I find the General Counsel has established a prima facie case. The burden of persuasion now shifts to the Respondent to prove, by a preponderance of the evidence, that it would have discharged Wickham even in the absence of his union activity. *Senior Citizens Coordinating Council of Co-op City,* 330 NLRB 1100, 1105, 1106 (2000); *Monroe Mfg*., 323 NLRB 24, 27 (1997). In order to meet this burden, the Respondent is required to do more than show that it had a legitimate reason for its actions. *Black's Railroad Transit Service*, 342 NLRB 549, 557 (2004); *Hicks Oil & Hicksgas, Inc*., 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). The employer must also prove, by a preponderance of the evidence, that it would have taken the same actions even in the absence of the employee's protected activity. *Peter Vitalie Co., Inc*., 310 NLRB 865, 871 (1993).

I find that Respondent has not met its burden under *Wright Line*, 251 NLRB 1083 (1980), of showing by a preponderance of the evidence that the discharge would have taken place even absent Wickham's union activity. The discussion on pretext above, in support of the General Counsel's prima facie case is hereby incorporated. Respondent introduced evidence that, as of October 3, 2011, 32 employees had been terminated for sleeping on duty since Pablo became general manager of the Phoenix area office in June 2008. Respondent points out that 24 of these terminations occurred prior to Wickham's. (R. Exh. 21.) There is no information, however, regarding whether or not these employees had prior infractions and/or whether their sleeping was objectively verified. Without this information, it is not possible to compare these employees to Wickham in any meaningful way. Moreover, the evidence shows that employees were terminated or chose to leave Respondent's employment for a variety of reasons. Finally, many of the infractions that led to termination in Respondent's Exhibit 21, such as unexcused absence, insubordination, unacceptable job performance, led to lesser discipline for other officers, as discussed above. Accordingly, I find Respondent has failed to meet its burden to prove that it would have terminated Wickham absent his union activities.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining overly-broad rules as set forth herein; threatening and interrogating employees, and giving them the impression that their union activities were under surveillance; and by disciplining Debra Sterling.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by terminating Donald Wickham.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

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

As I concluded that the contested parts of the security officer handbook's professional image rule, "no unnecessary conversations" provision, and confidentiality provisions, as well as the social networking policy are unlawful, the recommended order requires that the Respondent revise or rescind it, and advise its employees in writing that the rules have been so revised or rescinded.

Further, the Respondent having unlawfully disciplined Debra Sterling will be ordered to restore the status quo ante and make appropriate changes to her personnel files and/or other supervisor-maintained files.

The Respondent having unlawfully terminated Donald Wickham will be required to restore the status quo ante by making him whole for any loss of earnings he may have suffered and offering to reinstate him to the position he held before their unlawful termination or, if this position no longer exists, to a substantially equivalent position without prejudice to seniority and other rights and privileges. Backpay shall be based on earnings which each such employee would have earned from February 10, 2011, the date of his suspension preceding his termination. The backpay will be less net earnings during such period and shall be computed on a quarterly basis, plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub.nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

[Recommended Order omitted from publication.]