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

COSTCO WHOLESALE CORP.

and **Case 10–CA–316194**

JESSICA MARIE GEORG, AN INDIVIDUAL

Meghan Lucas and *Anthony Fitzpatrick, Esqs.,*
for the General Counsel.[1]
Paul Galligan, Esq.,
for the Respondent.

DECISION

INTRODUCTION[2]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This case involves allegations that Costco Warehouse Corp. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: (1) promulgating and since maintaining overly broad work rules in its Acknowledgement of Confidentiality for Investigations form; and (2) directing employees not to discuss their terms and conditions of employment by instructing them in correspondence not to disclose information about a an internal workplace investigation.

Jessica Marie Georg works for the Respondent at its Winston-Salem, North Carolina store. In August 2022, she filed an internal complaint alleging sexual harassment. Respondent investigated the complaint by interviewing the employees involved. Each employee was required to sign an Acknowledgement of Confidentiality for Investigations form that included, among others, a provision prohibiting the employee from recording their interviews or conversations with management without the consent of all parties, and a provision requiring the employee to maintain the confidentiality of the ongoing investigation, while another provision allowed them to communicate with their lawyer, any law enforcement official, government agency or entity, or with others about terms and conditions of employment. After several months, the Respondent concluded its investigation into Georg's complaint. On March 24, 2023, the Respondent's vice president, Tom Feely, sent Georg a letter informing her about the outcome. At the conclusion of the letter, Feely wrote that the Respondent expected that Georg would treat the information contained in the letter as confidential.

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[1] On February 3, 2025, President Donald J. Trump appointed William B. Cowen to be Acting General Counsel, replacing former General Counsel Jennifer Abruzzo. For ease and consistency, I will refer to the Acting General Counsel, the former General Counsel, and counsels for the General Counsel collectively as the General Counsel.

[2] Abbreviations in this decision are as follows: Transcript citations are "Tr. ___"; Joint Exhibits are "Jt. Exh. ____"; and General Counsel Exhibits are "GC Exh. __." Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based on the entire record.

The General Counsel alleges that the Respondent, through the Acknowledgement form and the Feely letter, violated Section 8(a)(1) of the Act by interfering with, restraining, and/or coercing employees in the exercise of their rights under Section 7 of the Act. The Respondent contends the allegations are untimely. But even if they were timely, the Respondent argues the limited restrictions imposed on employees were for a lawful, legitimate and compelling business reason, which was to protect the integrity of its internal investigation.

For the reasons stated below, I recommend finding that the Respondent violated the Act as alleged.

FINDINGS OF FACT

JURISDICTION

The Respondent, a Washington corporation, has been engaged in operating a retail grocery store at 1085 Hanes Mall Blvd, Winston-Salem, North Carolina 27103 ("Respondent's store"). Annually, in conducting its business operations at its store, the Respondent derived gross revenues in excess of $500,000, and it purchased and received products, goods, and materials valued in excess of $5,000 directly from points outside the State of North Carolina. The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As such, I find this dispute affects commerce and that the National Labor Relations Board (Board) has jurisdiction pursuant to Section 10(a) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

Georg works at the Respondent's store as a maintenance assistant. The Respondent has an "Employee Agreement," which contains various personnel policies. Among the policies is one entitled, "Open Door Policy/Resolution of Disagreements." (GC Exh. 8.) It prohibits unlawful harassment, discrimination, or retaliation, and it sets forth a reporting procedure for employees to follow if they or another employee has been subjected to such prohibited conduct. The policy states that all reports "will be investigated impartially and timely, in a way that respects the rights and interests of all persons involved, including any person complaining, witnesses, and any person accused of misconduct." It further states that:

> All complaints will be kept confidential to the fullest extent possible and will only be disclosed as necessary to allow us to investigate and respond to the complaint. No one will be involved in the investigation or response except those with a need to know. Costco has a compelling interest in preserving the integrity of investigations. All employees who participate in investigations will be held to the same standards of confidentiality. This confidentiality requirement is not intended to dissuade employees from engaging in protected concerted activity, such as disclosing wages, benefits, or working conditions for the purpose of mutual aid and protection.

(GC Exh. 8, p. 16.)

In around August 2022, Georg spoke with other female employees the Winston-Salem store about the conduct of a male coworker towards them. On about August 20, 2022, Georg filed an internal

complaint accusing the male coworker of sexual harassment. She spoke with the general manager, Keith Napolitano, and a manager, Jesse Rodriguez, about the matter. On August 21, 2022, Georg spoke with the assistant general manager, Ray Vasquez, about the complaint and her discussion with Napolitano and Rodriguez. Vasquez presented Georg with a copy of the Acknowledgement of Confidentiality for Investigations form to sign, which they both then signed. The Acknowledgement form contains the following provisions:

> ACKNOWLEDGEMENT OF CONFIDENTIALITY FOR INVESTIGATIONS
>
> I hereby acknowledge that I have read, understand, and agree to this statement of confidentiality. My statements to the investigator today are true and complete.
>
> I have not recorded any part of this interview and I acknowledge that electronic recordings of any conversation without the consent of all parties is considered a violation of company policy and may result in disciplinary action up to and including termination.
>
> I understand that Costco has a compelling interest in preserving the integrity of its investigations. I agree to maintain confidentiality regarding this ongoing investigation.
>
> I also agreed to cooperate fully in this investigation and answer any questions truthfully and to do the best of my ability.
>
> I understand that any violation of this Acknowledgement may result in disciplinary action up to and including termination.
>
> This Acknowledgement still permits me to communicate with my lawyer, with any law enforcement official, government agency or entity, and with others about terms and conditions of employment.
>
> If I have any questions about the investigation, I agree to contact the general manager or any other person conducting the investigation.
>
> I understand that Costco prohibits retaliation in any form and that if I feel I am retaliated against as a result of participating in this investigation, I will report it immediately to my General Manager, my Vice President, or the Human Resources Department.

(Jt. Exh. 2.)

There is no evidence that Vasquez, or any other member of the management, made any statements to Georg regarding the Acknowledgement form's intended purpose, scope, use or duration. There also is no evidence that Vasquez, or any other manager, referenced any other rules or policies as applicable, including the Open Door/Resolution of Disagreements policy. (Tr. 60–61.)

Over the next few months, the Respondent investigated Georg's harassment complaint. Earlier in the year, at least three other female employees had filed sexual harassment complaints concerning this same male coworker. (GC Exh. 27.) Like Georg, they and the accused were each presented with and required to sign the same Acknowledgement form.

Georg's complaint was later directed to the Respondent's vice president, Tom Feely. During the investigation, managers monitored and documented Georg's interactions with other employees about the alleged harassment. (GC Exh. 7.) An internal email establishes that human resources—personnel specialist Carlos Corniel explained to Georg the importance of the Acknowledgment form and why it was crucial that she only communicate with Napolitano, Feely, or personnel. And that if she was in fact influencing other people, Respondent would need to address that. (GC Exh. 6.)

In March 2023, Respondent completed its investigation into Georg's complaint. On March 24, Feely wrote Georg a letter advising her about the results of the investigation, specifically that the accused harasser was no longer employed. The letter concluded, "Finally, in order to protect the privacy of everyone involved, we've taken steps to handle this matter in confidence. We hope and expect that you will treat the information contained in this letter in the same manner. Thank you for your cooperation." (Jt. Exh. 3.)

STATEMENT OF THE CASE

On April 14, 2023, Georg filed the original charge in this case. It alleges that within the previous 6 months, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the Act by maintaining work rules that prevent or discourage employees from engaging in protected concerted activities, in violation of Section 8(a)(1) of the Act. The charge references the "Acknowledgement of Confidentiality" form that she was "forced into signing" and there was "no mention of protection for concerted activities." (GC Exh. 1(a)). On November 6, 2023, Georg filed the first amended charge. It added an allegation that by letter dated March 24, 2023, the Respondent made coercive statements to employees that prevent or discourage employees from engaging in protected concerted activities, in violation of Section 8(a)(1). (GC Exh. 1(c).) On about August 5, 2024, Georg filed a second amended charge. It added an allegation that was later withdrawn. (GC Exh. 1(e)-1(i).) On August 9, 2024, Georg filed the third-amended charge modifying the original charge allegation, specifically the date. (GC Exh. 1(g).) On August 20, 2024, Georg filed the fourth-amended charge. It, in relevant part, modifies the prior amended charge to allege that since on about October 14, 2022, and continuing to date, the Respondent has been interfering with, restraining, and coercing its employees in the exercise of rights protected by Section 7 of the Act by maintaining work rules that prevent or discourage employees from engaging in protected concerted activities. (GC Exh. 1(i).)

Based on these charges, the Regional Director for Region 10, on behalf of the General Counsel, issued the complaint and notice of hearing (complaint) on November 19, 2024. It alleges that since about October 14, 2022, the Respondent, through the Acknowledgement form presented to employees during workplace investigations, promulgated and has since maintained rules about the discussion of workplace investigations and recording of meetings, in violation of Section 8(a)(1). It further alleges that on about March 24, 2023, Feely, by letter, directed employees not to discuss their terms and conditions of employment by instructing them not to disclose information about a workplace investigation, in violation of Section 8(a)(1). On December 3, 2024, the Respondent filed its answer denying these alleged violations and raising various affirmative defenses. The hearing was held on March 25, 2025, in Winston-Salem, North Carolina.[3]

[3] At the start of the hearing, I granted the General Counsel's unopposed motion to amend out pars. 3 and 4 of the remedy section in the complaint. (Tr. 9–11.)

LEGAL ANALYSIS

Rules in Acknowledgment Form

The General Counsel contends that the Respondent promulgated and since maintained rules in its Acknowledgement form that violate Section 8(a)(1), specifically the investigative-confidentiality and no-recording provisions. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act. Section 7 affords employees the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Investigative-Confidentiality Provisions

The Board has held that Section 7 grants employees the right to discuss their terms and conditions of employment, including, but not limited to, their right to discuss potential workplace harassment, to solicit the assistance and support of others in filing and pursuing such harassment complaints, and/or to discuss the employer's response to those complaints. See *Fresh & Easy Neighborhood Market*, 361 NLRB 151 (2014); *Ellison Media Co*., 344 NLRB 1112 (2005). The Board generally prohibits rules restricting such discussions. See *Phoenix Transit System*, 337 NLRB 510 (2002), enfd., 63 Fed.Appx. 524 (D.C. Cir. 2003).

In *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), enfd. in part 851 F.3d 35 (D.C. Cir. 2017), the Board addressed whether an employer may lawfully instruct employees not to discuss ongoing workplace investigations with one another. In finding that the instructions violated Section 8(a)(1), the Board held that employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or workers, and an employer may restrict those discussions only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights. Id. at 1109. In so holding, the Board placed the burden on the employer to determine, on a case-by-case basis, whether its interests in preserving the integrity of an investigation outweighed presumptive employee Section 7 rights. The Board found that an employer must supply specific evidence that "in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up." Id. Only after an employer presented a particularized showing that corruption of the investigation was likely to occur could the employer lawfully require employee confidentiality.

In *Apogee Retail LLC*, 368 NLRB No.144 (2019), the Board overruled *Banner Estrella* and held that employers generally have a substantial interest in maintaining a fair investigation, encouraging employees to come forward with allegations, and to protect employees from retaliation or repercussions. To that end, it held that investigative-confidentiality rules that only apply for the duration of the investigation were categorically lawful under the analytical framework set forth in *Boeing Co*., 365 NLRB 1494 (2017).[4] The Board found that "justifications associated with

[4] In *Boeing*, the Board held that when evaluating a facially neutral policy, rule or provision that, when reasonably interpreted, would potentially interfere with the exercise of rights under the Act, the Board will evaluate two

investigative confidentiality rules applicable to open investigations will predictably outweigh the comparatively slight potential of such rules to interfere with the exercise of Section 7 rights." 368 NLRB No. 144, slip op. at 8. Accordingly, the Board held that confidentiality rules limited to open investigations were lawful, obviating any further need for a case-by-case balancing of competing Section 7 rights and management interests. The Board also stated in *Apogee* that its holding "does not extend to rules that would apply to nonparticipants [in an investigation], or that would prohibit employees—participants and nonparticipants alike—from discussing the event or events giving rise to an investigation (provided that participants do not disclose information they either learned or provided in the course of the investigation)." Id., slip op. at 2 fn. 3.

In *Watco Transloading, LLC*, 369 NLRB No. 93 (2020), the Board held that the *Apogee* framework is applicable to an employer's one-on-one confidentiality instruction to an employee, in all respects except one. Specifically, in *Apogee*, the Board addressed the facial validity of a general written investigative confidentiality policy and held that employees would reasonably interpret such a policy that is silent with regard to the duration of the confidentiality requirement as not limited to open investigations.

In *Alcoa Corp*., 370 NLRB No. 107 (2020), the Board applied *Apogee* and *Watco* to conclude that statements to employees about keeping the contents of their investigatory interview confidential to be lawful. In that case, the labor relations specialist told each employee who participated in the investigation to keep the conversation confidential, including supervisors and other employees, and to decline to answer if others asked about the conversation. There was no evidence or allegation that the directives applied to anyone other than the employees interviewed during the specific investigation of the complaint allegations, or that the directives prevented those employees, or any other employees for that matter, from discussing the events, giving rise to the investigation. The issue was limited to whether the labor relations specialist lawfully directed that interviewed employees keep confidential the information learned or provided during their interviews. On that issue, the Board did not hold the restrictions were unlimited in time and place simply because they did not include an express statement that employees could talk with others after the investigation was over. Considering the circumstances surrounding the investigation and its aftermath, the Board held employees would reasonably understand that the restriction was limited to the duration of the investigation.

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things: (i) the nature and extent of the potential impact on rights under the Act, and (ii) legitimate justifications associated with the rule. In conducting this evaluation, the Board balanced the employer's business justifications against the extent to which the rule or policy, viewed from the perspective of reasonable employees, interferes with employee rights under the Act. Ultimately, the Board placed challenged rules into one of three categories: (1) rules that the Board designates as lawful to maintain, either because (a) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of statutory rights; or (b) the potential adverse impact on protected rights is outweighed by justifications associated with the rule; (2) rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of statutory rights, and if so, whether any adverse impact on the statutorily protected conduct is outweighed by legitimate justifications; and (3) rules that the Board will designate as unlawful to maintain because they would prohibit or limit protected conduct, and the adverse impact on rights under the Act is not outweighed by justifications associated with the rule. The Board in *Apogee* held that investigative confidentiality rules limited to while the investigation remained open are lawful to maintain as a general matter under *Boeing* category 1(b), but that such rules not limited on their face to open investigations fall into *Boeing* category 2, requiring individualized scrutiny as to whether any post-investigation adverse impact on protected conduct is outweighed by legitimate justifications.

In *Stericycle, Inc*., 372 NLRB No. 113 (2023), the Board overruled *Boeing* and its progeny, including *Apogee* and its progeny,[5] and it established a new/modified standard for analyzing facially neutral workplace rules or policies, including investigative-confidentiality rules. There is no longer the presumption that the employer's interest in maintaining confidentiality of its internal investigations outweighs the impact a policy or rule may have on employees' Section 7 rights. Under *Stericycle*, the General Counsel must "prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights." Id. slip op. at 2. When evaluating whether the General Counsel has done so, the rule is interpreted "from the perspective of an employee who is subject to the rule and economically dependent on the employer . . . even if a contrary, noncoercive interpretation of the rule is also reasonable." Id. If the General Counsel carries the burden of showing a "tendency to chill," then the rule is presumptively unlawful. Id. If the rule is shown to be presumptively unlawful, the employer may avoid a finding that it violated the Act if it shows that the rule "advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." Id. In evaluating the policy or rule, the Board returns to a "case-specific approach" that looks to "the specific wording of the rule, the specific industry and workplace context in which it is maintained, the specific employer interests it may advance, and the specific statutory rights it may infringe." Id. slip op. at 20.

According to the General Counsel, the Acknowledgement form's investigative-confidentiality provisions that are at issue are the following:

> I understand that Costco has a compelling interest in preserving the integrity of its investigations. I agree to maintain confidentiality regarding this ongoing investigation.
>
> I understand that any violation of this Acknowledgment may result in disciplinary action up to and including termination.
>
> This Acknowledgment still permits me to communicate with my lawyer, with any law enforcement official, government agency or entity, and with others about terms and conditions of employment.
>
> If I have any questions about the investigation, I agree to contact the General Manager or any other person conducting the investigation.

The General Counsel alleges these provisions violate Section 8(a)(1) because they include a blanket prohibition on discussing the ongoing investigation, a provision stating that any violation of the Acknowledgement form may have disciplinary consequences, and two provisions discussing who employees can communicate with about the investigation. The Acknowledgement form does not contain any provisions stating that employees will be informed regarding the closure of the investigation, nor does it explicitly state that they can discuss the matter once the investigation is closed.

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[5] In his dissent in *Stericycle*, Member (now Chairman) Kaplan criticized the majority for reversing *Apogee*, opining that it struck an appropriate balance between employee rights and employer (and employee) interests." *Stericycle*, supra slip op. at 32. The majority responded, "we reject the principle that such investigative-confidentiality rules are always lawful to maintain, no matter how they are written and no matter what employer interests are invoked (or not invoked) to justify them, [and] we have remanded the facial challenge to [the] rule at issue in this case to the administrative law judge so that he can apply the standard announced today." Id., slip op. at 11 fn. 22.

In applying *Stericycle*, I conclude the General Counsel has established that these provisions have a reasonable tendency to chill employees in the exercise of their Section 7 rights. Employees would reasonably tend to interpret these provisions as preventing or limiting them from engaging in protected activity, including, but not limited to, gathering and sharing information about the events giving rise to the complaint, soliciting the support or assistance from others in bolstering the basis for the complaint, and/or discussing the employer's response to the complaint, including the outcome of the investigation.[6] While the Respondent argues the provisions are necessary to protect the integrity of its investigation, the language appears to encompass more than just the information employees learned or provided during their interviews.

As for duration, while the above provision refers to "this ongoing investigation," the proscriptions could reasonably be interpreted as extending beyond the conclusion of the investigation. As discussed below, Feely's March 24 letter to Georg confirms that the Respondent expected her to continue keeping the information about the investigation confidential following its conclusion. Under current and prior Board precedent, confidentiality provisions that remain in effect beyond the conclusion of the investigation are, absent an established, compelling interest, unlawfully overbroad.

The Respondent argues that any ambiguity or confusion about the potential effect on employees' Section 7 rights is eliminated by the provision stating employees are still permitted to communicate with their lawyer, with any law enforcement official, government agency or entity, and with others about terms and conditions of employment. The Respondent contends this provision clarifies and confirms that employees continue to have the right to engage in Section 7 activity, specifically that they may discuss with others their terms and conditions of employment.

In *First Transit, Inc*., 360 NLRB 619, 621–622 (2014), the Board held that a savings clause may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule or restriction. In deciding whether a clause adequately clarifies the rule or restriction, the Board considers whether the language "address[es] the broad panoply of rights" protected by Section 7; the length of the document and the placement of the savings clause in relation to the provisions that it is claimed to remedy; whether the savings clause and the provisions reference each other; and whether the employer has enforced the overbroad provision in a way that shows employees that the savings clause does not safeguard their Section 7 rights. Id. at 621–622. See also *Care One at Madison Avenue*, 361 NLRB 1462, 1465 fn. 8 (2014), enfd. 832 F.3d 351 (D.C. Cir. 2016). In deciding whether a savings clause renders an otherwise overly broad rule or restriction lawful, the Board construes any ambiguity against the employer as the drafter. *Century Fast Foods, Inc.*, 363 NLRB 891, 901 (2016).

[6] In their post-hearing brief, the General Counsel references the provision about contacting the general manager or any other person conducting the investigation with questions about the investigation. They argue that an economically dependent employee would reasonably interpret this provision to reiterate that they are only allowed to discuss the investigation with specific managers and not with other employees, which would tend to have an impermissible chilling effect on employees' Sec. 7 rights. While I agree this provision, along with the other provisions, would reasonably have a chilling effect, I do not read it as independently violating Sec. 8(a)(1), because it does not limit employees to only contacting management, or requiring that they contact management first, regarding questions or concerns they may have about the investigation. See *Kinder-Care Learning Centers, Inc.*, 299 NLRB 1171 (1990).

Certain factors support the Respondent's argument, including that the form is one page in length, the savings clause is three short paragraphs below the confidentiality provision, and there is no evidence the Respondent has enforced the confidentiality provision in a way that shows employees the savings clause does not safeguard their Section 7 rights. However, while this is true, I conclude that the savings clause is too vague and general to adequately advise employees about their broad panoply of rights, and that they may continue to engage in the sort of protected activity discussed above. Absent clear language about the precise nature of their continued right to discuss or disclose information related to the complaint/investigation as part of their right to communicate about the terms and conditions of employment, the savings clause is likely to leave employees unwilling to risk violating the confidentiality provision by exercising their Section 7 rights.

That likelihood is compounded by the Acknowledgement form's threat of disciplinary action, up to and including termination, for employees who violate the provisions in the form. Employees, therefore, are left to reconcile for themselves whether they are engaging in permitted discussions about their terms and conditions of employment or prohibited discussions about the ongoing investigation, under the specter that making the wrong determination could lead to their termination. Imposing this responsibility ignores the practical reality that the Board has long recognized, which is that "[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and [they] cannot be expected to have the expertise to examine company rules from a legal standpoint." *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994). For this reason, the Board reads language presented to employees in handbooks or agreements from the position of non-lawyers, rejecting wordsmithing efforts—no matter how carefully crafted—to salvage restrictions on protected conduct with language that assumes knowledge of the law. Id. See also *U-Haul Co. of California*, 347 NLRB 375, 378 (2006), enfd. mem. 255 Fed.Appx. 527 (D.C. Cir. 2007). Additionally, as stated, the Board construes any ambiguity regarding these provisions against the employer as the drafter.

Respondent also contends the language in the Open Door/Resolution of Disagreements policy in the Employee Agreement informs and saves the investigative-confidentiality provisions in the Aknowledgement form. It discusses the compelling interest in maintaining the confidential nature of investigations into allegations of harassment, discrimination or retaliation, but it states that the "confidentiality requirement is not intended to dissuade employees from engaging in protected concerted activity, such as disclosing wages, benefits, or working conditions for the purpose of mutual aid and protection." Like the above savings clause in the form, this policy language does not clarify or explain the scope and limits of the confidentiality obligation or its duration, and it leaves it for the employees to make the determination of whether their conduct is permitted or proscribed. Furthermore, the language in the policy is in a separate document, and neither the policy nor the form references the other. And no member of management mentioned the policy when Georg was given the form to sign, or when she was later reminded by the personnel specialist to abide by its terms.

For these reasons, I conclude the investigative-confidentiality provisions in the form violate the Act.

No-Recording Provision

The General Counsel also contends the no-recording provision in the Acknowledgment form violates Section 8(a)(1). They argue this provision is broad enough to bar the recording of not only the investigatory interview, but also any conversation an employee has with management without their consent, under the threat of discipline up to and including termination. I agree. The Board recognizes that audio recordings are 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 Market, Inc*., 363 NLRB 800, 802 (2015), enfd. 691 Fed.Appx. 49 (2d Cir. 2017). The Board has held that "any act of recording by a single employee that forms part of, or is undertaken in furtherance of, a course of group action constitutes concerted activity within the meaning of Sec. 7." Id. at fn. 9. Such activities may include, for example, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions. Id., citing *White Oak Manor*, 353 NLRB 795, 795 fn. 2 (2009), reaffirmed and incorporated by reference at 355 NLRB 1280 (2010). A blanket rule prohibiting such recording would reasonably tend to chill employees' Section 7 rights.

As stated, the Respondent contends that it maintained the provision at issue for its compelling interest in maintaining the integrity of its internal investigations. There was no additional evidence presented regarding this interest, or how it could not be more narrowly tailored than a total ban on recording, such as, for example, prohibiting the sharing of the recording with other potential interviewees while the investigation is ongoing. Absent clearer and more narrowly tailored language, I conclude the no-recording provision, as written, violates the Act.

"Expectations" in Feely's March 24 Letter

The General Counsel next argues that the Respondent, through vice president Feely's March 24, 2023 letter to Georg, violated Section 8(a)(1) because he required her to keep information about the investigation confidential after the investigation was completed. As stated, an employer cannot require confidentiality after the investigation is completed, absent evidence that the post-investigation adverse impact on protected conduct was outweighed by the employer's legitimate justifications. See *Phoenix Transit System*, supra; *SNE Enterprises, Inc*., 347 NLRB 472, 472 fn. 4 (2006), enfd. 257 Fed.Appx. 642 (4th Cir. 2007). The Respondent failed to present any evidence showing what, if any, justifications it had for indefinitely requiring Georg to keep information about the investigation confidential following its conclusion. As a result, I conclude the additional restriction imposed by Feely's letter further violates the Act. Without question, and regardless of whether the current or prior standard is applied, the combination of the Acknowledgement form and Feely's letter impermissibly prevents Georg from disclosing or discussing matters affecting her and other employees' terms and conditions of employment.

Section 10(b)

The Respondent contends both Complaint allegations should be dismissed because they are untimely under Section 10(b) of the Act. Section 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ." The 10(b) period begins to run when the charging party has clear and unequivocal notice --- either actual or constructive — of the acts that constitute the alleged unfair labor practice. See *Castle Hill Health Care Center*, 355 NLRB 1156, 1191 (2010)*; John Morrell & Co*., 304 NLRB 896, 899 (1991).

The Respondent first contends the allegation over the "rules" in the Acknowledgement form are untimely because Georg had notice of the contents of that form more than 6 months prior to filing her April 14, 2023 charge. The Board has held the maintenance of a violative rule or policy during the 6-month period preceding the filing of the charge is a continuing violation for as long as it remains in effect, even where the rule or policy was adopted or promulgated outside the 10(b) period. See *Cedars-Sinai Medical. Center*, 368 NLRB No. 83, slip op. at 8 fn. 7 (2019); *Cellular Sales of Missouri, LLC*,

362 NLRB 241, 242 (2015), enfd. in relevant part 824 F.3d 772 (8th Cir. 2016); *Register Guard*, 351 NLRB 1110, 1110 fn. 2 (2007). The Board has held the same regarding agreements or documents containing unlawful rules or policies that remain in effect during the 6-month period prior to the filing of the charge, even when they are executed outside the 10(b) period. See generally, *Dynamic Nursing Services, Inc*., 369 NLRB No. 49, slip op. at 4 (2020); *PJ Cheese, Inc*., 362 NLRB 1452 (2015); *The Neiman Marcus Group, Inc*., 362 NLRB 1286, 1287 fn. 6 (2015).

Georg signed her copy of the Acknowledgement form on August 21, 2022, and she remained subject to its terms — as did the others who signed it — for *at least* as long as the investigation remained ongoing. The Respondent first notified Georg that it had completed its investigation into her complaint on March 24, 2023, when Feely wrote to advise her about the outcome. Three weeks later, on April 14, 2023, Georg filed the original charge over the rules in the Acknowledgement form. I, therefore, conclude the allegations over the rules in the form were timely filed as a continuing violation.

The Respondent next contends the complaint allegation over Feely's March 24 letter was untimely because Georg did not file her first-amended charge alleging it violated Section 8(a)(1) until November 6, 2023, which was more than 6 months after she received the letter. Notwithstanding the literal language of Section 10(b), the Board does not absolutely bar complaint allegations that are based on charges filed outside the 6-month period. The Board has held that "the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the [6-month] 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge." *Pankratz Forest Industries*, 269 NLRB 33, 36–37 (1984), enfd. mem. sub nom. 762 F.2d 1018 (9th Cir. 1985). In determining whether an amended charge relates back, the Board applies the "closely related" test set forth in *Redd-I, Inc*., 290 NLRB 1115 (1988), as clarified by *Carney Hospital*, 350 NLRB 627 (2007). Under this test, the Board considers whether (1) the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge (i.e., the allegations involve similar conduct, usually during the same time period, and with a similar object); and (3) the respondent would raise the same or similar defenses to both the otherwise untimely and timely allegations.

Similarly, the Board applies this same closely related test to allegations first raised more than 6 months *after* the timely filed charge, including those amended into the complaint at the hearing, regardless of whether they are part of an amended charge. The Board has found violations based upon allegations raised for the first time at the hearing when they are closely related to a prior timely filed charge. See e.g., *Hood River Distillers, Inc*., 372 NLRB No. 126, slip op. at 1 and 23 fns. 2 and 40. (2023) (closely related violations occurring after the filing of the charges that were amended into the complaint more than 6 months later, at the start of the hearing); *Starbucks Corp*., 372 NLRB No. 50, slip op. 3–4 (2023); *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 2 (2018), enfd. 939 F.3d 798 (6th Cir. 2019); *Roslyn Gardens Tenants Corp*., 294 NLRB 506 (1989).

Applying these factors, I conclude the allegation in the first-amended charge regarding Feely's letter both relates back to and is closely related to the allegations about the rules in the Acknowledgment form in the original charge. Both involve the same legal theory, which is that the Respondent imposed restrictions that would reasonably tend to interfere with, restrain, and/or coerce employees in the exercise of their Section 7 rights, including their protected right to solicit, gather and disclose information affecting their terms and conditions of employment, in violation of Section 8(a)(1). The allegations also stem from the same factual situation and are a continuation of the same

chain of events. As outlined, when the Respondent began its investigation, it required Georg to sign and abide by the terms of the Acknowledgement form, and when it concluded its investigation, Feely, in his letter to Georg, stated that she was expected to keep the information about the investigation confidential. In other words, Feely's letter was an open-ended continuation of the Respondent's prior restrictions on Georg's ability to engage in protected activity that began when it required her to sign the Acknowledgement form. Finally, the Respondent has raised the same or similar defenses to both allegations. As stated, the Respondent defends against both allegations at issue by arguing that they were based on its compelling interest in protecting the integrity of its internal investigation into the harassment allegations.

For these reasons, I conclude that all the allegations were timely filed or closely related to timely filed charges.

CONCLUSIONS OF LAW

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

2. The Respondent violated Section 8(a)(1) of the Act by maintaining overly broad provisions in its Acknowledgement of Confidentiality for Investigations form requiring that employees maintain confidentiality regarding ongoing internal investigations and prohibiting them from recording their investigatory interviews or any conversations with management without their consent.

3. The Respondent violated Section 8(a)(1) of the Act by directing employees not to discuss their terms and conditions of employment by indefinitely prohibiting them from disclosing information about an internal workplace investigation.

4 The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in unfair labor practices, I shall order it to cease and desist and to take certain affirmative actions designed to effectuate the purposes of the Act. The Respondent shall post the attached notice at its Winston-Salem, North Carolina store in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010), and *Durham School Services*, 360 NLRB 694 (2014).[7] 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.

[7] As part of the remedy, the General Counsel seeks a nationwide posting, arguing that Respondent utilizes the Acknowledgement form in investigations at all its facilities. The General Counsel failed to allege or establish that the forms are used throughout the country. The evidence presented was limited to the Winston-Salem, North Carolina store. I, therefore, deny the request for a nationwide posting in this case. See *Starbucks Corp.*, 374 NLRB No. 10 fn. 28 (2024); *Trader Joe's*, 373 NLRB No. 73 fn. 2 (2024).

On these findings of fact and conclusions of law, and on the entire record in this case, I issue the following recommended[8]

ORDER

The Respondent, Costco Wholesale Corp., Winston-Salem, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining overly broad provisions in its Acknowledgement of Confidentiality for Investigations form requiring that employees maintain confidentiality regarding ongoing internal investigations and prohibiting them from recording their investigatory interviews or any conversations with management without their consent.

(b) Directing employees not to discuss their terms and conditions of employment by indefinitely prohibiting them from disclosing information about an internal workplace investigation.

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

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

(a) Within 14 days of the Board's order, rescind the Acknowledgement form and the rules requiring that employees maintain confidentiality regarding ongoing internal investigations and prohibiting them from recording their investigatory interviews or any conversations with management without their consent, and rescind correspondence from management directing employees not to discuss their terms and conditions of employment by instructing them not to disclose information about a workplace investigation.

(b) Post at it's the Respondent's Winston-Salem, North Carolina store copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by an authorized representative of the Respondent, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail a copy of the notice to

[8] 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 waived for all purposes.

[9] 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."

all current employees and former employees employed by Respondent at any time since October 14, 2022.[10]

(c) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that that Respondent has taken to comply.

Dated, Washington, D.C. May 5, 2025

Andrew S. Gollin
Administrative Law Judge

[10] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted and read within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted and read within 14 days after the facilities reopen and 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, 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]."

APPENDIX

NOTICE TO EMPLOYEES

(To be printed and posted on the official Board notice form)

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose a representative 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 maintain work rules or present you with agreements or acknowledgment forms that broadly require that you maintain confidentiality of workplace investigations.

WE WILL NOT maintain work rules or present you with agreements or acknowledgement forms that broadly prohibit you from recording interviews or conversations with management without all parties' consent.

WE WILL NOT maintain work rules or present you with agreements or acknowledgement forms that broadly limit your discussions with each other and others about workplace investigations.

WE WILL NOT broadly tell you not to discuss investigations into workplace harassment, including after the investigation is completed.

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

WE WILL rescind or revise the Acknowledgement of Confidentiality for Investigations form to remove offending provisions, and **WE WILL** notify, in writing, all employees who signed the Acknowledgment form that it has been rescinded and, if revised, provide a copy.

COSTCO WHOLESALE CORP.

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and

unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

Harris Tower, 233 Peachtree Street, N.E., Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-316194 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.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (470) 343-7498.