Lush Cosmetics, LLC *and* Workers United Canada Council, SEIU. Case 20–CA–272392

February 10, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

On March 24, 2022, Administrative Law Judge Dickie Montemayor issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

I. FACTUAL BACKGROUND

The Respondent is a worldwide company that manufactures, distributes, and sells cosmetics. It maintains a nonpublic intranet site called the "Hive" where it shares general news and guidelines with its employees in the United States and Canada, including information about its charitable activities and ethical campaigns. Employees can respond, like, and comment on the Respondent's posts, as well as engage in discussion with each other. They are also encouraged to post their thoughts related to the company and workplace. The Respondent maintains a Usage Policy for the Hive, which states that the Respondent "welcome[s] all respectful thoughts and musings" but has "zero-tolerance for defamatory and/or personal attacks on anyone in the Lush community." The Usage Policy contains content guidelines requiring postings to be professional, work related, and secure.[3]

Employee Maxwell Dolso-Morey was hired by Lush in 2015 and worked at the Respondent's retail facility on Powell Street in San Francisco, California, from August 2020 through January 2021. During his time at the Powell Street store, Dolso-Morey responded to the Respondent's Hive posts several times. As detailed in the judge's decision, on August 6, Dolso-Morey posted comments that addressed the Respondent's corporate restructuring plan and described the Respondent as "vultures" and its CEO as a "scumbag" and "the boot we are all supposed to lick"; on December 5, he posted comments focused on the employees' working conditions and the need for employee organizing; on December 21, he posted content addressing living wages and encouraged the Respondent to support union organizing among its employees; and on January 8, replying to a post about democracy, Dolso-Morey told the Respondent to stop harassing employees who want to join a union and highlighted the employees' need for living wages.

In a letter to Dolso-Morey dated January 6, 2021, Stephen Dynes, the Respondent's West Coast human resources representative, addressed Dolso-Morey's "conduct related to posts on the hive." Specifically, the letter mentioned Dolso-Morey's December 21 Hive post[4] in response to the Respondent's post on December 18, International Migrants Day. Referencing the Respondent's promotion of a non-profit organization that defends immigrants, Dolso-Morey had posted:

> Y'all should find a[n] org that supports Canadian immigrants that work in warehouses. Whoops! Never mind, that'd be totally against your own interests. Before you stand on your soap box, pay your workers a livable wage. STARTING with your immigrant workers in your own company. Support your workers trying to join a #union to avoid shooting yourself in the foot

[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.

There are no exceptions to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by interrogating employee Dolso-Morey and by instructing him to allow his manager to review his comments before they were posted to the Hive.

[2] We shall amend the judge's conclusions of law consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings, to the Board's standard remedial language, and in accordance with our decision in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022). We shall substitute a new notice to conform to the Order as modified.

Member Kaplan acknowledges and applies *Paragon Systems* as Board precedent, although he expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

[3] Neither the Hive Usage Policy nor the content guidelines are alleged to be or were litigated as unlawful in this proceeding.

[4] Although the letter refers to a December 19 Hive post, there is no December 19 Hive post in the record. Rather, Dolso-Morey's comments as referenced in the letter appear in his December 21 Hive post. This apparently inadvertent error does not affect our decision.

> because your public image is what you think is holding up this company.[5]

In his January 6, 2021, letter to Dolso-Morey, Dynes stated, in relevant part, as follows:

> On December 19th, [sic] you made posts on the hive which appear to be intended to disparage the Company and its managers by implying, without any substance, that Lush is mistreating Manufacturing employees . . . . Your conduct in posting unsubstantiated allegations . . . on the hive is not acceptable. . . . In the future, we ask you to refrain from making unsubstantiated allegations . . . on the hive. If you elect to continue such inappropriate conduct, the Company may consider your actions to amount to misconduct.

Dynes added that "[f]or purposes of further clarity, you may continue to express your views concerning unionization on the hive."

Dynes contacted Anthony Ybarra, Dolso-Morey's local store manager and asked him to deliver the letter to Dolso-Morey, field any questions, and point Dolso-Morey to the appropriate person to answer those questions. Ybarra provided the letter to Dolso-Morey a few days later, at which time Dolso-Morey read the letter and did not ask any questions.

Dolso-Morey resigned from Lush Cosmetics in June 2021 to work elsewhere. Prior to his resignation, he wrote two additional posts on the Hive. In April 2021, Dolso-Morey stated that the company's attempted union-busting was in the press, and in June 2021, he commented that if "this is leading fearlessly that brings the bar down QUITE a lot. Thanks for nothing I guess?" Dolso-Morey was not disciplined for either of these posts.

II. JUDGE'S DECISION AND RESPONDENT'S EXCEPTIONS

The complaint alleges that the Respondent's letter to Dolso-Morey "threatened [him] with unspecified reprisals by instructing the employee that making 'unsubstantiated allegations' . . . would constitute misconduct." In his decision, however, the judge treated the Respondent's letter to Dolso-Morey as a work rule prohibiting employees from making unsubstantiated allegations. Applying *The Boeing Company*, 365 NLRB No. 154 (2017), the Board's precedent for determining the lawfulness of employer work rules, the judge determined that the rule was unlawful in violation of Section 8(a)(1).

On exception, the Respondent asserts that the letter's prohibition on making unsubstantiated allegations did not constitute a work rule and that, accordingly, the judge erred in analyzing the prohibition under *Boeing*. Instead, the Respondent maintains that the letter was an ad hoc statement to a single employee to address his disrespectful conduct in a specific situation and, as such, should have been analyzed as a threat, as the General Counsel had alleged in the complaint. For her part, the General Counsel argues that the letter is properly analyzed as a threat of unspecified reprisals in violation of Section 8(a)(1), but she also argues that the judge did not err in considering the allegation under *Boeing*.

As explained below, we agree with the Respondent that its statements to Dolso-Morey in its January 6, 2021, letter must be analyzed as an allegedly unlawful threat. Applying such an analysis, we find the statements unlawful, contrary to the Respondent's position.

III. ANALYSIS

As noted, the complaint alleges that the statements in the Respondent's letter constituted an unlawful threat of unspecified reprisals. In addition, at the hearing, both parties litigated the statements as an unlawful threat, not an unlawful work rule. Neither party made arguments based on *Boeing* nor presented evidence in support of an analysis under that legal standard. To the contrary, the General Counsel stated that what was to be tried at the hearing was "paragraph 5 of the complaint alleging threats of reprisals by the letter . . . stating that unsubstantiated allegations about the company on the Hive would be considered misconduct." She also contended that the letter's vague and coercive language would lead Dolso-Morey to fear discipline in the future. Further, and notably, she asked the judge to apply a totality-of-the-circumstances test, not the *Boeing* standard. For its part, the Respondent advocated its view of the letter and the circumstances of its delivery as noncoercive, nondisciplinary, and nonthreatening. Testimony elicited by the parties was consistent with their respective positions on the merits of complaint paragraph 5. Dolso-Morey testified that he left Lush because he was having panic attacks working with Ybarra after receiving the letter, and he felt as though there "was kind of a target on my back." He also testified on cross-examination that he thought the "other shoe" would soon drop. By contrast, Dynes testified that the letter was merely of a coaching nature and reiterated the Respondent's position that Dolso-Morey could continue to post about union-related matters. Ybarra likewise testified as to the context of the meeting and denied that he was monitoring or prescreening Dolso-Morey's Hive posts.

In short, the complaint alleged that the Respondent violated Section 8(a)(1) by threatening Dolso-Morey with unspecified reprisals, and the parties' litigation at the hearing was entirely consistent with this allegation.

[5] Dolso-Morey had learned from posts on the Hive that the Respondent's manufacturing and distribution employees in Toronto, Canada, were seeking to organize.

Therefore, we find that the judge erred in analyzing the Respondent's statements in the letter to Dolso-Morey as a work rule under the Board's *Boeing* jurisprudence. Instead, the Respondent's statements should have been analyzed as an allegedly unlawful threat under the Board's totality-of-circumstances standard.[6] Applying that standard here, we find that the Respondent's statements to Dolso-Morey in the letter constituted an unlawful threat of unspecified reprisals for engaging in protected activity.

"The Board has long held that the standard to be used in analyzing statements alleged to violate Section 8(a)(1) is whether they have a reasonable tendency to coerce employees in the exercise of their Section 7 rights. Intent is immaterial." *KSM Industries, Inc.*, 336 NLRB 133, 133 (2001) (citing *Concepts & Designs,* 318 NLRB 948, 954, 955 (1995), and *Puritech Industries,* 246 NLRB 618, 622-623 (1979)). The Board considers the totality of circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. Id. Whether or not the employee changed their behavior in response is not dispositive, nor is the employee's subjective interpretation of the statement. See *Boar's Head Provisions Co.*, 370 NLRB No. 124, slip op. at 16 (2021); *Sunnyside Home Care Project*, 308 NLRB 346, 346 fn. 1 (1992). The Board therefore considers the total context of the alleged unlawful conduct from the viewpoint of its impact on employees' free exercise of their rights under the Act. See *American Tissue Corp.*, 336 NLRB 435, 441–442 (2001).

Under the established standard, the Respondent's January 6, 2021, letter could easily be understood as a warning against communicating with fellow employees about terms and conditions of employment on the Hive. Dolso-Morey's December 5, 2020 post on the Hive addressed employees' working conditions, and his December 21, 2020 Hive post addressed the wages the Respondent pays its employees by exhorting the Respondent to "pay your workers a livable wage."[7] By notifying Dolso-Morey that the Respondent considered his protected activity to be "unacceptable" and that, should he persist in such conduct, it would be deemed "misconduct," the letter strongly suggested that future postings about employees' terms and conditions of employment on the Hive would result in discipline or other unspecified reprisals. The Board has found that similar warnings to employees regarding protected activities convey a threatening message that engaging in such activities would put them at risk of adverse consequences and thus violate Section 8(a)(1). Indeed, the Board has found statements milder than the Respondent's—such as warnings to "be careful," "watch out," or "watch your back," even where the manager or supervisor was genuinely concerned for the warned employee's job security and intended the warning as friendly advice—to constitute unlawful threats. See, e.g., *Gaetano & Associates Inc.*, 344 NLRB 531, 534 (2005); *St. Francis Medical Center*, 340 NLRB 1370, 1383-1384 (2003); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995).

That the letter states that it "does not constitute discipline" does not warrant a different result. The letter clearly warned of the potential for *future* discipline or other adverse consequences, stating that "[i]f you elect to continue such inappropriate conduct, the Company may consider your actions to amount to misconduct." The letter came from senior management, putting an imprimatur of authority onto the warnings and suggesting upper management was watching Dolso-Morey's behavior. In these circumstances, upon reading the letter, Dolso-Morey would reasonably understand that he could be subject to discipline or other unspecified reprisals if he continued to post protected comments addressing employees' wages or working conditions on the Hive.[8]

Similarly, the letter's statements that Dolso-Morey "may continue to express [his] views concerning unionization on the [H]ive," and the fact that Dolso-Morey continued to do so, do not undercut a conclusion that the letter constituted a threat of unspecified reprisals. As noted, the relevant legal standard is an objective one, and we have determined that the statements in the letter would reasonably be understood as a coercive threat. Further, the Act protects employees' rights to engage in other protected concerted activities besides, and in addi-

[6] Board precedent has distinguished "one-off" threats from generally applicable work rules, including in post-*Boeing* decisions. See, e.g., *Watco Transloading*, 369 NLRB No. 93, slip. op. at 8 fn. 24 (2020); *PAE Applied Technologies*, 367 NLRB No. 105, slip op. at 4 fn. 8 (2019); and *Shamrock Foods*, 366 NLRB No. 117, slip op. at 2 fn. 10 (2018).

[7] These posts constituted protected concerted activity. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569–570 (1978); *Cordua Restaurants*, 368 NLRB No. 42, slip op. at 4 (2019), enfd. 985 F.3d 415 (5th Cir. 2021).

Member Kaplan agrees that Dolso-Morey's December 21 Hive post constituted protected concerted activity. The record establishes that when Dolso-Morey exhorted the Respondent to pay its workers a living wage, he was bringing a group complaint to the attention of management. See *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[8] Although Dolso-Morey was not disciplined after issuance of the letter, the absence of later discipline is not dispositive of whether, at the time of issuance, the letter would reasonably be understood to constitute a threat of unspecified reprisals for engaging in protected activity. See *Publix Super Markets*, 347 NLRB 1434, 1435–1436 (2006) (finding unlawful threat of discipline despite the fact that no discipline took place).

tion to, those related to unions and unionization.[9] So, although the letter allowed Dolso-Morey to continue to express his views on unionization, it did not assure him that he was free to engage in other protected concerted activity, such as communicating with his coworkers concerning wages, hours, or other terms and conditions of their employment, as he had done in previous posts on the Hive.[10]

Based on the foregoing, we find, consistent with the complaint and the parties' litigation at the hearing, that the Respondent violated Section 8(a)(1) by threatening Dolso-Morey with unspecified reprisals if he continued to engage in protected activity.

AMENDED CONCLUSIONS OF LAW

1. Lush Cosmetics (the Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Workers United Canada Council, SEIU (the Union) is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) by its letter dated January 6, 2021, threatening employee Maxwell Dolso-Morey with unspecified reprisals if he engaged in protected concerted activity by instructing him that making "unsubstantiated allegations" on the Hive forum would constitute misconduct.
4. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Lush Cosmetics, LLC, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals if they engage in protected concerted activities.

(b) 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) Post at its San Francisco, California facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, 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. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondent at any time since January 6, 2021.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. February 10, 2023

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[9] The Act, of course, applies to employees in both unionized and non-unionized workplaces, and Sec. 7 of the Act grants employees the right to act together for their "mutual aid or protection." It is well settled that this right includes employees' right to communicate with one another regarding their terms and conditions of employment. See *Eastex, Inc. v. NLRB*, supra. Such communications among employees are often preliminary to action for mutual aid or protection and, as the Board has explained, "lie[] at the heart of protected Section 7 activity." *St. Mary Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008). As a result, the right of employees under the Act to discuss terms and conditions of employment is broad. It encompasses employee discussions of a host of issues that may arise in the course of employment.

[10] This is particularly true if the posts include communications about working conditions and other protected concerted activity that, like Dolso-Morey's posts on the Hive, cannot be "substantiated" because they are the employee's opinion and not a factual statement.

[11] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisals if you engage in protected concerted activities.

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

LUSH COSMETICS

The Board's decision can be found at www.nlrb.gov/case/20-CA-272392 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Randy M. Girer, Esq., for the General Counsel.
Joel S. Aziere, Esq., Rob Buikema, Esq. (Buelow Vetter Buikema Olsen & Vliet), for the Respondent.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me on November 9, 2021, via the Zoom for Government videoconferencing platform. Charging Party filed a charge on February 8, 2021, and an amended charge on May 3, 2021. A complaint was issued on May 11, 2021, and an amended complaint issued August 2, 2021. Respondent filed an answer to the complaint denying that it violated the Act. By order dated October 28, 2021, the Regional Director withdrew allegations related to paragraph 7 of the complaint. On December 14, 2021, the parties filed posthearing briefs. After considering the matter (including the submissions by both Respondent and General Counsel) and based upon the detailed findings and analysis set forth below, I conclude that Respondent violated the Act.

FINDINGS OF FACT

JURISDICTION

The complaint alleges, and I find that

1. (a) The charge in this proceeding was filed by the Charging Party on February 8, 2021, and a copy was served on Respondent by U.S. mail on February 9, 2021.

(b) The first-amended charge in this proceeding was filed by the Charging Party on May 3, 2021, and a copy was served on Respondent by U.S. mail on May 4, 2021.

2. (a) At all material times, Respondent has been a limited liability company with places of business located throughout the State of California, including in San Francisco, and has been engaged in the retail sale of cosmetics.

(b) During the calendar year ending December 31, 2020, Respondent, in conducting its business operations described above in subparagraph 2(a), derived gross revenues in excess of $500,000.

(c) During the calendar year ending December 31, 2020, Respondent, in conducting its business operations described above in subparagraph 2(a), purchased and received at its California facilities goods valued in excess of $5000 directly from points outside the State of California.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Tony Ybarra - Store Manager
Stephen Dynes - People & Culture Business Partner, West Region

ALLEGED UNFAIR LABOR PRACTICES

Maxwell Dolso-Morey was employed by Respondent from

November 15, 2015, to July 2021, when he voluntarily left the company. He worked in the retail operations of the company beginning as a seasonal contract employee moving up to a sales associate, then an Operations Specialist and in 2017, he held the position of a floor leader, Respondent is a cosmetics company that manufactures, distributes, and directly sells products in retail locations in North America, Europe, Asia, and Australia.

Respondent maintains intranet sites for internal communications which are not accessible by the public. Respondent utilizes the sites to update employees on company policies products and announcements. Employees are required to log onto both websites daily to remain up to date with any employer announcements or informational posting. There are two separate sites. The first is called zipline. It is a site that only Respondent's officials can post on. The second is called the hive. Unlike zipline, the hive allows for communications by employees and between employees. The hive had a usage policy which employees were directed to follow which stated as follows:

> The hive is an online space meant for communicating with one another. You're welcome to speak your mind- just remember to keep it respectful to one another. The hive is a space that welcomes and encourages thoughtful discussion around topics related to Lush, its people, and its values. We aim to foster a safe space for the entire Lush community. We welcome all respectful thoughts and musings, regardless of personal opinion. In all spaces on the hive, there is zero-tolerance for defamatory and/or personal attacks on anyone in the Lush community. All commenters on the hive are asked to observe these guidelines and to keep language and remarks within accordance of them. All users are expected to follow the instructions above; any violation of these policies and procedures may result in disciplinary action. (R. Exh. 1.)

The usage policy also set forth what it described as "quick and easy" guidelines to maintain a safe and respectful hive for all Lushies as follows:

> 1. Keep it respectful.
>
> Because we want the hive to be a positive and collaborative environment where you can always find accurate information, all employee activity will be monitored by the internal communications team. Inappropriate comments, and misinformation will be deleted.
>
> 2. Keep it Lush
>
> We want the hive to be a place where employees can quickly and easily find relevant information for their jobs, so let's not clutter it up with too many distractions! Please keep your comments related to the posts' original topics. There are many places to share content about ourselves and our passions. Business posts on the hive should be a place where we talk about work.
>
> 3. Keep it secure.
>
> All content on the hive is for employees' eyes only, and subject to our confidentiality agreement. Please only access the hive from secure devices, and remember to log out when you are finished. (R. Exh. 1.)

Dolso-Morey was aware of the acceptable use policy which he acknowledged electronically on June 23, 2019. (R. Exh. 6.)

The employer also had in place an anti-harassment policy which Dolso-Morey was aware of. The policy stated as follows:

> Lush prohibits harassment of any kind, including sexual harassment, and will take appropriate and immediate action in response to complaints or knowledge of violations of this policy. . . . Written or graphic material placed on walls, bulletin boards, e-mail, the hive or elsewhere Lush's premises or circulated in the workplace that mocks, denigrates, or shows hostility towards an individual or group as outlined in the protected grounds/identities. (GC Exh. 11.)

On August 16, 2020, in response to one of Respondent's "Business Updates" regarding employee layoffs, Dolso-Morey posted a comment on the Hive under the topic "Lush Restructuring."

> This company doesn't value tenured staff. They'd rather hire an outside manager to run the staff like the Target or Marshalls they came from instead of already knowing and understanding the culture of being a Lush employee. When a staff member has worked here for 6+ years gets furloughed but a manager who's only worked here for a little over a year gets a 25% pay reduction is unjust and cruel.
> Where is the equity in BID training from that? You're vultures are taking advantage of this PANDEMIC to "rearrange" people and lighten the financial burden on YOU. Without any thought of your loyal, unflinching staff that have put blood, sweat and tears into this company, literally! These layoffs are irredeemable and prove that you are CEO and businessman, before you're a working class person but let's not forget that you will be totally fine with your Wolverton Security money. You're a scumbag and the boot we are all supposed to lick. Congratulations, you've started a revolution you didn't bargain for, Coward. (GC Exh. 2) (R. Exh. 5, p. 14).

On December 5, 2020, Dolso-Morey again posted on the hive under the topic of "Business Update from Mark Wolverton, CEO of Lush America" and the post read as follows:

> The lack of solidarity and curiosity on this post is disheartening. When it comes to the environment, people's right to vote, or shark "n soup we all come together and sell our hearts out for these causes that we believe in. But for some reason when employees come together and talk about organizing themselves, they're met with IMMEDIATE resistance and doubt. I love this company, it's products, and my fantastic co-workers but I cannot for the life of me wrap my head around why being anti-union is the focus for so many. We are WORKING through the pandemic. As a front facing retail employee, in a large city, I can confidently say that I am terrified of going to work and I can only imagine what manu is going through during holiday right now. I have nothing but love and support for

> them because they're physically producing pro"t (sic)in working conditions that only they can describe because I only know the manicured version. Support and appreciate them because they are essentially the ones paying your pay check. But don't just appreciate them for doing the dirty physical work but for having the courage to organize and take matters into their own hands. There is nothing more important RIGHT NOW than the labor movement because all of the things we all care deeply about are tied to the labor movement. From the environment to people's right to vote, and to shark "n soup it's all interconnected. So please have some empathy and try to critically analyze and question the response the company is having/going to have. From sales in San Francisco to manu in Vancouver and across Canada, we stan a queen. (GC Exh. 3.)

On December 8, 2020, Mark Wolverton posted a response to the comments that were received on the "Business Update" thread. It read as follows:

> I thought it appropriate to post a few thoughts on this thread.
> On December 3rd, Karen and I posted an update to thank everyone for their hard work and recognize the effort and stress you all are going through with this unprecedented pandemic. A conversation on unions in Toronto followed my post, which I did not intend. Regrettably, I have noticed that the hive has become a place where attacks are common, the conversation or comments sometimes negative and I am learning that some employees are choosing not to visit it due to this inappropriate sentiment. Although we encourage healthy debate and dialogue, Karen and I do not condone disrespectful behavior and comments, or posting falsehoods or statements which are designed to mislead staff. We are both very concerned with this trend and are working diligently to get our company and the hive back to our vision where it was not long ago. Over the past several months, there have been some posts that have attacked our company, our ethics and our integrity. In addition, there are posts that contain very significant inaccuracies. Although this has not been sitting well with us, it is important that our conversations continue. The hive was established to provide an open forum to share thoughts and ideas about work, and it must be a place where we can trust what is presented. As a result, we will directly reach out to an employee to address and any false statements, understand why they were made, and work to ensure correct information replaces it. We remain committed to maintaining a lively forum but will work to ensure it is also civil. We ask everyone to keep their comments relevant, respectful and truthful. (R. Exh. 5.)

On December 21, 2020, Dolso-Morey under the topic of "International Migrants Day" posted on the hive. This post read as follows:

> Y'all should find a org that supports Canadian immigrants that work in warehouses. Whoops! Never mind, that'd be totally against your own interests. Before you stand on your soap box, pay your workers a livable wage. STARTING with your immigrant workers in your own company. Support your workers trying to join a #union to avoid shooting yourself in the foot because your public image is what you think is holding up this company. (R. Exh. 5).

On January 8, 2021, Dolso-Morey posted under the topic of It's Our Democracy on the hive as follows:

> Y'all wanna talk about fragile democracy? Stop harassing employees who want to participate in the DEMOCRATIC process of joining a union. Please, please get off of your SOAPBOX. You know what helps more than mental health day? Being paid a livable wage so we don't have to worry about the next check being half of what we need for rent/utilities/medical expenses/food. Wait, that's all supposed to be covered with an extra $1 and a one time payment of $300. You're (sic) grapevines are getting thinner and thinner with little to no fruit. (R. Exh. 5.)

On January 6, 2021, Stephen Dynes, Respondent's west coast human resources official issued a letter addressed to Dolso-Morey regarding his "conduct related to posts on the hive." (GC Exh. 7.) The letter at Dynes' direction was delivered to Dolso-Morey by Shop Manager Tony Ybarra in a closed door meeting where only he and Dolso-Morey were present. At the closed door meeting Ybarra handed Dolso-Morey the letter. Ybarra was instructed to present the letter to Dolso- Morey "allow him to read it and then allow him to—if he had any questions, put him in the right direction of whoever he needed to talk to." (Tr. 157.) The letter provided as follows:

> This letter concerns your continuing conduct related to posts on the hive.
> To ensure that this letter is not misconstrued, we are specifically advising that it does not constitute discipline. Rather, we intend to ensure that you are aware of the Company's expectations and assist you in not engaging in misconduct the future. On December 19th, you made posts on the hive which appear to be intended to disparage the Company and its managers by implying, without any substance, that Lush is mistreating Manufacturing employees along with a unsubstantiated claim that "public image is what is holding up this company". This is in addition to your August 19th hive post in which you described Mark Wolverton as a "*scumbag*" and "*a boot we are supposed to lick.*" Your conduct in posting unsubstantiated allegations and personally insulting comments on the hive is not acceptable. If your intention is actually to have your complaints or concerns addressed, that intention cannot be served in this manner. The Company is committed to investigating and responding to all complaints and other reports that are brought forward in good faith. If you have a specific complaint or concern that you wish to bring to Lush's intention, it is asked that you speak directly with your manager or utilize either opendoor@lush.com or workinghere@lush.com. In the future, we ask you to refrain from making unsubstantiated allegations or personal insults on the hive. If you elect to continue such inappropriate conduct, the Company may consider your actions to amount to misconduct. For purposes of further clarity, you may continue to express your views concerning unionization on the hive. Given the original spirit of the hive, the Company has permitted the hive to be utilized to share views respecting unionization. It intends to continue to do so, as long as the discourse is profes-

> sional and that it doesn't, again, cross the line into insubordination, the making of misrepresentations or potentially libelous statements concerning the Company or against any individuals. Finally, we would also ask you to seriously consider the adverse effects that the making of unsubstantiated allegations and insulting comments, including to the approximately 4600 users of the hive, can have on the Company and on all of its employees. We hope that this is clear. Please contact me if you have any questions.

Ybarra handed him the letter, told him to take some time to read it, and asked if he had any questions. After reading the letter, Dolso-Morey "chatted back and forth for a little bit" then there were no questions about the letter so they both went about their day. (Tr. 160.) The "chat" revolved around books, videos, and movies about unionizing which Dolso-Morey recommend as resources to educate Ybarra about the topic. (Tr. 161.)

Analysis

1. The prohibition against making "unsubstantiated allegations" on the hive

At the outset it is important to point out that the General Counsel's complaint paragraph 5 is narrowly drawn to allege only that the instruction against making unsubstantiated allegations violates the Act. It does not challenge the lawfulness of the employer's rule or policy as it relates to prohibitions against "personally insulting statements." It is also important to note that the basic facts surrounding this allegation are undisputed.

Section 8(a)(1) of the NLRA states that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of" their organizing rights. 29 U.S.C. § 158. Maintenance of even a facially neutral workplace rule can violate Section 8(a)(1) where the rule is overbroad. To assess overbreadth, the Board asks whether a facially neutral rule, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." *Boeing*, 365 NLRB No. 154 (2017). If a rule "would *not* prohibit or interfere with the exercise of NLRA rights, maintenance of the rule is lawful without any need to evaluate or balance business justifications, and the Board's inquiry into maintenance of the rule comes to an end." Id. at 16. If it *would* prohibit or interfere with the exercise of NLRA rights, the Board then balances "the nature and extent of the potential impact" on those rights against the "legitimate justifications associated with the rule." Id. at 3. "[T]he rule's maintenance will violate Section 8(a)(1) if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7." Id. at 16.

Applying the law to the undisputed facts, I find that the rule is overbroad under the Board's established standards. The term "unsubstantiated allegations" by its very terms is vague ambiguous and unclear. A reasonable employee would not know what could or could not be posted. What is not ambiguous when viewed objectively is that the rule carries with it the threat of discipline. This is by its own terms coercive. Any reasonable employee when presented with a prohibition attached to which is a threat of discipline would reasonably interpret it as coercive. In Dolso-Morey's case, Respondent's specific aim was to coerce him into not posting about the alleged disconnect between the company's stated values and its treatment of migrant workers. This translates directly into interference under Section (8)(a)(1).

The second prong of the analysis requires balancing the employers "legitimate justifications" of the rule against "the extent of the potential impact." I find that given the degree of overbreadth and ambiguity of the rule, it could subject an employee to discipline for nearly any critical comment regarding terms and conditions of employment. In Dolso-Morey's case, he testified that some of his concerns were formed from reading published news articles. (GC Exhs. 8, 9, 10.) Presumably a regular employee would be tasked to take on the extraordinary role to investigate beyond published news articles and establish the absolute truth of any concern or face discipline if the employer disagreed with the contents of the communication. The "extent of potential impact" is broad. Respondent has offered no legitimate justifications which would balance the vague and ambiguous policy and its "extent of potential impact" against employees and in its favor. I find that the prohibition against "unsubstantiated allegations" violated Section 8(a)(1) of the Act.

2. The alleged interrogation and preview of employee comments by Tony Ybarra

General counsel in its complaint alleged that Tony Ybarra both interrogated Dolso-Morey and instructed him to allow Ybarra to review any comments before posting on the hive. Only two people were present during the alleged violations, and each offered a different version of events. The resolution of the question is entirely dependent on whose version of events is believed to be credible. I credit the testimony of Ybarra over that of Dolso-Morey as being a more accurate depiction of the events in question. The accuracy of Dolso-Morey's testimony was called into question more than once. For example, he was unable to recall what Ybarra allegedly said to him at the meeting regarding his hive posts. (Tr. 106.) He also testified that he never read or reviewed the hive usage policy. However, the electronic record showed that he had both opened the document and acknowledged that he read and received it. (R. Exh. 6, Tr. 176–178.) Ybarra's testimony was credited for a number of reasons. Overall, his calm demeanor and his openness while testifying suggested that he was being truthful. His testimony was logically consistent with established facts. He testified that he was delivering a letter that he was not the author of, and his job was to deliver the letter and "point him [Dolso-Morey] in the right direction" if he had any questions. (Tr 158.) This is logically consistent with his description of the conversation as someone merely serving as a messenger and not the author of the letter. Since there were no witnesses to the conversation, Ybarra could easily have denied any mention of unionization. He didn't. Instead, he described the conversation as follows:

> Q When you said you chatted back and forth, what did you chat about?
>
> We talked about—Max had mentioned some books, videos, movies that I should watch revolving unionizing—somehow we'd gotten on that conversation. I let him know that I was no—almost not educated at all about it. Max was always—definitely the person in the store that was an educational fig-

> ure, so I think he took the opportunity to just, you know, keep me educated and give me some resources and tools if I needed them. And then I also offered my service as resources and tools back to him.

This portion of Ybarra's testimony was particularly convincing because it offered a glimpse into the tone and character of the discussions. It is also important to note that the conversation regarding unionization was initiated by Dolso-Morey not Ybarra. (Tr. 105.) An interrogation violates Section 8(a) (1) when under all the circumstances, the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Healthcare Center*, 330 NLRB 935 (2000). There is nothing regarding the conversation that took place as described by Ybarra that would "reasonably tend to coerce." This is especially true since the topic of unionization was initiated by Dolso-Morey. (Tr. 105.) See *Phillips-Van Heusen Corp.*, 165 NLRB 1 (1967) (finding conversation between manager and employees, a normal response to a discussion employees themselves initiated and not violative of Section 8(a)(1)).

The General Counsel alleged that Ybarra instructed Dolso-Morey to review all of his posts before posting on the hive. Ybarra denied that he ever gave this instruction. He testified:

> I think it's important to know I was managing two shops in San Francisco, two large high traffic stores. It was my first time doing it ever for the business. There's no way I would have been able to do any of those things. Even if I, you know—whatever, I—I—there's—I didn't have the time. I barely had the time to give the developments to the people that I wanted, the quality of development I wanted. There was no way I would have wanted to invest time or energy into babysitting Max. You know, I wouldn't have prioritized that over anything else. (Tr. 167.)

I found this testimony credible. It is supported by the fact that after the meeting, Dolso-Morey continued to post on the hive without any input by Ybarra.

In view of the above findings, the allegations regarding paragraph six of the complaint are hereby dismissed.

CONCLUSIONS OF LAW

1. Respondent's actions surrounding its creation of a work rule regarding "unsubstantiated allegations" which threatened an employee with unspecified reprisals violated Section 8(a)(1) of the Act.

2. Respondent did not interrogate or request to review Dolso-Morey's hive posts and thus did not violate Section 8(a)(1).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

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

ORDER

The Respondent, Lush Cosmetics, LLC its officers, agents, successors, and assigns, shall

1. Cease and desist from engaging in the following conduct

(a) Making and enforcing overbroad work rules regarding "unsubstantiated allegations" and threatening employees with unspecified reprisals regarding such.

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

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Rescind the overbroad rule.

(b) Within 14 days after service by the Region, post at its facility in San Francisco, California, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by Respondent, and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted including the Respondent's Intranet known within the company as "the hive". 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 that facility at any time since February 9, 2021.

(c) Within 21 days after service by the Region, file with the Regional Director of Region 20 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provision of this Order.

Dated, Washington, D.C. March 24, 2022

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT threaten you with reprisals because you engaged in activities protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

YOU HAVE THE RIGHT to talk about your own and other employees' working conditions, and WE WILL NOT stop you from talking about such matters.

LUSH COSMETICS, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20–CA–272392 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.