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

UNITED STATES POSTAL SERVICE

and **Case No. 12-CA-316287**

KELLAN KIRKCONNELL, an Individual

UNITED STATES POSTAL SERVICE

and **Case No. 12-CA-330861**

KEREN WILLIAMS, an Individual

Marinelly Maldonado, Esq.
for the General Counsel.
Austin D. Black, Esq., *and James P. Challou, Esq.*
for the Respondent.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. This matter revolves around discipline issued by the United States Postal Service (the Respondent or the Postal Service) to charging parties Kellman Kirkconnell and Karen Williams (the Charging Parties). The Charging Parties are both union-represented employees of the Respondent. The Respondent issued to both Charging Parties a notice of removal which was later reduced to a 7-day suspension with pay pursuant to a grievance settlement. (Tr. 18, 40, 60, 73, 127-128, 157-158)

Kirkconnell filed a charge in case 12-CA-316287 on April 17, 2023[1] and an amended charge on December 5, 2024. Williams filed a charge in case 12-CA-330861 on November 29, 2023 and an amended charge on November 7, 2024. A complaint issued in case 12-CA-316287 on January 8, 2025 (the Kirkconnell complaint) and the Respondent filed an answer thereto on January 21, 2025. A separate complaint issued in case 12-CA-330861 (the Williams complaint) on March 13, 2025 and the Respondent filed an answer thereto on June 5, 2025. An amendment to the Kirkconnell complaint issued on March 13, 2025. The Respondent filed amended answers to both complaints on June 5, 2025. A hearing on the Kirkconnell and Williams complaints (the complaints) was held before me in Tampa, Florida on June 24, 2025.

The complaints allege several violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The complaints allege that the Respondent relied on facially overbroad rules to discipline the Charging Parties for their protected concerted activity. The Kirkconnell complaint alleges that the Respondent unlawfully relied on certain facially neutral rules to discipline Kirkconnell for his protected concerted activity. The Kirkconnell complaint also alleges that, on April 4 and 5, the Respondent engaged in surveillance of employees' protected concerted activity, created the impression that employees' protected concerted activity was

[1] All dates herein refer to 2023 unless stated otherwise.

under surveillance, told employees they were not permitted to post anything related to work on social media, directed employees to remove protected concerted posts from social media, and threatened employees with unspecified reprisals for engaging in protected concerted activity. The Williams complaint alleges that the Respondent, on October 21, directed employees not to engage in the protected concerted activity of taking pictures of her working conditions.

As discussed at length below, I largely recommend the finding of violations alleged in the complaint. I recommend dismissal of the allegation that the Respondent engaged in unlawful surveillance of employees' protected concerted activity.[2]

On the entire record, after considering the posthearing briefs filed by the General Counsel and the Respondent,[3] I render below my recommended findings of fact,[4] legal analysis, conclusions of law, remedy, and orders.

JURISDICTION

The Respondent admits, and I find, that the Board has jurisdiction over this matter by virtue of Section 1209 of the Postal Reorganization Act.

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[2] I make no recommendation regarding the allegation that Kirkconnell was unlawfully disciplined pursuant to an overbroad rule regarding employee behavior and personal habits because the General Counsel did not specifically address that allegation in the posthearing brief.

[3] The General Counsel filed a single brief for both complaints and the Respondent filed separate briefs for each complaint.

Although the Respondent asserted in its sixth affirmative defense of the answers to the complaints that the complaints should be dismissed pursuant to grievance settlements (G.C. Exh. 1(u) & 1(w)), the Respondent did not argue deferral in its posthearing briefs. Accordingly, the affirmative defense of deferral has arguably been waived. See *Wisconsin Bell, Inc.*, 346 NLRB 62, 64 fn. 8 (2005). On the merits of the deferral issue, the General counsel contends that, under *Alpha Beta Co.*, 273 NLRB 1546 (1985), deferral to the grievance settlements would be "clearly repugnant" to the policies of the Act because, despite reducing the Charging Parties' notices of removal to 7-day suspensions, the reduced disciplines still penalized them for their Section 7 activity. See *Phillips 66 Co.*, 373 NLRB No. 1, slip op. at 1 fn. 2,13 (2023) ("The Board has consistently refused to defer to arbitration awards that uphold discipline or a discharge for conduct that is protected by the Act"); *Cone Mills Corp.*, 298 NLRB 661, 666-667 (1990) (arbitration award is inherently inconsistent and palpably wrong in finding that protected activity amounted to insubordination warranting discipline); *Garland Coal & Mining Co.*, 276 NLRB 963, 965 (1985) (arbitration award finding union activity insubordinate and a basis for discipline, even if reduced from discharge to suspension, is not susceptible to any interpretation consistent with the Act). I will not, at this stage in the proceeding, take issue with the General Counsel's opposition to deferral as it appears at least arguably applicable and the Respondent has provided no argument or authority to the contrary.

[4] My factual findings are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent evidence of a fact is trustworthy and not contested, the fact is generally stated without reference to the underlying evidence. In assessing credibility, I consider such factors as the context of witness' testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, reasonable inferences that may be drawn from the record as a whole, and witness demeanor. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Witness demeanor is only relied upon if specifically stated in this decision.

ALLEGED UNFAIR LABOR PRACTICES

ALLEGATIONS IN THE KIRKCONNELL COMPLAINT (CASE NO. 12-CA-316287)

Facts

The Respondent's Employee Labor Relations Manual (ELM) contains the following provisions (Jt. Exh. 1):

> **665.1 General Expectation**
>
> **665.11 Loyalty**
> Employees are expected to be loyal to the United States government and uphold the policies and regulations of the Postal Service.
>
> . . .
>
> **665.13 Discharge of Duties**
> Employees are expected to discharge their assigned duties conscientiously and effectively.
>
> . . .
>
> **665.15 Obedience to Orders**
> Employees must obey the instructions of their supervisors. If an employee has reason to question the propriety of a supervisor's order, the individual must nevertheless carry out the order and may immediately file a protest in writing to the official in charge of the installation or may appeal through official channels.
>
> **665.16 Behavior and Personal Habits**
> Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary action against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute.
>
> . . .
>
> **667.34 Protection Responsibilities**
> Employees must protect all information about individuals, customers, all other Restricted Information, and all National Security Information against unauthorized use and disclosure.

The Respondent maintains a separate "Management Instruction," MI AS-882-2011-6, regarding "Postal Service Use of Retail and Cell-Phone Cameras." which states, in part, the following (Jt. Exh. 2):

> Purpose
> This Management Instruction (MI) establishes the policy and procedures for: (1) Postal Service management's use of cameras for monitoring retail operations

and (2) restrictions on employee's or contractor's use of handheld and cell-phone cameras in Postal Service facilities.

Scope

This MI applies to the following cameras used in Postal Service facilities:

- Cameras used for monitoring retail operations.
- Cameras used in retail kiosk equipment.
- Closed circuit television (CCTV) cameras used for monitoring retail operations by management as described in *Administrative Support Manual* 273.17, Closed Circuit Television System Security.
- Cell phones with camera capabilities or other handheld cameras used by employees or contractors in Postal Service facilities.

The MI does not apply to the following:

- Photography authorized by management for operational purposes, including images of mail, mail processing operations, retail marketing (including Passport cameras), or similar activities.
- Photography conducted in accordance with the collective bargaining agreement.
- Video teleconferencing, photography, or video recording of official meetings.
- Video teleconferencing, photography, or video recording of events such as award, retirement, training, or other similar functions.
- Photography by nonPostal Service persons, including photographic activities subject to *Postal Operations Manual* 124.58, Photographs for News, Advertising, or Commercial Purposes.
- Cameras installed, operated, or maintained by the U.S. Postal Inspection Service or the Postal Service's Office of Inspector General. (The Inspection Service maintains camera policies and procedures, which address the issues presented below and conform to applicable federal law governing the use of such techniques).

. . .

Prohibitions

Under this policy, the following activities are prohibited:

Video Monitoring Cameras in Retail Operations:

- Cameras must not be used to profile customers in any discriminatory fashion.
- Cameras must not be used to capture legible images of mail piece addresses or any documents, credit cards, or computer screens used in transactions.
- Camera images must not be transmitted via any network other than the Postal Service intranet ("Blue").
- Wireless cameras must not be used without approval of the district IT manager.
- Camera microphones must not be used to record or monitor any form of audio information.

Privacy Act and Information Security Assurance: Retail Operations and Retail Marketing will notify the Privacy Office and the CISO, if at any time in the future, information is retrieved by personal identifiers (e.g., names) or individual appearance, or if information is maintained in an application requiring completion of the ISA process.

Handheld and Cell-Phone Cameras: Cameras or cell-phone camera functions may not be used by Postal Service employees or contractors in restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, or any other

areas unless approved by an area or headquarters vice president or his or her designee for business purposes. Cameras or cell phones used as cameras in violation of this prohibition may be subject to temporary confiscation.

Notice

Customer Notice: The Postal Service will notify customers when they are being video-monitored during a transaction, such as at a retail counter or self-service kiosk. Notice will be provided via a placard posted in Management Instruction AS-882-2011-6 plain view or by a notice appearing on the computer screen prior to the beginning of the transaction. Appropriate notices on screen or via signage shall be coordinated by Retail Operations and Retail Marketing.

Privacy Act Notice: The Postal Service will notify customers, employees, or contractors if, at any time in the future, information will be retrieved from camera film or footage via their personal identifiers, thus necessitating the creation or amendment of a Privacy Act system of records. In such cases, the Postal Service will post a placard in plain view with the appropriate Privacy Act notice stating when and where the camera is operational.

. . .

Violations

The Postal Service may investigate and take appropriate action for violations of this policy.

Respondent Labor Relations Specialist Brandy Hillard testified that she has used the cell phone policy in MI AS-882-2011-6 on multiple occasions, including to discipline employees for using cell phone cameras to take pictures and video recordings and post them on social media. (Tr. 124, 159) However, Hillard did not recall how many times she has disciplined employees for such conduct and did not testify to the level of discipline which was issued. (Tr. 159)

The Respondent generally provides employees with training on policies when they are initially hired and, thereafter, in ad hoc "service talks." Notices forbidding photography are also posted in postal facilities. (Tr. 100-101, 112-113, 124-125, 150)

Charging party Kirkconnell was hired by the Respondent in October 2015 as a rural letter carrier in the Gainesville, Florida sorting and delivery center (S&DC). Kirkconnell is represented by the National Rural Letter Carriers Association (the Letter Carriers). (Tr. 18-19)

Outside of work, Kirkconnell has a following under the name "Kellman Explores" on various social media platforms, including TikTok, YouTube, Instagram, Facebook, and X. (Tr. 51-53) Kirkconnell uses his social media accounts to post videos regarding travel. Except for the three videos at issue in this case (as discussed below), Kirkconnell does not post videos on Kellman Explores regarding the Postal Service, union business, or his work. (Tr. 51-53) Kirkconnell testified that a TikTok account can be "monetized" and generate revenue sharing if ads are added to posted content over one minute long. (Tr. 52) Kirkconnell's TikTok account was monetized in May as a result of the interaction he generated from the videos at issue in this case, which he posted in early-April. (Tr. 161) Kirkconnell's TikTok account was not monetized before he posted those early-April videos and he was not paid for any of the early-April videos because none of them were more than one minute long. (Tr. 161)

Pursuant to the collective-bargaining agreement and a 2014 arbitration award, rural letter carriers are paid in accordance with a rural route carrier evaluation system (RRC system). (Tr. 152-154) The RRC system provides for a "count" or reevaluation of rural carriers' pay every

2 or 4 years. Each carrier has an electronic handheld scanner with a GPS function. Under the RRC system, using the handheld scanners, the Respondent tracks the amount of mail each rural carrier delivered, the distance travelled during their routes, their steps walked, their time in the post office, and certain keys they punched into the scanners. Pursuant to an agreed upon formula, these factors are used to determine the salary and work schedule of each carrier for a period of time ending when another count is conducted. (Tr. 25-26, 44-48, 134-135, 152-158) The salaries and schedules are classified by numbers and letters (e.g., 46K or 41J). The number refers to the salary (the higher the number the higher the salary) and the letter refers to the schedule (K is 5 days per week and J alternates 5 and 6 days per week). (Tr. 25-26)

Kirkconnell testified that he was unaware of the RRC system (which he described as a "new system") until employees were informed 6 months in advance of an April RRC count. (Tr. 44-45) Kirkconnell testified that he did not know "when I signed up to be a rural letter carrier that . . . our pay could just be variable at a certain point." (Tr. 45) Presumably, in his previous years of employment with the Respondent from 2015 to 2023, Kirkconnell had not received a pay reduction as a result of an RRC count.

At hearing, Kirkconnell testified that carriers may have received a pay reduction as a result of the April RRC count because they received incorrect instructions to enter only 6 of the 30 key options on the handheld scanner during the RRC evaluation period. (Tr. 44) Respondent Supervisor Monica Duncan testified that carriers may have received adverse pay adjustments as a result of the April RRC count because they did not keep the scanners on their person at all times and, as a result, certain information was not recorded. (Tr. 135) Labor Relations Specialist Hillard testified that carriers may have received a pay reduction as a result of the April RRC count if the volume of mail was higher in the previous period. Hillard confirmed that many carriers had their pay reduced and the Respondent realized a large cost savings as a result of the April RRC count. (Tr. 19-21, 155-156, 158)

Rural letter carriers are notified of the results of an RRC count by distribution to them of a Form 4241-A, which contains the carrier's identifying information, their salary for the year, their route, number of boxes, loading time, and other details of their routes. (Tr. 155) Hillard initially testified that Form 4241-A is not a public document "[b]ecause it contains their personal identifiable information as well as their salaries." (Tr. 155) Hillard later testified that "salary would not necessarily be" confidential, but she did not know whether Kirkconnell's salary was confidential. (Tr. 159-16) Hillard answered, "Yes," when she was asked whether Form 4241-A contained proprietary information of the Postal Service. (Tr. 155)

On April 1, each rural letter carrier received a Form 4241-A containing the results of the April RRC count, including employees' adjusted salary and schedule. (Tr. 155) Kirkconnell was reclassified from 46K to 41J. Kirkconnell estimated that, as a result, his based salary was reduced by about $11,000 and he was required to work an extra day per pay period (which, in turn, reduced his ability to earn overturn pay). (Tr. 19-25) Kirkconnell testified that, upon receipt of the Forms 4241-A, "people were very upset, including myself. Some people walked out, crying in tears. I was in shock pretty much myself." (Tr. 20) Kirkconnell suppressed his initial impulse to walk out with other carriers because he "figured that was wrong," and decided instead to record and post a TikTok video. (Tr. 20, 48) (G.C. Exh. 2) Kirkconnell recorded and posted the video on the S&DC work floor. (Tr. 20) Kirkconnell testified that he created the video to cope with and process his anger and anxiety, and "to stop me from walking out of the building that day." (Tr. 47-49) Kirkconnell further testified that he posted the video because he thought the public and newer rural carriers were not aware of the RRC system and the ramifications of it. (Tr. 50) Kirkconnell described his "intended audience" as "other people like me, in my situation, and people who could help." (Tr. 50)

In his April 1 video, Kirkconnell stated the following (G.C. Exh. 2):

> All right I work for the Post Office and we just got told we're losing… a lot of us are losing money with our new pay system. I'm losing about $12,000 per year guaranteed. A lot of you may not be getting mail today. We've had some people walk out and other people lost way more than I did. And I have to work an extra day now per pay period. Instead of 10 days, I have to work 11. But, welcome to the Post Office.

The first 11 seconds of the video show two employees standing on the work floor. (G.C. Exh. 2, 0:01-0:11) Beginning about 11 seconds into the video, Kirkconnell panned to the left toward what appeared to be a rack of supplies and booklets before zooming in on his Form 4241-A. (G.C. Exh. 2, 0:11-0:15) Specifically, Kirkconnell focused on boxes at the bottom of the form which contain his "salary" ($56,179) and "guaranteed salary" ($52,815). (G.C. Exh. 2, 0:21-0:25) The last 22 seconds of the video show a close up of Kirkconnell's face while he is speaking. (G.C. Exh. 2, 0:26-0:48) Briefly, 43 seconds into the video, a portion of what appears to be a stamped letter can be seen in the background on a shelf above Kirkconnell's right shoulder. (G.C. Exh 2, 0:43-0:44) No name or address was visible on this letter (even when I saved the video frame to a separate file and zoomed in on the letter). The remainder of the video does not appear to show specifically identifiable pieces of mail. (G.C. Exh. 2) After posting this video, Kirkconnell left the S&DC to complete his route. (Tr. 22)

At the end of his route, Kirkconnell noticed that the video he posted that morning had attracted significant interaction, including a comment from an out-of-state letter carrier which stated, "45k to 43j. It's devastating!." (Tr. 22-23) (G.C. Exh. 3) Kirkconnell pulled his truck to the side of the road on 104th Avenue in Gainesville, where he recorded and posted a video reply to the carrier's comment. In this video reply, Kirkconnell stated the following (G.C. Exh. 3):

> I'm really sorry to hear that… that… it's crazy to me. I went from a 46k to a 41j and a lot of the comments they don't understand but to take an almost $12,000 pay cut and now have to work another 2 days a month for no more pay or less pay, actually, uhh… it's.. it's not right to do that to, to somebody… and I'm one of the good people that got cut. Where I'm from, we got people losing $18 grand. I'm also losing out on about $20 grand if you factor in the overtime potential for those 2 days.

This video shows a close up of Kirkconnell's face while sitting in his truck with the comment to which he was replying (i.e., "45k to 43j. It's devastating!") in a bubble above his head. No mail can be seen in this video. (G.C. Exh. 3)

Kirkconnell testified that rural letter carriers "went to the union about" the RRC adjustments and were represented by the Letter Carriers during a 4-week process. (Tr. 50)

On April 4, shortly after 8 a.m., Supervisor Duncan approached Kirkconnell at his workstation. Kirkconnell described his interaction with Duncan as follows (Tr. 26-32): Duncan told Kirkconnell she needed to see him real quick and motioned toward an office shared by supervisors. On the way to the office, Kirkconnell asked Duncan if any witnesses would be present or if he would have union representation. Duncan said, "it's not important. It'll be real quick. Just come on." (Tr. 27) Kirkconnell again asked if anyone would be present as a witness. Duncan repeated, "it'll be real quick." (Tr. 28) Upon entering the office, Duncan closed the door. Duncan stepped forward, pointed at him, and said, "the video, it needs to

come down right now." (Tr. 28) Kirkconnell was uncomfortable and asked again if his union was going to be present. Duncan asked, "so are you refusing to take the video down?" (Tr. 28) Kirkconnell again told Duncan he was uncomfortable talking to her without a witness, his union, or somebody else present. Duncan called Union Steward Jennifer Smith on speaker phone, but Smith was out of the facility and not available to attend the meeting. Duncan then called Union President Marion Schroeter on speaker phone. Duncan told Schroeter she pulled Kirkconnell into the office because he recorded an illegal video in the building which needed to come down. (Tr. 30) Kirkconnell said he did not think the video was illegal and he needed somebody in here. Schroeter asked Kirkconnell whether he recorded anything in the building, and Kirkconnell confirmed that he had. (Tr. 31) Schroeter asked to speak to Kirkconnell alone and Duncan walked out of the office about 50 feet away. Schroeter told Kirkconnell he had to take the video down if he recorded it in the building. Kirkconnell asked about videos recorded by other postal workers in post offices. Schroeter said she was not worried about those carriers or those videos, she was only worried about Kirkconnell and he needed to remove the video. (Tr. 31) Kirkconnell agreed and changed the setting of the video to private, which prevented anyone from seeing it. Duncan returned and used a cell phone to confirm that the video could not be seen online. Kirkconnell then left the facility to do his route and went home without further incident. (Tr. 31-32)

Duncan testified that, a couple days after employees received their RRC adjustments, someone emailed her a copy of the video Kirkconnell recorded in the S&DC. (Tr. 137-138) (G.C. Exh. 2) Duncan did not recall who emailed her the video. (Tr. 144-145) Duncan described Kirkconnell's comments on the video as tarnishing the Postal Service brand by saying he was unhappy with his new pay, (Tr. 138-140, 145-146) (G.C. Exhs. 2, 4) Duncan further testified that Kirkconnell recorded the addresses of customers and a Form 4241-A, which, according to her, was not supposed to be posted on social media. (Tr. 138, 145-146) According to Duncan, on April 4, she told Kirkconnell he was not allowed to film in the post office and needed to take the video down immediately or be placed on emergency placement leave. (Tr. 139-140) Duncan testified that Kirkconnell initially refused to remove the video because he thought it was his First Amendment right to say whatever he felt, but ultimately took it down after he spoke to Union President Schroeter. (Tr. 139)

On April 4, after finishing his route and going home, Kirkconnell recorded a video outside his house and posted it on TikTok. (Tr. 34) (G.C. Exh. 4) In this video, Kirkconnell stated the following (G.C. Exh. 4):

> Alright, quick update. I was asked to remove those videos earlier today at work and also my union kind of asked me to and I did do it in support of my union. They are working on a resolution to this and I don't want to be in the way of that or jeopardize any kind of momentum with that. We'll know more, I guess, by the end of the week. But a lot of you were asking, so that's why the videos are gone. Yeah. And thank you for following me and following up with it and all the support a lot of you have been giving me. Most of you have been giving me. I appreciate it and hopefully this resolves itself. I'm just glad a lot of people are aware and that's what happened to the videos.

On about April 5, a little after 8 a.m., Duncan approached Kirkconnell at his workstation and said she wanted to see him again in the supervisors' office. Kirkconnell described his interaction with Duncan on April 5 as follows (Tr. 34-37): Kirkconnell asked if his union or at least some other witness would be present. Duncan said, "it will be real quick, and let's go." (Tr. 35) Kirkconnell insisted he wanted a witness present and, on the way, asked his direct supervisor, Jasmine Andrews, to come to the office. Andrews reluctantly agreed and Duncan

did not object. Inside the office, Duncan questioned Kirkconnell about the video he made the previous day at home and told him he needed to take that video down as well. Kirkconnell asked why he needed to remove that video since he filmed it at home and did not mention anything regarding the Postal Service. Kirkconnell asked for the social media policy and to know what he was allowed to post because he should be allowed to talk about something. Andrews told Duncan that Kirkconnell needed to know what he can and cannot post. Duncan simply responded that the video had to come down. Kirkconnell asked where the line was and whether, for example, he could post a video about stamps. Duncan told Kirkconnell, "you need to watch out. You're are being watched. And anything you post is . . . being watched on . . . anywhere." (Tr. 37) Kirkconnell placed the setting of the video on private and Duncan used a phone to confirm that it was not available to be viewed online. (Tr. 37)

Duncan testified that someone showed her a second video Kirkconnell recorded which was different than the one he recorded in the S&DC. (Tr. 145) Duncan testified that she asked Kirkconnell to take this video down as well "[b]ecause he was tarnishing the name brand as well. And then he was inside a postal vehicle with his mail." (Tr. 140) Duncan testified that the second video tarnished the brand because "he said that we forced him to pull the first video down, among other stuff. So he basically was saying what we were doing towards him or what he felt we were doing towards him."[5] (Tr. 146) Duncan testified that Kirkconnell told her he posted the video because "[h]e felt like that was his way of dealing with, I guess, what was going on – or his way of processing." (Tr. 140) When Duncan was asked by Respondent's counsel whether Kirkconnell told her he gets paid to post content on the internet, Duncan testified, "[h]e has, yes." (Tr. 140) On rebuttal, Kirkconnell was asked whether he told Duncan he got paid to post on the internet, and answered, "I did not tell her. No, I did not." (Tr. 161)

Later that day, on April 5, Kirkconnell was provided a copy of the Respondent's social media policy. (Tr. 37) The social media policy was not entered into evidence.

On April 6, Duncan and union steward Jennifer Smith took Kirkconnell to the stewards office for an investigatory interview. (Tr. 37-38, 140-142) Duncan testified that she asked Kirkconnell questions she prepared in advance and wrote down the answers. (Tr. 142) Those questions and answers included the following (R. Exh. 3):

> 3. Please explain why you fail to follow instructions for posted policy for social media on April 2, 2023. [Answer] I did I didn't do anything to violate the postal policy
>
> 4. We[re] you aware it is against postal policy to film, video record, take pictures inside of the post office? [Answer] I think deep down I ~~knew~~ was. But that's how I process and vented on April 1[.]
>
> 5. Please explain why you fail – to follow instruction by recording in side the post office on April 2, 2023? [Answer] I didn't film it was Sunday. I didn't film on that date.
>
> 5b. What date was it you film inside the office[?] [Answer] April 1, 2023 around 8:05 am when I was told I was going to lose 12,000 bc working 5 weeks for free working at my new level.
>
> 6. Please explain why you fail to follow instructions by showing customer address on your video recording? [Answer] I don't believe that

[5] At hearing, Duncan apparently conflated the April 1 video Kirkconnell recorded in his postal vehicle and the April 4 video he recorded at home, believing they were a single video. (Tr. 140, 146)

7. Please explain why you fail to follow instructions by posting on the internet the customer address on the video? [Answer] I don't believe I did that.

7b. Why did you film inside the post office posted on the internet? [Answer] I think you see . . . again the policy wasn't on my mind. I was processing the financial blow. It wasn't on my mind.

On April 11, Duncan completed a Disciplinary Action Request (DAR) which recommended that Kirkconnell be removed from the Postal Service. The DAR included the following questions and answers (R. Exh. 3):

3. Describe in a detailed narrative form exactly what happened, when the incident(s) happened (date/time), who was involved and/or witnessed, where it happened, how it happened, etc. . . .
Kellman Kirkconnell recorded inside the post office after he was given his new 4241A. Kellman had part. Of his case which have customer address part of the video he recorded. He also recorded the Postal Form 4241A. Kellman Kirkconnell also posted the video on the internet. Kellman stated people might not be getting the mail due to carriers walking out. Kellman Kirkconnell said by him recording and posting online concerning the rural route evaluation was [h]is way to process what he was told

4. What exactly was violated? . . .
Code of Ethics and social media
Kellman Kirkconnell also post customer address from his case and post online postal form 4241A

5. How and when was the employee made aware of the rule, regulation, policy and/or order? . . .
Stand up talk. Kellman Kirkconnell have stated to me that he knew that he shouldn't recorded in the Post office. He was aware of the policy not to file inside the post office.

6. What is the employee's version of what happened and the reason(s) for the employee's actions? What have you done to investigate the employee's explanation and why is it unacceptable?
Kellman Kirkconnell said he was upset with what he heard about his new evaluation. He stated the he [w]asn't thinking about the policy not to record inside the post office at the time he was only thinking [a]bout how much money he will be losing with the new route evaluation, and he wanted the world to [k]now how the post office is treating their employees

After completing the DAR, Duncan sent it to the labor relations department. (Tr. 140-141) (R. Exh. 3) Duncan included with the DAR her notes of Kirkconnell's April 6 investigatory interview and the following narrative (R. Exh. 3 p. 10):

I spoke to Kellman Kirkconnell on April 4, 2023, concerning his post he recorded inside the post office. The employee stated the only thing he did wrong was record inside the post office. He was resistan[t] to pulling the video down. I informed Kellman Kirkconnell that he shows his case that shows the customer address and he also post a postal form 4241a. Kellman Kirkconnell was not

authorize to video record inside the post office or post on the internet the video or postal form 4241A. Kellman Kirkconnell wanted someone to be in the office as a witness to what was going on. I call the shop steward Jennifer Smith, but she didn't answer. So, I call the Rural Union president Merlyn and she spoke to Kellman Kirkconnell and told him to pull the video down. Kellman Kirkconnell pull the video down but other people on the internet had already tag him and/or record the video Kellman Kirkconnell posted. Kellman Kirkonnell later in the day recorded and post a video at home stating that he was told to pull the video recording down by management and rural union.

When Kellman Kirkconnell came into work the next day I pull him into the office and again told him to pull the video down. He wanted to see the policy for social media. I went to pull that for him, and he went to call someone on the phone to ask what he can post. When I came back in, he asks Jasmine Andrew another supervisor to be a witness for him. Kellman Kirkconnell ask what he can post I told him nothing that tarnish the brand name of the post office. Kellman Kirkconnell stated that he gets paid to post on the internet. I told him to contact HR Shared Services they may be able to tell you what you can and cannot post.

On about April 15, a little after 8 a.m., Duncan called Kirkconnell into the supervisors' office and handed him a Notice of Removal which stated the following (Tr. 38-40) (R. Exh. 3):

You are hereby notified that you will be removed from the Postal Service effective at the end of your tour on May 26, 2023.

CHARGE NO. 1: IMPROPER CONDUCT

You are a fully trained rural carrier with an enter-on-duty date of October 3, 2015, and you are well aware of your duties and responsibilities as a rural carrier. Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute.

On April 1, 2023, you filmed an unauthorized video while inside a Postal facility and afterwards posted the video to social media. The video disclosed customers names and addresses. You made a statement to Postal customers that they may not receive mail. In the video, you made inappropriate and negative comments concerning the Postal Service without authorization.

A fact finding was held with you on April 6, 2023. Your union representative, Jennifer Smith was present with you. I asked you if you were aware of the Postal Services policy on social media. You stated, "I think deep down, I knew but this is how I process and vented on April 1st and 2nd. You added that you filmed the video on April 1, 2023 around 8:05 a.m. when you found out that you would be

> losing $12,000.00 and were working five weeks for free at your new level. I asked you to explain why you failed to follow the instruction when you showed customer's names and address in the video. You stated you did not believe you did that. I asked you why you filed a video inside the Post Office then posted it to the internet. You state, "I think you can see again that the policy was not on my mind. I was processing the financial blow. It wasn't on my mind.' I asked you if you had anything additional you would like to add. You stated, "no." You gave no further explanation for your actions.
>
> Your improper conduct will not be tolerated. Employees are expected to be loyal to the United States government and uphold the policies and regulations of the Postal Service and be honest, reliable, trustworthy, courteous, and of good character and reputation. Your actions have destroyed the trust necessary to retain you as a postal employee.
>
> Your actions are contrary to your duties and responsibilities as postal employee as well as parts 665.11, 665.13, 665.15, 665.15 and 667.35 of the Employee and Labor Relations Manual.
>
> This charge and these specifications standing on their own warrant your removal from the Postal Service.

Kirkconnell testified that, on the same day he received the notice of removal, he filed a grievance contesting it with union steward Smith. (Tr. 40, 57)

On May 3, the Respondent and the Letter Carriers entered into a settlement of Kirkconnell's grievance, which stated the following (G.C. Exh. 6) (Tr. 40-41):

> As a result of the Step 1 discussions, the undersigned parties mutually agree to full settlement of the above referenced case as follows:
>
> While the facts and circumstances remain in dispute, in an effort to settle the grievance at the lowest possible level, the parties have agreed to reduce the Notice of Removal dated 4/15/203 to a 7 Day Suspension dated 4/15/2023. The discipline will remain in the grievant' s file pursuant to Article 16.8, for 12 months from the date the discipline was issued. Therefore will be removed from all records and files on 3/15/2024.
>
> This settlement is made in good faith without prejudice to either parties' position and is not to be cited in any future, similar grievance involving other employees.

The grievance settlement was signed by Amy Escobar on behalf of the Respondent and steward Smith on behalf of the Union. Kirkconnell did not sign the settlement and the record does not indicate whether he otherwise agreed to or adopted it. (G.C. Exh. 6)

Credibility

I generally found Kirkconnell and Duncan to be credible witnesses and I do not believe their testimony conflicts in any significant way. Kirkconnell provided detailed descriptions of his interaction with Duncan in response to nonleading questions without contradicting himself or other evidence. Kirkconnell gave no indication in his demeanor or otherwise that he was attempting to shade his testimony in a manner favorable to the General Counsel's case.

Rather, Kirkconnell appeared to provide honest, straightforward, and non-combative answers regardless of who was asking him questions. As discussed below, Duncan's testimony was, in certain respects, less detailed and comprehensive than Kirkconnell's testimony. And as noted above, Duncan seemed somewhat confused about the content of Kirkconnell's "second" video (which was actually two different videos). However, Duncan did not, in her demeanor or otherwise, manifest any significant bias or intention not to tell the truth.

Duncan was not expressly asked to confirm or deny any specific aspect of Kirkconnell's testimony. (Tr. 52, 140, 161) In fact, Duncan was not asked to provide complete and comprehensive testimony of her April 4 and 5 conversations with Kirkconnell. The Respondent's counsel asked Duncan what those meetings were "about," which could be interpreted as a request for summaries of the conversations rather than blow-by-blow accounts of who said what and when. (Tr. 139-140) Although the Respondent's counsel asked a few follow up questions about specific details, Duncan was not asked for and did not provide a detailed account of her conversations with Kirkconnell in their entirety. Accordingly, Kirkconnell's testimony about those conversations, to the extent Duncan did not specifically confirm or deny them, was largely unrebutted and I credit him.

Duncan was asked on direct examination the leading question whether Kirkconnell "[told] you he gets paid to post content on the internet," and answered, "he has, yes." (Tr. 140) As noted above, the General Counsel called Kirkconnell on rebuttal to deny he told Duncan he was paid to post content on the internet. Kirkconnell testified, "I did not tell her. No, I did not." (Tr. 161) Duncan's testimony that Kirkconnell "has" told her he gets paid does not necessarily indicate that Kirkconnell told her this in early-April. Kirkconnell's TikTok account was not monetized until May and he may have told her at some point thereafter that he was eligible to be paid for posting content on the internet. Further, Duncan made no mention in her April disciplinary documentation Kirkconnell's conduct that he said he gets paid to post content on the internet. Ultimately, I think it more likely than not that Kirkconnell did not tell Duncan in an early-April conversation that he gets paid to post content on the internet.[6]

Legal Analysis

8(a)(1) Overbroad Rule ELM 665.16 – Kirkconnell Complaint ¶ 4(a)

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by maintaining ELM 665.16, which states the following (Jt. Exh. 1):

> **665.16 Behavior and Personal Habits**
> Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-

[6] Regardless, even if Kirkconnell did tell Duncan in early-April that he is paid to post on the internet, it would not change my legal analysis below. The Respondent relies on Duncan's testimony that Kirkconnell told her he gets paid to post on the internet as part of an argument that Kirkconnell's conduct, even if presumptively protected by the Act, was rendered unprotected by his misconduct. However, as discussed below, the evidence did not establish that the Respondent actually disciplined Kirkconnell for attempting to obtain payment for posting videos on TikTok.

> duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary action against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute.

The Board's current standard for evaluating alleged overbroad work rules is set forth in *Stericycle, Inc.*, 372 NLRB No. 113 (2023) (*Stericycle*). In *Stericycle,* the Board reversed *Boeing Co.*, 365 NLRB No. 154 (2017) (*Boeing*) and *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019), which had, in turn, reversed *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (*Lutheran Heritage*). Under *Lutheran Heritage*, the General Counsel was required to prove the alleged unlawful rule had a reasonable tendency to chill employees in the exercise of their Section 7 rights. In *Stericycle*, the Board returned to *Lutheran Heritage* but clarified the standard and added a second step defense. 372 NLRB slip op. at 2. *Stericycle* clarified "that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity." Id. The Board noted that by incorporating the perspective of the economically dependent employee into its analysis, the standard "is consistent with the Board's long-established practice of construing any ambiguity in a work rule against the employer as the drafter of the rule." Id. slip op. at 9. "[T]he employer's intent in maintaining the rule is immaterial" and the General Counsel will "carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable." Id.

In *Stericycle*, the Board "return[ed] to a case-specific approach" of "examin[ing] 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 employer interests it may advance, and the specific statutory rights it may infringe. " 372 NLRB slip op. at 13. However, the Board stated that this "case-by-case approach will not sacrifice clarity and predictability" and it "would aim to ensure that like cases will be decided alike." Id. Thus, "[t]he nearer the wording of a specific rule is to a rule assessed in a prior case, or the nearer the workplace context or employer interests are to those factors previously considered, the more likely the Board's determination of the rule's legality will be the same." Id.

Even if the General Counsel proves the rule is presumptively unlawful, "the employer may rebut that presumption by proving 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.

Under *Lutheran Heritage*, the Board has found unlawful those rules which ban negative comments about an employer or demand conduct favorable to an employer because such rules would be construed by employees to bar them from discussing complaints regarding their terms of employment. See *Hills and Dales General Hospital*, 360 NLRB 611, 611-612 (2014) (rules overbroad in prohibiting "negative comments" or "negativity," and requiring employees to "represent [the employer] in the community in a positive and professional manner"); *Claremont Resort and Spa*, 344 NLRB 832, 832 (2005) (rule overbroad where "rule's prohibition of 'negative conversations' about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions"). ELM 665.16 runs afoul of such caselaw in expecting employees "to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service" and prohibiting employees from engaging in "conduct prejudicial to the Postal Service." Employees would reasonably construe this rule as restricting complaints about and

actions to correct, including union activity, undesirable conditions of employment.[7] Accordingly, I recommend a finding that ELM 665.16 is presumptively unlawful.

At the second step of the *Stericycle* test, the Respondent makes several arguments to rebut the presumption of illegality on the ground that certain ELM provisions advance legitimate and substantial business interests which could not be advanced by more narrowly tailored rules. These interests include customer confidentiality of personally identifiable information, physical security of post offices and valuable items contained therein (e.g., cash and stamps), a work environment for employees free of discomfort and harassment, and the good image of the Postal Service and the federal government. The Respondent asserts that these interests are advanced by ELM 665.11, 665.13, 665.15, 665.16, and 667.34, but it is only ELM 665.16 which I find presumptively overbroad to the extent it requires employees to conduct themselves in a manner which "reflects favorably upon" and is not "prejudicial to the Postal Service."

In my opinion, those presumptively unlawful prohibitions in ELM 665.16 are unduly broad and could have included more detailed instructions regarding the protection of the Respondent's interests. MI AS 882-2011-6 (camera use) is an example of a clarification of ELM 667.34 (protection responsibilities), but ELM 665.16 makes no reference to such a clarifying management instruction. ELM 665.16 also contains no clause assuring employees that the rule would not be applied to restrict their rights under federal labor law and no specific examples of conduct that is or is not prohibited. Accordingly, ELM 665.16 could have been more narrowly tailored to protect employees' Section 7 rights.

Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(1) of the Act by maintaining the overbroad rule in ELM 665.16.

8(a)(1) Discipline of Kirkconnell – Kirkconnell Complaint ¶ (8)(a)-(c)

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by disciplining Kirkconnell (i.e., a notice of removal reduced to a 7-day suspension) because of his protected concerted activity. The General Counsel applied the type of setting-specific standard which was reinstated in *Lion Elastomers, LLC*, 372 NLRB No. 83 (2023) (overruling *General Motors,* LLC, 369 NLRB No. 127 (2020)) for determining whether the discipline of an employee for Section 7 activity is lawful because the activity involved misconduct so opprobrious as to lose the Act's protection. More specifically, the General Counsel applied the totality-of-the-circumstances test for social media posts and other conversations among employees regarding their wages, hours, and other terms and conditions of employment. See *Pier Sixty LLC*, 362 NLRB 505 (2012); *Desert Springs Hospital Medical Center*, 363 NLRB 1824 (2016). The Respondent contends that Kirkconnell's activity was not concerted and, even if it was, such activity lost the Act's protection as a disloyal disparaging attack unrelated to a labor dispute. See *NLRB v. Electrical Workers UE Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953); *American Golf Corp.*, 330 NLRB 1238 (2000).

Kirkconnell Engaged in Protected Concerted Activity

Section 7 establishes the right of employees "to engage in . . . concerted activities for the purpose of mutual aid and protection." Section 7 activity must be both concerted and protected;

[7] In so concluding, I note that protected employee conduct can be "prejudicial" to an employer without constituting misconduct. Section 7 activity, including union activity, may by "prejudicial" to an employer by increasing labor costs or limiting flexibility regarding decisions related to labor.

not all concerted activity is protected and vice-versa. See *Senior Citizens Coordinating Council of Riverbay Community Inc.*, 330 NLRB 1103 (2000). Activity is generally "protected" when it relates to employees' wages, hours, and other terms and conditions of employment. Id. Here, the Respondent does not contend that Kirkconnell's activity did not relate to his wages and work schedule. Rather, the Respondent contends that Kirkconnell engaged in individual activity of a strictly personal nature which was not concerted.

An employee's activity is concerted when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries, Inc.*, 268 NLRB 493, 497 (1984) (*Meyers I).* This includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries, Inc.*, 281 NLRB 882, 887 (1986) (*Meyers II*). Activity that involves only a speaker and a listener can be concerted, "for such activity is an indispensable preliminary step to employee self-organization." Id. "The Board has found Facebook posts among employees about terms and conditions of employment to be protected concerted activity." *World Color (USA) Corp.*, 360 NLRB 227 (2014), citing *Bettie Page Clothing*, 359 NLRB 377 (2013), incorporated by reference in 361 NLRB 876 (2014). See also *Hispanics United of Buffalo*, 359 NLRB 368 (2012) (employees engaged in protected concerted activity by posting comments on Facebook that responded to a co-worker's criticism of their job performance); *North West Rural Electric Cooperative*, 366 NLRB No. 132, fn. 1 (2018) (Facebook post concerning workplace safety was protected concerted activity); *Triple Play Sports Bar and Grille*, 361 NLRB 308 (2014) (use of Facebook to complain about income-tax withholding was protected concerted activity). "[T]he question of whether an employee engaged in concerted activity is, at its heart, a factual one" based on all the circumstances. *Meyers I*, 268 NLRB at 497; *Meyers II*, 281 NLRB at 886.

I recommend a finding that Kirkconnell's early-April TikTok posts were protected concerted activity. In his first video post on the morning of April 1, Kirkconnell did not just reference his own reduction in wages and change of schedule, but noted also that "a lot of us are losing money with our new pay system" and "[w]e've had some people walk out . . .." (G.C. Exh. 2) The use of language such as "us" and "we" tends to reflect a concerted complaint. See *Dickens, Inc.*, 352 NLRB 667, 667 fn. 3 (2008) (complaint on its face implied group involvement in referencing the bonus rate "we" have); *Hitachi Capital America Corp.*, 361 NLRB 123, 124 (2014) (use of plural pronouns are an indication of concerted activity).

More importantly, Kirkconnell's posts were concerted as a conversation between employees regarding their wages and schedules. Kirkconnell's first April 1 post was directed to an audience including other postal workers and attracted significant public interaction, including a comment from another postal employee which stated, "45k to 43j. It's devastating!" (G.C. Exh. 3) Kirkconnell attached and replied to this coworker comment in his second April 1 post, and said, among other commentary, "I'm really sorry to hear that." (G.C. Exh 3) Such an exchange among employees on a social media platform regarding less favorable terms of employment and what some employees did in response was concerted activity. See *Caesars Entertainment*, 362 NLRB 1690, 1693 (2015) (employee videotaping is protected by Section 7 when, for example, they document and publicize discussions about terms of employment); *Bettie Page Clothing*, 359 NLRB 777, 777-778 (2013) (Facebook postings among employees about complaints and looking into their legal rights was "classic concerted protected activity").

Finally, on April 4, in response to commentor questions why the April 1 TikTok videos were removed, Kirkconnell posted a third video explaining that his union asked him to remove those videos and he "did do it in support of my union." (G.C. Exh. 4) Kirkconnell testified that many postal employees went to and were represented by the Letter Carriers about their RRC

adjustments. Union activity is inherently concerted and, therefore, Kirkconnell's statements regarding the Letter Carriers were concerted. See *Dougherty Lumber Co.*, 299 NLRB 295, 299 (1990) (employee dissemination of a prounion letter was protected concerted activity).

I reject the Respondent's contention that Kirkconnell was not engaged in concerted activity because he posted the initial TikTok video as a way to vent and cope with losing pay instead of walking out with other employees. That Kirkconnell's concerted activity had some individual emotional benefit to him does not change the fact that he attempted to and did communicate with other employees regarding a wage and hour issue of mutual concern. "It is well settled . . . that an employee's subjective motive for taking an action is not relevant to whether that action constitutes protected concerted activity." *Matrix Equities, Inc.*, 365 NLRB 731, 735 (2017), citing *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014) (concertedness is analyzed under an objective standard and an employee's subjective motive for taking action, which may be selfish, is not relevant).

I also reject the Respondent's contention that Kirkconnell did not engage in concerted activity because the videos resulted in the monetization of his TikTok account and potential gain. Again, Kirkconnell's motive for communicating with other employees regarding significant changes to their terms of employment is irrelevant to whether that activity was concerted. Regardless, Kirkconnell's accounts were not monetized until May and he had no reason to believe, in April, that his posts would result monetary gain.

Lastly, I reject the Respondent's assertion that Kirkconnell did not engage in concerted activity because much of his posted content concerned his own wage and schedule. As noted above, Kirkconnell's posts referenced similar and larger pay reductions suffered by other employees. Kirkconnell replied in his second video to an employee who suffered a similar RRC adjustment and, in that video, noted that he was "one of the good people that got cut" in losing $12,000 of guaranteed salary compared to other "people losing $18 grand." (G.C. Exh. 3) Regardless, it is irrelevant to concertedness whether Kirkconnell was, as one might expect, more concerned about his pay than the pay of his colleagues. Kirkconnell's activity was concerted because he reached out to other employees for their mutual aid and protection. Indeed, even if Kirkconnell were the only employee adversely impacted by the April RRC count, his activity would still arguably be concerted. See *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014) (activity concerted where employee sought help from other employees in raising a personal complaint not shared by them).

Kirkconnell did not Lose the Protection of the Act

Having determined that Kirkconnell engaged in protected concerted activity which was admittedly a basis for disciplinary action the Respondent took against him, I next turn to whether Kirkconnell's activity involved misconduct sufficient lose the Act's protection.

In *Pier Sixty*, 362 NLRB 505, 506 (2015), the Board considered the following factors, among the totality of the circumstances, in determining that the Facebook post of an employee regarding mistreatment by a manager lost the Act's protection:

> (1) whether the record contained any evidence of the Respondent's antiunion hostility; (2) whether the Respondent provoked [the employee's] conduct; (3) whether [the employee's] conduct was impulsive or deliberate; (4) the location of [the employee's] . . . post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the Respondent considered language similar to that used by [the employee] to be offensive; (8) whether the employer maintained a specific

> rule prohibiting the language at issue; and (9) whether the discipline imposed upon [the employee] was typical of that imposed for similar violations or disproportionate to his offense.

Factor 1, evidence of the Respondent's hostility toward employees' protected concerted activity, favor's Kirkconnell retaining the Act's protection. Duncan described Kirkconnell's complaints about his RRC adjustment and being forced to remove posts regarding the same as tarnishing the Postal Service's brand. Duncan also admitted she believed Kirkconnell was not allowed to post the form reflecting his new wages and schedule. Likewise, Hillard testified that Form 4241-A is not a public document because it contains employees' salaries. These comments reflect a misconception that employees' protected concerted discussions and complaints regarding their wages and schedules was misconduct warranting discipline. And as discussed at greater length below, Duncan's misconception and hostility toward employees' Section 7 activity was reflected in her coercive statements prohibiting employees from and threatening employees with reprisals for engaging in protected concerted activity.

Factor 2, whether the Respondent's unfair labor practices provoked the conduct, favors Kirkconnell retaining the Act's protection. Kirkconnell's first two videos were not provoked by the Respondent since the RRC system was the product of collective-bargaining. However, as discussed below, Kirkconnell's third video posted from his home on April 4, in which he explained why he removed the first two videos, was provoked by Duncan's unlawful direction that he remove from TikTok the videos he posted on April 1.

Factor 3, whether the conduct at issue was impulsive or deliberate, favors Kirkconnell retaining the Act's protection. On the morning of April 1, Kirkconnell was "upset" and in "shock" that, as a result of the April RRC count, he had to work an extra day per period to earn about $12,000 less per year with less opportunity for overtime. Kirkconnell posted the first video, in part, as a way to cope with his anxiety and suppress the impulse to join other employees who walked out of work. Later that day, Kirkconnell posted a second video in response to a comment he received from another postal service employee who was similarly impacted by the RRC count. On April 4, Kirkconnell posted a third video explaining that he removed the first two videos because he was asked to do so. Kirkconnell posted these videos as a reaction to events as they unfolded and not as a deliberate premeditated scheme to undermine the Postal Service.

Factor 4, the location of the posts, is mixed in favoring and disfavoring Kirkconnell retaining the Act's protection. Kirkconnell recorded his first video at a postal facility on the workroom floor, but recorded his third video at home.[8] *Pier Sixty*, 362 NLRB at 507 (activity protected where employee posted comments while alone, on break, outside the employer's facility), citing *Restaurant Horikawa*, 260 NLRB 197, 197-198) (1982). Supervisor Duncan testified that the video Kirkconnell recorded at home was, in part, a basis for his notice of removal.

Factors 5 and 6, the subject matter and nature of the posts, largely favor Kirkconnell retaining the Act's protection. Kirkconnell's disappointment with a near 20% loss of guaranteed salary with less opportunity for overtime was not surprising and a sentiment apparently shared by other Postal Service employees who suffered equivalent or worse reductions. Kirkconnell did not use profanity, yell, or expressly disparage the Respondent or management. Kirkconnell's closing remark to his first video, "welcome to the Post Office," perhaps reflects a resigned

[8] Although Kirkconnell apparently recorded this second video on April 1 while out on route on working time, it is not clear whether MI AS 882-2011-6 prohibits the use of cell phone cameras in postal vehicles.

disapproval of the institution, but was at most an extremely mild implied insult compared to the following comment the Board found "distasteful" but still protected in *Pier Sixty, LLC*, 362 NLRB at 505, 507:

> Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

In analyzing factors 5 and 6, I give mixed consideration to Kirkconnell's statements in his first April 1 video that "you may not be getting mail today" because "[w]e've had some people walk out." (G.C. Exh. 2) Regarding his reference to employees walking out, Kirkconnell did not indicate he would engage in a work stoppage or urge other employees to do so. In fact, Kirkconnell testified that he posted the video as a way to suppress an urge to walk out because walking out would be "wrong." Kirkconnell's brief and uncontested observation of employees' reaction to an upsetting change in their pay and/or schedule primarily concerned employees' terms of employment and did not constitute a direct or obvious attack on the Postal Service. Regarding his reference to people perhaps not receiving their mail, I recognize that the Respondent might want to maintain control of public statements regarding any potential break in service and the substance of that statement was directed more toward a customer concern than an employee concern about terms of employment. See *NLRB v. Electrical Workers UE Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953); *American Golf Corp.*, 330 NLRB 1238 (2000). However, Kirkconnell did not definitively say there would be a break in mail service or, if there was, it would last longer than "today." More importantly, Kirkconnell's three TikTok posts were far less concerned with a break in mail service than the adverse changes in employees' terms of employment which resulted from the April RRC count. Thus, in my opinion, Kirkconnell's brief speculation that some people might not get their mail was not the type of lengthy disparaging attack unrelated to employees' employment which would cause him to lose the Act's protection. Cf. *NLRB v. Electrical Workers UE Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953); *American Golf Corp.*, 330 NLRB 1238 (2000).

In finding factors 5 and 6 largely favor continued protection, I reject the Respondent's contention that Kirkconnell unfairly disparaged the Respondent by blaming the Postal Service for adverse RRC adjustments because the RRC system was bargained for by the Letter Carriers. Kirkconnell did not, as the Respondent asserts, spread such "misinformation." (Resp. Kirkconnell Brf. p. 15) As noted above, Kirkconnell ended his first video by saying, "welcome to the Post Office." (G.C. Exh. 2) However, the Postal Service is largely staffed by union represented employees and the fact that employees suffered adverse adjustments did not necessarily mean Kirkconnell's union was not at least partially at fault. In fact, Kirkconnell acknowledged in his April 4 video that his union joined the Postal Service in asking him to remove the April 1 videos. (G.C. Exh. 4) This would tend to confirm that the Postal Service did not act unilaterally and was not necessarily wrong in its application of the RRC count.

Further, in finding factors 5 and 6 largely favor continued protection, it matters little that, as the Respondent notes, the contractual validity of the RRC system was confirmed in a 2014 arbitration award. That the RRC system has been in place for over a decade does not mean there could be no new dispute regarding its application. Kirkconnell testified that employees contacted the Letter Carriers to contest their RRC adjustments and the Letter Carriers represented them. For his part, Kirkconnell suspected the RRC count was inaccurate because carriers allegedly received inaccurate instructions on the proper keys to press on the handheld scanners. Supervisor Duncan suspected the count was inaccurate because carriers did not keep their scanners with them at all times. However, even if the Respondent was entirely correct in its application of the April RRC count, that Kirkconnell and other employees were

perhaps wrong in expressing displeasure and contesting their adverse RRC adjustments would not render their protected activity unconcerted or unprotected. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840 (1984) ("an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that the right was violated"); *King Scoopers, Inc.*, 364 NLRB 1153, 1154 (2016) (the Bord and the courts have found that employees were engaged in protected concerted activity despite making mistakes about their contractual rights).[9]

Factor 8, specific rules prohibiting the employee's conduct, largely favors Kirkconnell retaining the Act's protection. The Respondent did have a specific rule, MI AS-d882-2011-6, restricting camera use on the workroom floor. However, as discussed blow in my analysis of the Williams complaint, in my opinion, MI AS-882-2011-6 is unlawfully overbroad. The Respondent did not identify a specific rule forbidding an employee from posting a public statement on social media to the effect that some people might not receive their mail because certain employees walked out. The Respondent also failed to identify a specific rule forbidding employees from spending less than a minute of work time in a work area discussing their terms of employment (be it in-person, by phone, or through social media). Kirkconnell's notice of removal claimed that he "disclosed customers[‘] names and addresses," and such a disclosure would violate ELM 667.34. However, I have reviewed the videos numerous times, including in frame by frame slow motion, and did not see customer information. The first video (G.C. Exh. 2) at 0:43-0:44 shows what appears to be a partially blocked stamped letter in a rack above Kirkconnell's right shoulder, but no name and address is visible (even when I saved the video frame to a separate file and zoomed in on the letter). See *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 4 fn. 6 (2021) (recording of termination meeting was protected where the recording did not contain private customer information).

In finding factor 8 favors Kirkconnell retaining the Act's protection, I reject the Respondent's assertion that Kirkconnell violated federal law or interfered with the Postal Service's obligations under federal law. Citing 5 C.F.R. § 2635.101 and 5 C.F.R. § 2635.702, the Respondent claims Kirkconnell violated federal law by "private monetization efforts while on-the-clock . . .." (Resp. Kirkconnell Brf. p. 13) However, as mentioned above, Kirkconnell's TikTok account was not monetized when he posted videos in early-April. Further, even if Kirkconnell somehow knew by April 4 that his TikTok account would be monetized as a result of the April 1 posts, the April 4 post was simply an explanation in response to commentor inquiries why he removed the April 1 posts. The evidence does not indicate he was motivated by the prospect of monetary payment, which he did not receive because none of the posts were over a minute long. Regardless, and more importantly, the Respondent did not actually discipline

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[9] These cases involve the Board's *Interboro* doctrine (discussed at greater length below in connection with the Williams complaint), "under which an individual's assertion of a right grounded in a collective-bargaining agreement is recognized as 'concerted activity' and therefore accorded protection of § 7." *City Disposal,* 465 U.S. at 829. The General Counsel does not rely on the *Interboro* doctrine to establish that Kirkconnell's video posts were concerted. However, the rationale of that doctrine logically applies to an employee such as Kirkconnell who was perhaps wrong about his protected concerted complaints. That is, even if the Letter Carriers did not ultimately grieve his RRC adjustment, Kirkconnell had a reasonable concern regarding a dramatic adverse change which was perhaps the result of mistakes in the training and use of handheld scanners. Accordingly, Kirkconnell had a Section 7 right to communicate and discuss those concerns with other employees and the Letter Carriers. As observed by the Supreme Court, "in the context of a workplace dispute, . . . the participants are likely to be unsophisticated in collective-bargaining matters." *City Disposal,* 465 U.S. at 840. It would be difficult for employees to determine the viability of a potential grievance if they could not discuss the same.

Kirkconnell for "private monetization efforts while on the clock." Citing 5 U.S.C. § 552(a) and 5 U.S.C § 412, the Respondent claims Kirkconnell prevented the Postal Service from complying with its legal obligation to protect private information as Kirkconnell "displayed the addresses of customers and sensitive internal documents related to mail volume and route evaluations." (Resp. Kirkconnell Brf. p. 13) However, as noted above, as far as I can tell, Kirkconnell's videos did not display such information. I assume "sensitive internal documents related to mail volume and route evaluations" refers to Kirkconnell's Form 4241-A, but the Respondent did not identify or explain what information on that form was confidential or why. The first April 1 video, at 0:20-0:25 of the recording, zoomed in on salary information which Kirkconnell had a Section 7 right to share with other employees. (G.C. Exh. 2)

Factors 7 and 9, whether the Respondent has imposed similar discipline for similar conduct, favor Kirkconnell retaining the Act's protection. The record contains no similar comparator discipline issued to other employees for recording a video or making disloyal disparaging comments regarding the Postal Service. Likewise, the record contains no comparator discipline issued to employees for spending less than a minute of work time in a work area doing something other than work (such as having a discussion). Labor Relations Specialist Hillard testified that she has "used" the cell phone policy in MI AS-882-2011-6 on multiple occasions, including to discipline employees who posted on social media pictures and video recordings they took with their cell phones. (Tr. 124, 159) However, Hillard did not know how many times she has disciplined employees for such conduct and did not testify to the level of discipline imposed (e.g., notice of removal or a 7-day suspension). (Tr. 159)

As alluded to above, the Respondent's reliance on *NLRB v. Electrical Workers UE Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) and *American Golf Corp.*, 330 NLRB 1238 (2000) is, in my opinion, misplaced. In those cases, employees distributed lengthy criticisms of the product the employers were providing to customers with no reference to the subject of a labor dispute. That is not the case here. Here, Kirkconnell was reasonably surprised by the results of the RRC count and ultimately attributed the result to inaccurate instructions carriers received regarding the operation of their handheld scanners. Unlike in *Jefferson Standard* and *American Golf Corp.*, these concerns raised the prospect of a potential labor dispute and employees had a Section 7 right to discuss those concerns with each other and their union representative, including through social media posts. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (even if workers' walk out due to the cold winter conditions was "unnecessary and unwise, . . .it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not"). And as discussed above, in the context of such a labor dispute, employee protected concerted activity would not be rendered unprotected simply because the employer's conduct is not ultimately determined to violate a collective-bargaining agreement. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840 (1984); *King Scoopers, Inc.*, 364 NLRB 1153 (2016).

In my opinion, considering the totality of the circumstances and the record as a whole, the balance of the evidence indicates that Kirkconnell was disciplined for protected concerted activity which did not involve misconduct sufficient to lose the Act's protection. In so finding, I emphasize that I would not fault the Respondent for wanting to avoid the video recording of customers' names and addresses, unauthorized public comments by employees regarding whether customers will receive their mail on a particular day, or the performance of nonwork activity by employees on working time. However, Kirkconnell did not actually posted customer information and the Respondent did not actually reference MI AS 882-2011-6 (use of cell phone cameras) in Kirkconnell's notice of removal. The Respondent did not reference in Kirkconnell's notice of removal a rule which specifically prohibits employees from engaging in any nonwork activity on work time (no matter how brief) or from telling customers about a potential break in

service. Meanwhile, the notice of removal referenced ELM 665.16, which, as discussed above, was overbroad to the extent it directed employees to conduct themselves "in a manner that reflects favorably upon the Postal Service" and not engage in "conduct prejudicial to the Postal Service." Duncan relied upon that portion of the rule to discipline Kirkconnell for tarnishing the Postal Service brand.[10] And even if some of the Respondent's criticisms of Kirkconnell were accurate and valid, the Respondent did not effectively carve out such conduct for discipline separate and apart from Kirkconnell's protected concerted activity. Cf. *Honda of America Mfg., Inc.*, 334 NLRB 746, 748 (2001) (discharge warning legal where it was clearly directed at use of offensive language, not protected activity). Rather, under the apparent belief that an employees' brief and impromptu communications with other employees through social media about adverse changes to their wages and schedules was unprotected misconduct, the Respondent lumped all Kirkconnell's perceived misconduct together in issuing him a notice of removal. The Respondent did so even though Kirkconnell's third video on April 4 was partially the result of an unlawful direction from Duncan to remove protected concerted content from social media and Kirkconnell's posted comments were only modestly critical of the Postal Service. The Respondent also failed to establish with prior comparator disciplines that Kirkconnell engaged in any specific unprotected conduct which would have warranted the discipline he received regardless of his protected concerted activity.

Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(1) of the Act by issuing Kirkconnell a notice of removal later reduced to a 7-day suspension because he engaged in protected concerted activity.

Application of ELM 665.11, 665.13, 665.15, 665.16 & 667.34 – Kirkconnell Complaint ¶ 8(e)

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by applying overbroad rule ELM 665.16 and facially lawful rules ELM 665.11, 665.13, and 667.34 to issue Kirkconnell a notice of removal, later reduced to a 7-day suspension.

"Under established Board law, an employer is prohibited from applying a facially neutral policy in a manner that would restrict protected Section 7 activity." *Starbucks Corp.*, 372 NLRB No. 50 (2023) (employer unlawfully applied neutral recording policy to employees' protected concerted activity of recording meeting with managers), citing *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 4 (2021) (employer unlawfully threatened to hold employee accountable for future violations of neutral rule where employee's sole act of "not following policy" was protected

[10] Paragraph 8(d) of the Kirkconnell complaint (G.C. Exh. 1(i) ¶ 8(d)) alleges that Kirkconnell was disciplined pursuant to overbroad rule ELM 665.16. See *The Continental Group, Inc.*, 357 NLRB 409 (2011) (subject to an affirmative defense that an employee was disciplined for conduct which interfered with the employer's operation, an employer violates the Act by imposing discipline pursuant to an unlawful overbroad rule for activity of a protected character, even if the employee's conduct was not concerted). However, the General Counsel did not specifically assert such a theory under *The Continental Group* in the posthearing brief. If, as discussed above, the Respondent arguably waived a deferral defense by not addressed it in a posthearing brief, the General Counsel arguably did the same regarding a theory that Kirkconnell was unlawfully disciplined pursuant to an overbroad rule. See *Mike-Sells Potato Chip, Co.*, 366 NLRB No. 143, slip op. at 2 (2018). However, in evaluating the totality of the circumstances as to whether Kirkconnell retained the Act's protection, the reasoning of *The Continental Group* is instructive. In that case, the Board observed that, "in the absence of a *valid* employer rule prohibiting the employee conduct at issue, the conduct maintains its protected status." Id. at 411 (emphasis in the original). This rationale applies to the instant totality-of-the-circumstances test because Duncan appeared to rely upon the overbroad portion of ELM 465.16 to discipline Kirkconnell for protected concerted activity. Id. at 411-412.

by Section 7). The Board will consider all the facts and circumstances of a particular case to determine whether an employer's application of a facially lawful rule interfered with employees' Section 7 rights. *AT&T Mobility, LLC*, 370 NLRB slip op. at 4. The test "does not turn on the employer's motive or on whether the coercion succeeded or failed." Id.

I recommend a finding that the Respondent unlawfully applied ELM 665.11, 665.13, 665.15, 665.16, and 667.35 to discipline Kirkconnell for engaging in protected concerted activity. I concluded above that Kirkconnell's April TikTok posts were protected concerted activity not involving misconduct sufficient to lose the Act's protection. Likewise, I concluded that ELM 665.16 is overbroad in expecting employees to conduct themselves "in a manner that reflects favorably upon the Postal Service" and prohibiting employees from engaging in "conduct prejudicial to the Postal Service." Kirkconnell's notice of removal partially quoted this unlawful language. The remainder of the notice of removal included broad generalized accusations of misconduct not specifically directed at portions of the video which were perhaps thought to be unprotected. In this regard, the notice of removal accused Kirkconnell of making "inappropriate and negative comments concerning the Postel Service without authorization" and reminded Kirkconnell that "[e]mployees are expected to be loyal to the United States government and uphold the policies and regulations of the Postal Service and be honest, reliable, trustworthy, courteous, and of good character and reputation." (R. Exh. 3) Under these circumstances, reasonable employees would believe the ELM provisions referenced in Kirkconnell's notice of removal were being applied to prohibit employees from engaging in protected concerted activity.

Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(1) of the Act by relying on ELM 665.11, 665.13, 665.15, 665.16, and 667.34 to issue Kirkconnell a notice of removal, later reduced to a 7-day suspension, for engaging in protected concerted activity.

8(a)(1) Statements – Kirkconnell Complaint ¶¶ 6-7

The General Counsel contends that the Respondent, by Supervisor Duncan, on April 4 and 5, committed several violations of Section 8(a)(1) of the Act. Specifically, the General Counsel contends that the Respondent engaged in surveillance of employees' protected concerted activity (Kirkconnell Comp. ¶ 7(a)), created the impression among employees that their protected concerted activity was under surveillance (Kirkconnell Comp. ¶ 7(b)), told employees they were not permitted to post anything on social media related to work (Kirkconnell Comp. ¶ 7(c)), directed employees to remove social media posts constituting protected concerted activity (Kirkconnell Comp. ¶¶ 6, 7(d)), and threatened employees with reprisals for engaging in protected concerted activity (Kirkconnell Comp. ¶ 7(e)). (G.C. Exh. 1(n))

The Board's test to determine if there has been a violation of Section 8(a)(1) is generally whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. See *David Sax Productions*, 364 NLRB 1427, 1444 (2016). The Board considers the totality of the circumstances and the test does not normally turn on the employer's motive or whether the coercion succeeded or failed. *KSM Industries, Inc.*, 336 NLRB 133, 133 (2001); *Yoshi's Japanese Restaurant & Jail House*, 330 NLRB 1339, 1339 fn. 3 (2000); *American Freightways Co.*, 124 NLRB 146 (1959).

Initially, as part of the totality of the circumstances, I note that Kirkconnell, in his April 4 and 5 meetings with Duncan, repeatedly asked if a union representative or some other witness would be present and indicated he was uncomfortable proceeding without one. Duncan resisted Kirkconnell's efforts to have a representative present and attempted to talk to him alone in the supervisors' ob. Although, on April 4, Duncan ultimately called a union representative,

this was only after Duncan told Kirkconnell the video "needs to come down right now" and interpreted his repeated request for a union representative as a refusal to take down the video. And although the Kirkconnell complaint does not allege a *Weingarten* violation, Duncan created an environment which would tend to increase the coercive impact of her statements.

April 4 Statements by Duncan (Kirkconnell Complaint ¶ 6)

In my legal analysis above, I concluded that Kirkconnell engaged in protected concerted activity when he created and posted on TikTok three videos regarding the April RRC adjustments. On April 4, Duncan accused Kirkconnell of recording an illegal video in the post office and told him the video had to come down. The assertion that Kirkconnell recorded an "illegal" video was presumably based on the no-camera use policy in management instruction MI AS-882-2011-6.[11] A reasonable employee would interpret Duncan's comments as a direction, upon implied threat of discipline, to remove social media posts constituting protected concerted activity. Such an understanding of Duncan's comments and MI AS-882-2011-6 would have been confirmed by Duncan's additional unlawful statements the next day (discussed below) and the discriminatory notice of removal she issued to Kirkconnell thereafter (discussed above). Accordingly, I recommend a finding that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6 of the Kirkconnell complaint.

April 5 Statements by Duncan (Kirkconnell Comp. ¶ 7)

On April 5, Duncan told Kirkconnell to remove a TikTok video he recorded the previous day at home. As discussed above, that video contained Section 7 content. Kirkconnell specifically asked Duncan why he needed to remove a video recorded at home and where the line was regarding his right to post content regarding the Postal Service. Duncan did not answer the question, instead telling Kirkconnell, "you need to watch out. You're being watched. And anything you post . . . is being watched . . . on anywhere." And in an April 15 notice of removal, the Respondent disciplined Kirkconnell because, in part, "[y]ou made inappropriate and negative comments concerning the Postal Service without authorization."

Duncan's warning to Kirkconnell that he was "being watched" unlawfully created the impression that employees' proactivity was under surveillance (Kirkconnell Comp. ¶ 7(b)). See *Shamrok Foods Co.*, 366 NLRB No. 117 (2018) (employer created impression of surveillance by telling employee to "just watch yourself, because they [are] watching both of us, so watch your back"); *Los Angeles Hosp.*, 244 NLRB 960, 961 (1979) (administrator created impression of surveillance by telling employee he "felt sorry for me because I was under a lot of pressure and that I had to watch every move I made because [the president] was watching me").

Duncan also unlawfully communicated to Kirkconnell that, upon threat of reprisals, employees were not permitted to post on social media and had to remove all social media posts related to work, including protected concerted posts. (Kirkconnell Comp. ¶ 7(c)-(e)) Duncan was asked to but refused to distinguish between content employees could and could not post regarding the Postal Service. Rather, Duncan told Kirkconnell he had to "watch out" because "anything" he posted was being watched "anywhere," which would include protected concerted posts. Further, Duncan's insistence that Kirkconnell remove a protected concerted post from TikTok and "watch out" would be understood as a threat of reprisals for posting protected concerted content on social media. See *Itt Federal Services Corp.*, 335 NLRB 998, 1003, fn. 15 (2001) (the words "better watch out" convey an unlawful threat), citing *Southern Devices, Inc.*,

[11] As discussed below in my analysis of the Williams complaint, I recommend a finding that MI AS-882-2011-6 is an overbroad rule.

173 NLRB 1436, 1437 (1968). Such an understanding would have been confirmed when Duncan issued Kirkconnell a notice of removal that referenced his protected concerted activity.

I decline to recommend that the Respondent engaged in the unlawful surveillance of employees' protected concerted activities (Kirkconnell Comp. ¶ 7(a)). An employer commits unlawful surveillance "if it acts in a way that is out of the ordinary in order to observe [Section 7] activity." *National Captioning Institute, Inc.*, 368 NLRB No. 105, slip op. at 7 (2019) (employer violated the Act by encouraging an employee to report on a private, invitation-only Facebook group dedicated to discussions about unionizing). The burden is on the General Counsel to establish that the employer's conduct is out of the ordinary. *Partylite Worldwide, Inc.*, 344 NLRB 1342 (2005) (employer is only required to explain its presence in the parking lot to view union handbilling "once it has been shown the conduct was out of the ordinary"). See also *Traco*, 363 NLRB 368, 380 (2015); *Springfield Hospital*, 281 NLRB 683 (1986). Here, although the Respondent did somehow learn of Kirkconnell's public posts, the General Counsel did not prove that the Respondent acted in a way which was out of the ordinary to do so.

Based upon the foregoing, I recommend findings that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 7(b)-(e) of the Kirkconnell complaint, but recommend dismissal of the violation alleged in paragraph 7(a) of the Kirkconnell complaint.

ALLEGATIONS IN THE WILLIAMS COMPLAINT (CASE NO. 12-CA-330861)

Facts

Charging party Karen Williams was hired by the Respondent in December 2020 as a mail handler in the Mid-Florida Lake Mary process and distribution center (P&DC). Williams is represented by the National Postal Mail Handlers Union, Local 318. (Local 318) (Tr. 18-19, 60)

The Respondent and Local 318 are parties to a collective-bargaining agreement which contains the following provision at Article 14 (Tr. 65-66) (G.C. Exh. 7):

> **Section 14.1 Responsibilities**
> It is the responsibility of management to provide safe working conditions in all present and future installations and to develop a safe working force. The Union will cooperate with and assist management to live up to this responsibility. The Employer agrees to give appropriate consideration to human factors in the design and development of automated systems.
>
> **Section 14.2 Cooperation**
> A The Employer and the Union insist on the observance of safe rules and safe procedures by employees and insist on correction of unsafe conditions. Mechanization, vehicles and vehicle equipment and the work place must be maintained in a safe and sanitary condition, including adequate occupational health and environmental conditions. The Employer shall make available at each installation forms to be used by employees in reporting unsafe and unhealthful conditions. If an employee believes he/she is being required to work under unsafe conditions, such employees may: a) notify the employee's supervisor who will immediately investigate the condition and take corrective action if necessary; b) notify such employee's steward, if available, who may discuss the alleged unsafe condition with such employee's supervisor; c) file a grievance at Step 2 of the grievance procedure within fourteen (14) days of notifying such employee's supervisor if no corrective action is taken during

> the employee's tour; d) and/or make a written report to the Union representative from the local Safety and Health Committee who may discuss the report with such employee's supervisor.
>
> Upon written request of the employee involved in an accident, a copy of the PS Form 1769 (Accident Report) will be provided.
>
> B Any grievance which has as its subject a safety or health issue directly affecting an employee and which is subsequently properly appealed to arbitration in accordance with the provisions of Article 15 may be placed at the head of the appropriate arbitration docket.

The P&DC has two shifts - tours 1 and 3 - with a 1 hour overlap between them. (Tr. 110-111) Three managers of distribution operations (MDOs) and seven supervisors of distribution operations (SDOs), cover the two shifts. Three SDOs work on tour 1 and four SDOs work on tour 3. (Tr. 90, 102, 105, 109-111)

The P&DC contains an ADUS machine which is a large piece of equipment for sorting mail. (Tr. 63, 86-87, 92-95,) (G.C. Exh. 10) Parcels and oversized envelopes move along a conveyor belt on top of the ADUS and are then scanned and sorted down chutes to boxes and bags on the side of the machine. (Tr. 86-87, 92-95) (G.C. Exh. 10) Up to seven employees can work on the ADUS at once. (Tr. 105-106) Parcels containing hazardous materials are processed to one box. (Tr. 95) It is not common for mail on the ADUS to back up and overflow onto the floor if enough employees are working on it. (Tr. 92)

As noted above, the Respondent maintains a management instruction, MI AS-882-2011-6, which states, in part, the following (Jt. Exh. 2):

> Handheld and Cell-Phone Cameras: Cameras or cell-phone camera functions may not be used by Postal Service employees or contractors in restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, or any other areas unless approved by an area or headquarters vice president or his or her designee for business purposes. Cameras or cell phones used as cameras in violation of this prohibition may be subject to temporary confiscation.

On October 21, Williams worked on side 1 of the ADUS during a shift scheduled to end at 1 a.m. (Tr. 61, 102) At about 1 a.m., MDO Lakisha Jenkins asked Williams to work overtime and Williams agreed. Jenkins told Williams to take her 15 minute break and Williams did so. (Tr. 61-62) Nobody replaced Williams at the ADUS when she left for her break. (Tr. 63)

Williams testified that the following occurred when she returned from break: Williams walked to the bathroom. On her way, she saw "mail everywhere on the floor" near the ADUS. (Tr. 63) When Williams returned from the bathroom to the ADUS, tour 1 SDO Racquel Jordan and employee Jaquan Skeete were present. (Tr. 63, 102) (R. Exh. 2, pp. 24-25) Skeete left the area and, according to Williams, Jordan "smirked at me and walked away as I approached the machine." (Tr. 63-64) Employee Peter Thompson was working on side 2 of the ADUS and Williams asked him to call MDO Paul Olbeter.[12] (Tr. 61-62, 64) Thompson paged Olbeter, but Olbeter did not come. (Tr. 64) Williams started cleaning side 2 of the ADUS and "[Jordan]

[12] At hearing, Williams identified this person as Paul Ober, but he was referred to as Paul Olbeter in the Williams complaint and other exhibits. (Tr. 61-62) (G.C. Exh. 8) (R. Exh. 2, p. 20)

came over to me and asked me, was there a problem, and I told her that it was a mess." (Tr. 65) Jordan told Williams to go home. Williams asked Jordan whether she really wanted her to go home, and Jordan confirmed that she did. According to Williams, "before I left, I just took a picture of the machine, and then I got my belongings and left." (Tr. 65) Williams took a picture of the ADUS "[t]o report it to my supervisor, [MDO Jenkins]." (Tr. 65) Williams identified Article 14 of the collective-bargaining agreement as the policy she relied upon to take the picture. Williams described Article 14 as a provision that concerns "[s]afety; if you feel that the work area is unsafe, to report it to your supervisor." (Tr. 65-66) (G.C. Exh. 7)

Jordan testified that the ADUS was overflowing with mail along the chutes and bouncing around on top of the conveyor belt when, from behind, she saw Williams holding up her cellular device as though to record the mail. (Tr. 91-93) Jordan testified that she would not characterize the area as "hazardous," but that there was an issue "safety-wise." (Tr. 93) Jordan testified that she asked mail handler Frank Grazini to help Williams rectify the problem and then she left the area. (Tr. 93-94, 104) Jordan did not recall how long into Williams' overtime shift she asked Grazini to help. (Tr. 106) Likewise, Jordan did not recall whether the problem with the ADUS was resolved before she left the area. (Tr. 94) At hearing, when Jordan was asked to describe what disciplinary steps were taken after Williams took a photo of the mail, she testified as follows (Tr. 96):

> I asked her . . . to go home. I went and spoke to my managers. And then after that we did investigatory interviews with everyone that was involved. And after that, we got a packet together and submitted it to the Labor Department for discipline.

On her way out of the facility, Williams saw MDO Jenkins speaking to SDO Phyllis (last name unknown) and approached them. (Tr. 66-67) Williams told Jenkins, "I know you want me to stay for overtime; however, the machine is a mess. There's mail everywhere. It's hazardous. And I showed her the picture." (Tr. 66-67) Williams testified that Jenkins was in shock and said "oh, wow. And then she said, you're not allowed to take pictures. I said, oh, I'm sorry, I didn't know that. So . . . she told me to delete it." (Tr. 67) Williams said, "okay, no problem." (Tr. 67) Williams told Jenkins she (Williams) was told to go home and Jenkins said it was okay for her to leave.[13] (Tr. 67)

Before she left, Williams was approached by MDO Olbeter and Jordan. Williams told Olbeter she paged him. Olbeter said he was in a meeting. Olbeter said Jordan told him she (Williams) took a picture, which was against policy and needed to be deleted. Williams said she did not know there was such a policy and that she had already deleted the picture. (Tr. 67-68)

On October 25, Jordan conducted investigatory interviews of employees Williams, Grazini, Thompson, Skeete, and Victoria Smith. (Tr. 68-70, 99-100) (R. Exh. 2, pp. 9-25) Jordan prepared typewritten questions in advanced of the interviews and took handwritten notes of the answers. (Tr. 97-98) At some point thereafter, Jordan used her handwritten notes of the interviews to prepare memoranda purporting to reflect for each employee the questions and answers during each employee interview. (Tr. 98) (R. Exh. 2, pp, 9-25)

[13] Jenkins testified that, on October 21, Williams "showed me something on the phone, but it happened so fast I don't know whether it was a video or picture." (Tr. 113) Jenkins further testified that she told Williams, "you're not supposed to be doing that." (Tr. 113) The testimony of Williams and Jenkins did not directly conflict and Jenkins was not asked to deny any portion of Williams' testimony. Accordingly, I credit Williams regarding her interaction with Jenkins.

Williams described the events of October 25 as follows: Supervisor Alberta Barley told Williams SDO Jordan wanted to see her in the office. Williams asked Barley whether she knew why Jordan wanted to see her, but Barley did not know. Williams said she would not go to the office without a steward if it was going to lead to discipline. Barley said she did not know and would find out. (Tr. 68-69) Williams went to the bathroom and was approached by MDO Jenkins and Barley on her way out. (Tr. 69) Jenkins told Williams that not coming to the office was a "fail to follow." (Tr. 69-70) Williams said she was not going to the office without a union steward present. Jenkins said they had a union steward. They went to MDO Olbeter's office. (Tr. 69-70) Olbeter, Jordan, and steward Michael were present. (Tr. 70) (G.C. Exh. 8, p. 2) Olbeter told Williams it was against Postal Service policy to take a picture. Williams said she did not know that. Williams told Olbeter she took the picture to report to Jenkins that there was a hazardous condition at the ADUS because Jordan left her (Williams) there by herself. (Tr. 70)

On October 30, Jordan prepared a Disciplinary Action Request (DAR) for the proposed removal of Williams and submitted it to the Respondent's labor department. (Tr. 96) (R. Exh. 2, pp. 4-6) Attached to the DAR were two narratives of events on October 21 (R. Exh. 2, pp. 7-8 & 26-27),[14] typed memoranda reflecting Jordan's interview notes, (R. Exh. 2, pp. 9-25), and a handwritten statement signed by Grazini (R. Exh. 2, p. 28). Also attached to the DAR were disciplinary documents regarding a previous letter of warning Williams received on December 20, 2022 for failing to perform certain work (loading trucks). (R. Exh. pp. 29-62)

On November 29, Jordan called Williams into MDO Olbeter's office and issued her a notice of removal which stated the following (Tr. 70-73) (G.C. Exh. 8):

> This is advanced notice that you will be removed from the United States Postal Service no sooner than December 22, 2023. The reason(s) for this action are:
>
> **Charge 1: Improper Conduct- Prohibited Conduct; Video Recording**
>
> You are a trained Mail Handler with an initial enter on duty date of July 17, 2021.
>
> Employees of the Postal Service are expected to conduct themselves during and outside of working hours In a manner that reflects favorably upon the Postal Service. A basic requirement is that postal employees be honest, reliable, trustworthy, courteous and of good character and reputation. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service.
>
> Section **667.21** of the Employee and Labor Relations Manual states: Prohibition - During the course of activities related to postal employment, postal employees may not record, monitor, or otherwise intercept the oral or wire communications of any other person through the use of any electronic, mechanical, or other device, nor listen in on a telephone conversation, nor direct another to do so, unless all parties involved in the communication are made aware of and consent to such interception.
> Postal Policy on Handheld and Cellphone Cameras: Cameras or cellphone camera

[14] Item 3 of the DAR asked for a detailed narrative of events, and Jordan responded, "See attachment." (R. Exh. 2, p. 4) The first narrative attached to the DAR is written in the third-person and does not identify the author. (R. Exh. 2, pp. 7-8) The second narrative attached to the DAR reflects two pages of a longer statement. (R. Exh. 2, pp. 26-27). This narrative begins, "I, Raquel Jordan and Andreas Velasco were supervisors on October 20-21st 2023." (R. Exh. 2, p. 26) The initials "R.J." are handwritten on the bottom of both pages. (R. Exh. 2, pp. 26-27)

functions may not be used by Postal Service Employees or contractors In restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, or any other areas unless approved by an area or headquarters vice president or his/her designee for business purposes. Cameras or cellphones used as cameras in violation of this prohibition may be subject to temporary confiscation.

Specification 1: Specifically on October 21, 2023, at approximately 1:35AM, during the course of activities relating to postal employment you were observed by Supervisor Distribution Operations, Racquel Jordan recording a video of the mail on side 2 of the ADUS with your cellphone. You took It upon yourself to record the ADUS machine while you should have been gainfully employed working. This conduct Is prohibited.

Charge 2: Improper Conduct - Failure to Follow Instructions

Employees must obey the Instructions of their supervisors. If an employee has reason to question the propriety of a supervisor's order, the individual will nevertheless carry out the order and immediately file a protest In writing to the official in charge of the installation, or appeal through official channels. You are required to conduct yourself in a professional manner at all times while on duty. An Investigation by local management has revealed that you have failed to meet these basic requirements.

Specification 2: Specifically on October 21, 2023, at approximately 1:35AM, you failed to follow the instructions of SDO Jordan when she instructed you to stop recording and to put your cellphone away. You failed to follow these instructions and continued to record. This conduct is prohibited.

Specification 3: On October 21, 2023, you failed to follow Instructions when SDO Jordan Informed you that It was against postal policy to record and take pictures on the workroom floor and instructed you to stop recording and put your cellphone away for a second time. You failed to follow this instruction and continued to film the mall on side 2 of the ADUS. This conduct is prohibited.

Specification 4: On October 21, 2023, you failed to follow Instructions when you were asked to stay for End of Tour [ET] overtime for the AOUS due to employee availability and heavier than usual mall volume to which you agreed yet failed to be gainfully employed while on overtime. You were observed obstructing the mall by telling fellow Mail Handler Francisco Grazlnl, "Don't touch the mall," so you could make a video recording of the ADUS side 2. This Is prohibited conduct as well as failure to follow Instructions when being utilized In an overtime capacity.

Specification 5: On October 25, 2023, you failed to follow instructions when SDO Alberta Barley Instructed you to go to the MOO office to see MOO Paul Olbeter and SDO Jordan and you refused. You failed to follow SDO Barley's Instructions and became disruptive and unreasonable on the workroom floor.

Specification 6: On October 25, 2023, you failed to follow Instructions when SOO Barley Informed you that representation was provided In the form of certified Tour 1 union representative Michael Williams and you refused to accept the steward on duty as your representation and continued to refuse to meet with the MDO and SDO as Instructed.

A fact-finding Interview was conducted with you on October 25, 2023, with your shop

steward representative, Michael Williams, present. You denied having any knowledge of obeying instructions of your supervisors as well as the prohibition clauses regarding cellphones and use of cameras on the workroom floor. You stated yes that you worked on October 20-21, as well as acknowledged your overtime assignment. You denied having anyone present to work with you on the ADUS side 2. You denied co-worker MHA Francisco Grazini working with you as well as your request to not touch the mall. You stated no, when asked If you were actively working when you were approached by SDO Jordan. When asked why you weren't actively assisting MHA Grazini for your ET overtime assignment on the ADUS side 2 you stated you weren't instructed. When asked if you were recording you stated you don't remember and all you remember is that you told them to page Paul. You were asked again if you were recording a video on your cellular device around 1:35AM on the day mentioned on side 2 of the ADUS to which you replied that you didn't remember what time It was, but yes. When asked If you shared the video recordings that you took on the workroom floor with MDO La'Kisha Jenkins you stated you don't remember the time, yes. You could not recall how many photos you showed MDO Jenkins on October 21, 2023, but stated you showed her the workload. You were asked If MOO Olbeter and MOO Jenkins made you aware of the prohibition regarding recording and that another employee was currently In trouble for using a device to record on the workroom floor you stated you believe so, you don't recall and you didn't know. Your answers during the Investigation were self- serving and did not reflect eye-witness accounts of the event as they had unfolded on the early morning of October 21, 2023. Your actions on October 21st and 2S'h, as described above are improper and unprofessional and will not be tolerated.

This Incident has undermined the trust bestowed upon you as an employee of the United States Postal Service. Your actions were uncalled for, improper, and unacceptable. You are required to conduct yourself In a professional manner at all times while on duty. Toe facts show that you demonstrated poor judgment and your actions are Improper, unacceptable, and intolerable when considering your position as a Mall Handler. Your behaviors and conduct clearly demonstrate that you cannot be retained.

This charge standing on Its own warrants a removal, however In addition to the above, the following elements of your past record has been considered In arriving at this decision for corrective progressive action:

In a letter dated December 20, 2022, you were issued a Letter of Warning for Failure to Follow Instructions.

Additionally, your actions were contrary to your duties and responsibilities as a postal employee, parts 665.13, 665.16, 665.23, 665.24, and 667.21 of the Employee and Labor Relations Manual as well as the MI-AS882 and Handheld & Cellphone Cameras Policies.

Williams filed a grievance which ultimately settled. The record contains a memorandum dated January 31, 2024, which states the following (G.C. Exh. 9):

SUBJECT: KEREN WILLIAMS
USPS#: 24111562 UNION#: MFL-318-23D-046
GRIEVANCE APPEAL- STEP 2
ARTICLE(S) 16 & 19 OF THE NATIONAL AGREEMENT

This is regarding the above referenced Step 2 appeal.

We met to discuss this case at Step 2 of our contractual grievance procedures. The matters presented by you, as well as the applicable contractual provisions, have been reviewed and given careful consideration. Time limits were extended by mutual consent.

The question in this grievance is whether Management violated the above subject Articles of the National Agreement when management issued the grievant a Notice of Removal dated November 22, 2023 for Improper Conduct - Prohibited Conduct; Video Recording and Improper Conduct - Failure to Follow Instructions.

The parties agree this grievance is settled. For the sole purpose of settling this grievance, the parties agree to reduce the Notice of Removal to a Seven Day paper suspension for sixteen [16] months pending no further discipline. Additionally, the parties agree to a one-time lump sum; less standard deductions:

KEREN WILLIAMS EIN:06101232 PMT: $1,501.96

It is understood by the undersigned that this agreement is in full and complete settlement of all outstanding administrative complaints or appeals including any grievances in this or any other forum, filed by Ms. Williams, or on her behalf, relating to any matters that occurred prior to the execution of this settlement agreement. This settlement is made without prejudice to either party, is non-precedent setting and cannot be cited by either party in any grievance / arbitration other than for the sole purpose of the enforcement of this settlement.

This memorandum was signed by Postal Service Labor Relations Specialist Jeane M. Carrubba and Local 318 President Darren Brown. (G.C. Exh. 9) In advance of the settlement, Local 318 asked Williams whether she was willing to accept it. Williams was initially reluctant to agree to the settlement, but ultimately did so because she felt she had to accept the resolution to return to work. (Tr. 81-83)

As noted above, Labor Relations Specialist Hillard testified that she has relied on the cell phone policy in MI 882-2011-6 to discipline employees, but did not testify to the level of discipline which was issued. (Tr. 124, 159) Jenkins testified that she was aware of individuals other than Williams who have taken a picture or video inside the P&DC, but that it is not a common occurrence. (Tr. 115) Jenkins did not testify whether such individuals were disciplined and, if so, the level of such discipline.

Credibility

The Respondent relies on uncorroborated hearsay in Respondent Exhibit 2 to support certain factual assertions in the posthearing brief. Respondent Exhibit 2 contains double (arguably triple) hearsay to the extent it consists of Jordan's out-of-court typewritten memoranda of her out-of-court handwritten interview notes of out-of-court statements by employee declarants. The evidence does not indicate that the employee declarants saw or adopted Jordan's writings. Respondent Exhibit 2 also contains uncorroborated hearsay in the form of a

statement by employee Grazini and narratives written by Jordan. In making my recommended legal analysis below, I do not credit or rely on uncorroborated hearsay[15] (be it single, double, or triple) which is the exclusive basis for factual assertions in the Respondent's brief.[16]

Grazini did not testify at hearing and, for the most part, neither Jordan nor Jenkins denied Williams' version of events. Accordingly, I largely credit and rely on Williams' testimony. Williams and Jordan provided conflicting testimony as to whether Williams took a picture of the ADUS before or after speaking to Jordan. Jordan testified that Williams recorded a video of the ADUS before they spoke and indicated the same in a statement she prepared during the disciplinary investigation. (R. Exh. 2) I do not find any basis for discrediting Jordan on this point. However, the Respondent relied on Williams' testimony (i.e., Williams took a picture after speaking to Jordan) in support of the argument that Williams had no reason to take the picture to report a safety problem to her supervisor because Williams knew Jordan was present to see any safety problem for herself. (Resp. Brf. p. 14) Accordingly, I use Williams' testimony as the factual basis for my legal analysis below.

Legal Analysis

8(a)(1) Overbroad Rule MI AS-882-2011-6 – Williams Complaint ¶ 4

The General Counsel contends that the Postal Service rule on handheld and cell-phone cameras in MI AS-882-2011-6 is unlawfully overbroad.

As discussed at greater length above, in *Stericycle*, 372 NLRB No. 113 (2023), the Board defined a two-part test for evaluating whether a rule is unlawfully overbroad: (1) Whether, from the perspective of an employee who is economically dependent on the employer and contemplates engaging in protected concerted activity, the rule has a reasonable tendency to chill employees in the exercise of their Section 7 rights, and if so, 2) whether the employer could have advanced legitimate and substantial business interests with a more narrowly tailored rule. If the answer is affirmative at both steps, the rule is overbroad. The burden at step one is on the General Counsel and the burden at step two is on the Respondent. Id. slip op. at 2.

I recommend a finding that the no-camera use policy in MI AS-882-2011-6 is presumptively overbroad. Workplace recordings such as photographs and video may, depending on the facts and circumstances of the particular case, constitute protected concerted activity. See *AT&T Mobility, LLC*, 370 NLRB slip op. at 4. In *Boeing Co.*, 365 NLRB No. 154, slip op. 17 (2017), the Board, in finding rules forbidding camera use on employer property to be

[15] Hearsay may be used to corroborate other admissible and more reliable nonhearsay evidence. See *Rome Electrical Systems*, 356 NLRB 170, fn. 4 (2010).

[16] Note that I do not feel compelled to credit hearsay because the General Counsel did not object to Respondent Exhibit 2 on hearsay grounds or expressly rebut certain factual assertions therein. Respondent Exhibit 2 was not expressly offered for the truth of declarants' uncorroborated hearsay and, therefore, was not admitted as anything more than the corroboration of Jordan's nonhearsay testimony that she investigated and recommended the removal of Williams. Further, the Respondent's factual assertions based on Jordan's and Grazini's writings were not joined at hearing for purposes of litigation. That is, the General Counsel would not necessarily feel the need to rebut out-of-court statements not accepted into evidence for their truth.

lawful, reasoned that "the no-camera rule in some circumstances may potentially affect the exercise of Section 7 rights, but this adverse impact is comparatively slight." In *Stericycle*, the Board overruled *Boeing* and rejected the *Boeing* Board's conclusion that the adverse impact of a no-camera rule on employee's Section 7 activity is always "comparatively slight." 370 NLRB slip op. at 10 fn. 18. Rather, the *Stericycle* Board asserted that, "[i]n a society where smartphone cameras have become ubiquitous and, accordingly, where there is increased utilization of these devices to document complaints with photographs, audio, and videos, a rule that prohibits the use of cameras has a very definite impact on protected activity." Id. Based upon this extant precedent, I conclude at step one of the *Stericycle* test that MI AS-882-2011-6 had a reasonable tendency to chill employees in the exercise of their Section 7 rights.

The Respondent cites several legitimate and substantial business reasons supporting MI AS-882-2011-6 and contends that MI AS-882-2011-6 could not have been more tailored to avoid prohibiting employees' Section 7 activity. Citing 5 U.S.C. § 552(a) and 39 U.S.C. §§ 410(b)1) & 412, the Respondent notes that the Postal Service is prohibited from disclosing people's personally identifiable information such as customers' names and addresses. The Respondent also asserts that MI AS-882-2011-6 is necessary to promote the physical security of post offices and valuable content contained therein (e.g., cash and stamps), and a work environment for employees free of discomfort and harassment. The Respondent justifies a broad prohibition by equating its confidentiality interests with those of the defense contractor in *Boeing* and the hospital in *Flagstaff Medical Center*, 367 NLRB 659 (2011). The Board, in *Stericycle*, recognized that those two employers had a particularly strong confidentiality interest in prohibiting the use of cameras. *Stericycle*, 372 NLRB at 5 & 11-12. I do not take issue with the legitimate and significant interests advanced by the Respondent or conclude that MI AS-882-2011-6 should have included a less comprehensive prohibition of camera use. While the Respondent is perhaps correct in comparing its confidentiality interests to a defense contractor or hospital, I do not necessarily think such equivalence is necessary to justify a broad restriction on camera use which does not, when employees use a camera for conduct not protected by the Act, rely on the discretion and photography skills of the employees to avoid taking pictures of the names and addresses of mail throughout a postal facility.

Nevertheless, even though, in my opinion, a broad prohibition of camera use is justified, the rule could be more narrowly tailored by specifically excluding from prohibition those instances when the use of cameras is protected by the Act. The Respondent contends that MI AS-882-2011-6 already includes such a "savings clause" by exempting from its scope "[p]hotography conducted in accordance with the collective bargaining agreement." However, this provision only excludes from the no-camera policy contractually agreed-upon conduct; not conduct statutorily protected by the Act. The Respondent's position on Williams' photography of the ADUS demonstrates the difference. The Respondent contends that MI AS-882-2011-6 did not exclude Williams' pictures from its scope because, while "Article 14 of the CBA instructs employees with safety concerns to **inform their supervisor**, it does not sanction recording or photography." (Resp. Brf. p. 14) (emphasis in the original). However, as discussed at length below, Williams engaged in statutorily protected activity when she took a picture of the ADUS.

I emphasize that an appropriate savings clause would likely be lawful under *Stericycle* even if the clause were quite limited. Thus, presumably and for example, an employer could include in a saving clause a limitation that, even if a camera is used for protected activity, the customers' personally identifiable information should only be photographed if it is unavoidable and should only be shown to people authorized to view it (e.g., Postal Service staff). A savings clause might also require the deletion of a picture taken once its statutory use has been accomplished. Again, the October 21 incident involving Williams is an instructive example of conduct which would fall within such a limited savings clause. As discussed below, Williams

photographed her workstation as a way to rely upon and enforce Article 14 of the collective-bargaining agreement. It was likely unavoidable for those pictures to include the names and addresses of customers since mail was strewn about the ADUS. Williams only showed a picture of the ADUS to MDO Jenkins and explained that, although Jenkins asked Williams to work an overtime shift on the ADUS, the machine was a mess and hazardous. Williams then deleted the picture when Jenkins told her to do so. In this regard, Williams' pictures reflected an appropriate but limited statutory use of her cell phone camera which could have been carved out from prohibition by a limited savings clause in MI AS-882-2011-6.

Finally, I reject the Respondent's argument that MI AS-882-2011-6 was not overbroad "because there is no evidence in the record that Williams, or any other Postal service employee, construed MI AS-882-2011-6 to chill protected activity." (Resp. Brf. p. 14) The Respondent observed that Williams testified that she was not aware of a rule prohibiting the use of cameras to take pictures in the facility. However, the General Counsel is not required to prove employee knowledge of an overbroad rule to establish that an employer has unlawfully maintained such a rule. See *Imagefirst and Laundry Distribution*, 366 NLRB No. 182, slip op. at 1 fn. 3 (2018) (General Counsel need not prove an employee read or could read an overbroad rule which prohibited discussion of payroll information). Further, the standard for determining whether an employer has unlawfully maintained an overbroad rule is an objective one which does not turn on the subjective understanding or interpretation of any particular employee. *Stericycle*, 372 NLRB No. 113, slip op. at 9 (2023). The standard is whether, from the objective perspective of a "typical" employee who is economically dependent on the employer and contemplates engaging in protected concerted activity, the rule had a reasonably tendency to chill employees in the exercise of their Section 7 rights. Id.

Based upon the foregoing, I recommend a finding that the no-camera use rule in MI AS—882-2011-6 is unlawfully overbroad.

8(a)(1) Discipline of Williams – Williams Complaint ¶ 6

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by disciplining Williams (i.e., a notice of removal reduced to a 7-day suspension) because of her protected concerted activity (G.C. Exh. 1(n) ¶ 6(e)) and pursuant to overbroad rule MI AS-882-2011-6 (G.C. Exh. 1(n) ¶ 6(e)).

The General Counsel asserts that "*Wright Line* does not apply" and since Williams' alleged misconduct of taking a picture of the ADUS, being "part of the res gestae of activity protected by Section 7, . . . the Board will find a violation unless [her] actions lost the Act's protection." (G.C. Brf. p. 28) Thus, the General Counsel seeks to apply a *Lion Elastomers*-type standard (supra, p. 15) in support of the allegation that the Respondent disciplined Williams for her protected concerted activity. Alternatively, the General Counsel contends that, even if Williams was not engaged in protected concerted activity when she photographed the ADUS, the Respondent unlawfully disciplined her pursuant to an overbroad rule. See *The Continental Group, Inc.*, 357 NLRB 409 (2011) (subject to an affirmative defense that an employee was disciplined for conduct which interfered with the employer's operation, an employer violates the Act by imposing discipline pursuant to an unlawfully overbroad rule for activity of a protected character, even if the employee's conduct was not concerted).

The Respondent contends that Williams was not engaged in protected concerted activity when she photographed the ADUS and that MI AS-882-2011-6 is not unlawfully overbroad. As discussed above, I reject the latter assertion. The Respondent did not analyze Williams' discipline under *Wright Line*, 251 NLRB 1083 (1980). Likewise, the Respondent did not assert

that, under a *Lion Elastomers* standard, if Williams did engage in protected concerted activity, her protected concerted activity involved misconduct sufficient to lose the Act's protection.

Williams Engaged in Protected Concerted Activity

Under the Board's "*Interboro* doctrine," despite acting alone, an employee's assertion of a right grounded in a collective-bargaining agreement is concerted. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2nd Cir. 1967). And as noted above, workplace recordings such as photographs and video may, depending on the facts and circumstances of the particular case, constitute protected concerted activity. See *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 4 (2021). Regarding such recordings, the Board has observed that "such protected conduct may include, for example, . . . documenting unsafe workplace equipment or hazardous working conditions . . .." *Caesars Entertainment*, 362 NLRB 1690, 1693 (2015). See also *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 1 fn. 1 (2018) (Facebook post concerning workplace safety was protected concerted activity).

Here, Williams testified that she relied on Article 14 (Safety and Health) of the collective-bargaining agreement to photograph the ADUS. The ADUS was overflowing with mail and SDO Jordan admitted that this raised an issue "safety-wise." On October 21, Williams showed the picture she took of the ADUS to MDO Jenkins and told both Jenkins and MDO Olbeter that the area was hazardous. Under the *Interboro* doctrine, Williams' conduct of taking a picture of the ADUS was part and parcel of her attempt to assert a contract right.[17] See *White Oak Manor*, 355 NLRB 1280 (201), incorporating by reference two-member decision in 353 NLRB 795 (2009), enfd. 452 Fed.Appx. 374 (4th Cir. 2011) (photographing other employees was part of res gestae of protected activity of attempting to compel employer to fairly enforce dress code). The fact that Williams was attempting to enforce Article 14 would also exclude Williams' conduct from the scope of MI AS-882-2011-6, which does not prohibit "[p]hotography conducted in accordance with the collective bargaining agreement." (G.C. Exh. 7) But regardless, even if Williams took a picture in violation of MI AS-882-2011-6, the rule would not render her activity unprotected or unconcerted. See *Valley Hospital Medical Center*, 351 NLRB 1250, 1254 (2007) ("employees engaged in [protected concerted] activity generally do not lose the protection of the Act simply because their activity contravenes an employer's rule or policies."), enfd. sub nom. *Nevada Service Employees Union, Local 1107, SEIU v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009). Likewise, even if Williams was not correct that Article 14 entitled her to take a picture of the ADUS, this too would not render her activity unconcerted. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840 (1984) ("an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that the right was violated"). See also *King Scoopers, Inc.*, 364 NLRB 1153 (2016)*; Interior Alterations, Inc.*, 264 NLRB 677 (1982).

The Respondent argues that Williams was not acting in an honest and good-faith attempt to enforce Article 14 of the collective-bargaining agreement. In *Interior Alterations, Inc.*, the Board observed that it "need not find the complaints to be meritorious in order to hold the activity protected but the fact that the complaints were apparently reasonable does support the conclusion that they were made for legitimate union purposes and were not fabricated for

[17] In so finding, I note that Williams would not necessarily rely on Article 14 solely for the purpose of documenting an unsafe work environment, but also to explain why she could not work on the ADUS. Indeed, Williams showed MDO Jenkins a picture of the ADUS and explained that it would be a problem to work on the machine because it was a mess and hazardous. (Tr. 66-67)

personal reasons." 264 NLRB at 681, quoting *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2nd Cir. 1967). Thus, an employee does not lose the Act's protection simply for having a factual misunderstanding of the contract, but the reasonableness "of the employee's asserted interpretation of the contract is relevant to the factual issue of the employee's good faith . . .." Id., quoting *NLRB v. H.C. Smith Construction Co.*, 439 F.2d 1064 (9th Cir. 1971). As discussed below, I disagree that the record supports such a defense.

In asserting that Williams was not actually concerned about enforcing Article 14, the Respondent notes that Article 14 allows an employee to "notify the employee's supervisor" of unsafe working conditions, but does not sanction recording or photography. However, it would be reasonable for an employee to believe taking pictures of an unsafe area is, under Article 14, an effective way to best communicate to a supervisor the safety concern.

The Respondent next contends Williams was not acting in good faith because she did not need to photograph the ADUS while SDO Jordan was present to see the safety problem herself.[18] Again, I disagree. First, Article 14 provides that employees working in unsafe conditions may notify their steward as well as their supervisor. On October 21, Jordan asked Williams whether there was a "problem" and sent Williams home as, according to Jordan, a precursor to disciplinary action. Williams, who previously received a letter of warning for not doing certain work, would arguably have a particularly strong interest in notifying a steward of an unsafe area which, as she explained to MDO Jenkins, inhibited her ability to work. Second, although Jordan was "a" supervisor, she was not necessarily "the employee's supervisor" under Article 14 since Jordan (tour 1) worked on a different shift than Williams (tour 3). It was Jenkins (not Jordan) who asked Williams to work the ADUS overtime shift and Williams testified that she took the picture "[t]o report it to my supervisor, [Jenkins]." Williams did, in fact, show Jenkins a picture of the ADUS and explained that it would be a problem to work on the machine because it was a mess and hazardous. And even if Williams was wrong in her belief that Jenkins (not Jordan) was the supervisor to whom she should report an unsafe work area, the mistake would not be so unreasonable as to suggest that Williams was not actually attempting to rely on Article 14. See *Interior Alterations, Inc.*, 264 NLRB 677 (1982).

Finally, I reject the Respondent's contention that Williams was not relying on Article 14 of the collective-bargaining agreement because, in speaking to Jordan, "Williams refused to explain her reasoning for taking the photo and omitted any mention of her alleged safety concerns." (Resp. Brf. p. 13) Jordan did not ask Williams why she took a photo and, as observed by the Respondent, Jordan could see for herself whether there was a safety concern. At hearing, Jordan testified that the ADUS did, in fact, raise an issue "safety-wise." (Tr. 93) Further, as noted above, Williams testified that she photographed the ADUS to report its condition to MDO Jenkins, the manager who asked Williams to work an overtime shift on the ADUS. Williams did, in fact, show a picture of the ADUS to Jenkins and explain that it would be difficult to work such a shift because the ADUS was a mess and hazardous.

[18] The Respondent relies on employee Grazini's out-of-court handwritten statement in asserting that Williams used a camera for the independent and unprotected reason that she needed "to make a video to show it to her lawyers." (R. Exh. 2 p. 28) Setting aside that Williams credibly testified she took a picture (not a video), I do not, as discussed above, rely on Grazini's uncorroborated hearsay for my recommend findings of fact. However, even if I were to do so, the evidence does not indicate whether such "lawyers" were Williams' lawyers or Local 381's lawyers, and, if the latter, whether a picture would be delivered to Local 381 lawyers by a steward (whom, under Article 14, an employee is authorized to notify of an unsafe work area). Further, Grazini's statement does not indicate whether Williams asked him to stop work indefinitely or just long enough to take a picture.

Based upon the foregoing, I find that Williams was engaged in protected activity when she used her cell phone to photograph the ADUS.

Defenses not Asserted by the Respondent

In a posthearing brief, the Respondent asserted that Williams did not engage in protected concerted activity when she used her cell phone camera to take a picture of the ADUS and that MI AS-882-2011-6 is not an overbroad rule. I recommended above that those defenses be rejected. The Respondent admits Williams was disciplined, in part, for taking a picture of the ADUS and because doing so violated MI AS-882-2011-6. And as noted above, the Respondent did not assert that, if taking a picture of the ADUS was protected concerted activity, Williams engaged in misconduct sufficient to lose the Act's protection under a *Lion Elastomers*-type standard. Further, the Respondent did not assert that, under *The Continental Group, Inc.*, 357 NLRB 409 (2011), Williams was disciplined for conduct which actually interfered with its operation and that interference, not the rule violation, was the reason for discipline. Finally, the Respondent did not analyze Williams discipline under *Wright Line*. Accordingly, I recommend a finding that the Respondent violated Section 8(a)(1) of the Act by disciplining Williams (i.e., a notice of removal later reduced to a 7-day suspension) because of her protected concerted activity and pursuant to the overbroad work rule in MI AS-882-2011-6.

8(a)(1) Direction not to Take Pictures of Working Conditions – Williams Comp. ¶ 5

The General Counsel contends that the Respondent, by MDOs Jenkins and Olbeter, violated Section 8(a)(1) of the Act by directing Williams not to engage in the protected concerted activity of taking a picture of her working conditions.

I concluded above that Williams was engaged in protected concerted activity when she photographed the ADUS. Jenkins and Olbeter both told Williams she was prohibited from doing so. These statements, alone, were likely sufficient to violate Section 8(a)(1) of the Act. See *Community Counseling & Mentoring Services, Inc.*, 371 NLRB No. 39, slip op. at 13-14 (2021) (employer violated 8(a)(1) by instructing employees not to speak negatively about the employer, including by complaining to co-workers about pay); *Albertsons, Inc.*, 344 NLRB 1172 (2005) (employer violated 8(a)(1) by instructing employees not to engage in protected concerted activity). Following these statements, Williams received a notice of removal for, among other things, "Improper-Prohibited Conduct; Video Recording." The coercive impact of the instructions to refrain from engaging in protected concerted activity would be significantly exacerbated and more akin to a threat because they were followed by an adverse employment action on the basis of Williams' protected concerted activity. See *Big Town Super Mart, Inc.*, 148 NLRB 595, 596 (1964) (employer violated 8(a)(1) by saying employee "was crazy for going along with the Union" where statement was followed by the discriminatory firing of that employee).

Based upon the foregoing, I recommend a finding that, by MDOs Jenkins and Olbeter, the Respondent violated Section 8(a)(1) of the Act by directing Williams not to engage in the protected concerted activity of taking pictures of her working conditions.

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. As alleged in the Kirkconnell complaint (12-CA-316287), the Respondent violated Section 8(a)(1) of the Act by:

a) Maintaining and enforcing an overbroad rule in ELM 665.16 which expects employees "to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service" and prohibits employees from engaging in "conduct prejudicial to the Postal Service."

b) Issuing a notice of removal, later reduced to 7-day suspension, to Kirkconnell because he engaged in the protected concerted activity of creating and posting videos on TikTok regarding adverse RRC adjustments to employees' wages and schedules.

c) Relying on the rules in ELM 665.11, 665.13, 665.15, 665.16, and 667.34 to issue a notice of removal, later reduced to a 7-day suspension, to Kirkconnell because he engaged in protected concerted activities.

d) Creating the impression among employees that their protected concerted activities are under surveillance.

e) Telling employees they are not permitted to post on social media related to work, which would include protected concerted activities.

f) Directing employees to remove social media posts that constitute protected concerted activity.

g) Threatening employees with reprisals because they engaged in protected concerted activities.

3. As alleged in the Williams complaint (Case No. 12-CA-316287), the Respondent violated Section 8(a)(1) of the Act by:

a) Maintaining and enforcing an overbroad no-camera use rule in MI AS-882-2011-6 which does not exclude from prohibition those instances when employees' use of a camera is protected by Section 7 of the Act.

b) Issuing a notice of removal, later reduced to a 7-day suspension, to Willaims because she engaged in the protected concerted activity of relying on Article 14 of the collective-bargaining agreement to take a picture of her working conditions.

c) Issuing a notice of removal, later reduced to 7-day suspension, to Williams pursuant to the overbroad no-camera use rule in MI AS-882-2011-6.

d) Directing employees not to engage in the protected concerted activity of taking a picture of their working conditions

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices, my recommended orders direct the Respondent to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It is my understand that, pursuant to grievance settlements, the Charging Parties received 7-day "paper" or "no-time-off" suspensions with no loss of pay. (Tr. 40, 127-128, 157-158) (G.C. Exh. 6, 9) Accordingly, I do not include backpay remedies in my recommended orders.

The Respondent contends that the Board does not have authority to rescind Postal Service rule MI AS-882-2011-06. The Respondent asserts that, under the Postal Reorganization Act of 1970 (PRA), management instructions such as MI AS-882-2011-06 are federal regulations (39 C.F.R. § 211.2) largely exempt from judicial review. However, the case law relied upon the Respondent provides only that such rules are largely exempt from judicial review pursuant to the Administrative Procedure Act (APA). While Postal Service rules may be largely exempt from APA review, the case law does not establish that such rules are exempt from review under the Act. In *NLRB v. U.S. Postal Service*, 833 F.2d 1995, 1197 (6th Cir. 1987), relied upon the Respondent, the Sixth Circuit declined to enforce a Board finding that the Postal Service violated the Act by failing to deduct union dues from employees who resigned from a union. In so finding, the court observed that the relevant provision of the Act conflicted with a provision of the PRA and the PRA only "made employee-management relations subject to the provisions of the NLRA 'to the extent not inconsistent with the provisions' of Postal law, 39 U.S. § 1209." However, here, the Respondent has not identified conflicting *statutory* language in the PRA and the Act. Since a federal regulation is not statutory text, I reject the Respondent's contention that the Board my not rescind MI AS-882-2011-06.

The Respondent also contends that the Board has no authority to rescind MI AS-882-2011-06 because, under Article 19 of a controlling collective-bargaining agreement, rules that directly relate to wages, hours, or working conditions are incorporated into the collective-bargaining agreement. The Respondent asserts that the collective-bargaining agreement provides a mechanism for the union to contest proposed rules and there is no evidence of any union opposition to MI AS-882 2011-06. (Tr. 121-123) Again, I reject the Respondent's defense. First, Article 19 of the collective-bargaining agreement is not in evidence. Second, as the Respondent concedes, a work rule does not become lawful simply because it is agreed to in a collective-bargaining agreement. See *American Federation of Teachers New Mexico, AFL-CIO*¸ 360 NLRB 438, 434 (2014). The Respondent contends only that the Board "has never categorically held that parties to a collective-bargaining agreement cannot themselves determine how a reasonable employee in their workplace would read a rule." (Resp. Brf. p. 26) However, under *Stericycle*, it is the Board, not the bargaining parties, who determine how a reasonable employee would interpret an alleged overbroad rule. 372 NLRB No. 113, slip op. at 9 (2023).

My recommended orders will direct the Respondent to post the notices attached hereto as "Appendix A" and "Appendix B."

On these findings of fact, legal analysis, and conclusions of law, and on the entire record, I issue the following recommended Orders.[19]

ORDER IN CASE NO. 12-CA-316287

The Respondent, United States Postal Service, Gainesville, Florida, its officers, agents, successors, and assigns, shall

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

1. Cease and desist from

a) Maintaining and enforcing an overbroad rule in Employee Labor Relations Manual (ELM) 665.16 which expects employees "to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service" and prohibits employees from engaging in "conduct prejudicial to the Postal Service."

b) Issuing notices of removal and 7-day suspensions to employees because they engaged in protected concerted activities.

c) Applying the rules in ELM 665.11, 665.13, 665.15, 665.16, and 667.34 to issue discipline to employees for engaging in protected concerted activity.

d) Creating the impression among employees that their protected concerted activities are under surveillance.

e) Directing employees to remove social media posts constituting protected concerted activity.

f) Telling employees they are not permitted to post anything on social media related to work, including posts that constitute protected concerted activity.

g) Threatening employees with reprisals for engaging in protected concerted activities.

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

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

a) Rescind the portion of the overbroad rule in ELM 665.16 which expects employees "to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service" and prohibits employees from engaging in "conduct prejudicial to the Postal Service."

b) Remove from its files any reference to the notice of removal and 7-day suspension the Respondent issued to Kellman Kirkconnell, and notify him in writing that this has been done and that the notice of removal and 7-day suspension will not be used against him in any way.

c) Post at its Gainesville, Florida sorting and delivery center, copies of the attached notice marked "Appendix A."[20] Copies of the notice, on forms provided by the Regional Director for Region 12, 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 the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 4, 2023.

d) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

ORDER IN CASE NO. 12-CA-330861

The Respondent, United States Postal Service, Lake Mary, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a) Maintaining and enforcing an overbroad no-camera use rule in MI AS 882-2011-6 which does not exclude from prohibition those instances when employees' use of a camera is protected by Section 7 of the Act.

b) Issuing notices of removal and 7-day suspensions to employees because they engaged in protected concerted activities.

c) Issuing notices of removal and 7-day suspensions to employees pursuant to the overbroad work rule in MI AS 882-2011-6.

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

d) Directing employees not to engage in the protected concerted activity of taking a picture of their working conditions.

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

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

a) Rescind the overbroad no-camera use rule in MI AS-882-20110-6 which contains the following language:

> Handheld and Cell-Phone Cameras: Cameras or cell-phone camera functions may not be used by Postal Service employees or contractors in restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, or any other areas unless approved by an area or headquarters vice president or his or her designee for business purposes. Cameras or cell phones used as cameras in violation of this prohibition may be subject to temporary confiscation.

b) Remove from its files any reference to the notice of removal and 7-day suspension issued to Keren Williams, and notify her in writing that this has been done and that the notice of removal and 7-day suspension will not be used against her in any way.

c) Post at its Lake Mary, Florida sorting and delivery center, copies of the attached notice marked "Appendix B."[21] Copies of the notice, on forms provided by the Regional Director for Region 12, 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 the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 21, 2023.

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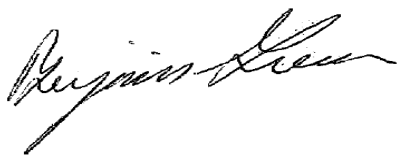
[21] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to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

d) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated: Washington, D.C., May 6, 2026.



Benjamin W. Green
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain or enforce an overbroad rule in Employee Labor Relations Manual (ELM) 665.16 to the extent it expects employees "to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service" and prohibits employees from engaging in "conduct prejudicial to the Postal Service."

WE WILL NOT issue notices of removal, 7-day suspensions, or otherwise discipline employees for engaging in protected concerted activities.

WE WILL NOT apply rules, including ELM 665.11, 665.13, 665.15, 665.16, and 667.34, to discipline employees for engaging protected concerted activities or to otherwise restrict employees in the exercise of their Section 7 rights.

WE WILL NOT create the impression among employees that their protected concerted activities are under surveillance.

WE WILL NOT tell employees they are not permitted to post anything on social media related to work, including posts that constitute protected concerted activity.

WE WILL NOT direct employees to removal social media posts constituting protected concerted activity.

WE WILL NOT threaten employees with reprisals for engaging in protected concerted activities.

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

WE WILL rescind the overbroad rule in ELM 665.16 to the extent it expects employees "to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service" and prohibits employees from engaging in "conduct prejudicial to the Postal Service," and that portion of the rule will no longer be enforced, and we will notify you that those rescinded provisions will no longer be enforced.

WE WILL, within 14 days from the date of this decision and order, remove from our files any reference to the unlawful notice of removal and 7-day suspension issued to Kellman Kirkconnell, and we will, within 3 days thereafter, notify him in writing that this has been done and that the unlawful disciplinary action will not be used against him in any way.

UNITED STATES POSTAL SERVICE
(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

201 E Kennedy Blvd Ste 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-316287 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 (813) 228-2641.

To the extent either party wanted to negotiate a change to the wages of unit employees by adding a provision on wages, it would be a permissive rather than mandatory subject of bargaining.

APPENDIX B

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain or enforce the following overbroad no-camera use rule in management instruction MI AS-882-2011-6 which does not exclude from prohibition those instances when employees' use of a camera constitutes protected concerted activity and other activities protected by Section 7 of the National Labor Relations Act:

WE WILL NOT issue notices of removal, 7-day suspensions, or otherwise discipline employees pursuant to the overbroad no-camera use rule in MI AS-882-2011-6.

WE WILL NOT issue employee notices of removal, 7-day suspensions, or otherwise discipline employees for engaging in protected concerted activities.

WE WILL NOT direct employees not to engage in the protected concerted activity of taking a picture of their working conditions.

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

WE WILL rescind the overbroad rule in MI AS 882-2011-6 to the extent it does not exclude from prohibition those instances when employees' use of a camera constitutes protected concerted activity and other activities protected by Section 7 of the National Labor Relations Act, and we will notify you that the rescinded provision will no longer be enforced:

WE WILL, within 14 days from the date of this decision and order, remove from our files any reference to the unlawful notice of removal and 7-day suspension issued to Keren Williams, and we will, within 3 days thereafter, notify her in writing that this has been done and that the unlawful disciplinary action will not be used against her in any way.

UNITED STATES POSTAL SERVICE
(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

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