JD(ATL)–30–06
Rapid City, SD

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

ADVANCED SERVICES, INC.

and Case 18–CA–17958

KELLY O'RIAIN, an Individual

Sandra C. Francis, Esq., for the General Counsel.
Grace H. Han and *Kenneth C. Rice, Esqs.,* for the Respondent.

DECISION

Statement of the Case

George Carson II, Administrative Law Judge. This case was tried in Rapid City, South Dakota, on May 31 and June 1, 2006.[1] The complaint issued on April 20. It alleges that the Respondent violated Section 8(a)(1) by maintaining an overly broad solicitation and distribution rule, by unlawfully interrogating an employee, and by terminating Kelly O'Riain and Katherine Canady because they engaged in protected concerted activities.[2] The Respondent's answer denies that it violated the Act. I find that the Respondent did violate the Act by maintaining an overly broad solicitation and distribution rule.

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

Findings of Fact

I. Jurisdiction

The Respondent, Advanced Services, Inc., the Company, is engaged in the operation of a telephone service center in Rapid City, South Dakota. The Company annually derives gross revenues in excess of $1,000,000 and purchases and receives materials and services valued in excess of $50,000 directly from points located outside the State of South Dakota. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] All dates are in the year 2006 unless otherwise indicated. The charge was filed on March 3 and was amended on March 13 and April 13.

[2] At the hearing, I granted the Respondent's motion to dismiss subparagraph 4(a) of the complaint alleging a December 2005 interrogation regarding protected concerted activities because it was not established by any evidence. Counsel for the General Counsel, in her brief, has moved to withdraw subparagraph 4(c) of the complaint alleging a February 6, 2006 interrogation regarding protected concerted activities. That motion is hereby granted.

II. Alleged Unfair Labor Practices

A. Facts

The Company, a subsidiary of General Electric, operates a telephone call center at which approximately 300 employees respond to telephone calls concerning General Electric appliances. Some handle calls relating to warranties, others handle home deliveries, and 65 Product Support Specialists (PSS) respond to questions regarding the products. The Company operates several telephone call centers. In late 2005, the Company began expanding its Rapid City center in anticipation of the closure of a call center in Phoenix, Arizona. In an effort to attract new employees and to maintain an experienced workforce in Rapid City, the Company offered a bonus of $400 upon the six month anniversary of each new employee who successfully completed the six week training class and thereafter continued to work. The foregoing incentive was offered to the first several classes of new employees.

The manager of the call center is Senior Vice President Carol Bancroft. The PSS employees are directly supervised by Team Developer Brian Miller who reports to Frank Pilgrim, PSS Operations Director. Mary Drumm is the Human Resources Director.

Kelley O'Riain was hired as a Product Support Specialist (PSS) on October 28, 2005, and completed the second training class for PSS employees. The class members, at the conclusion of their six week training, vote to give special recognition to the classmate who is most proficient with the computers used by the employees, the most valuable player, and the class clown. O'Riain received recognition as the "PC whiz." Thereafter he worked for a little less than two months. He was terminated on February 17.

It is undisputed that O'Riain had excellent computer skills and handled a large number of customer calls. The Company recognized employees for excellent performance or effort by issuing "Rock On" cards. O'Riain received eight or nine of these for his performance, including error free calls and working on Super Bowl Sunday. The Rock On cards contain the words "Rock On" and a thumbs up logo or symbol. As hereinafter discussed, O'Riain chose to display the cards he received upside down, so that they were thumbs down.

Notwithstanding his computer skills and productivity, O'Riain experienced work related problems. During training he was counseled for making a sexually inappropriate comment to a female employee. Although he did not recall the incident, I credit the testimony of Team Developer Miller that he and Human Resources Generalist Janet Grundstrom spoke with O'Riain about the incident, which is documented in a memorandum dated November 28, 2005.

The call center contains work spaces, cubicles, at which employees receive telephone calls. The cubicle walls are approximately four feet high, thus, when standing, employees can see into each other's cubicle and can be heard by other employees. The record establishes four occasions upon which O'Riain made derogatory comments loudly enough to be overheard by other employees. He acknowledged once referring to a customer as a "complete idiot" and did not deny referring to the PSS employees being "in hell." O'Riain testified that, during training, management suggested that the PSS employees "let off steam" after a particularly difficult call so that the next call was handled appropriately and not influenced by the previous call. Although Team Developer Miller incredibly denied making that suggestion, it is obvious that any letting off of steam would be appropriate only if it did not interfere with other employees and could not be overheard by a customer. O'Riain admits that, after being overheard saying, "That woman was a complete idiot," Miller spoke to him and told him to "just not let that happen again."

Katherine Canady, who lives at the same address as O'Riain, initially applied for a job on October 5, 2005. She informed the Company that she had been referred by Maureen Moss. She was not hired and submitted a second application dated November 8, 2005. On that occasion she identified O'Riain as the person who referred her. Canady was hired on November 22, 2005. When Canady was hired on the basis of the second application, O'Riain received a bonus payment. The record does not reflect the amount. The Respondent argues that Canady's change in the identity of who referred her as well as discrepancies between the two applications with regard to her work history reflect adversely upon her credibility. Insofar as those discrepancies had no bearing upon her termination, I accord them little weight. Far more significant is the fact that Canady's history of paid employment, disregarding her reported service as a volunteer, reflects no continuous period of employment longer than six months.[3]

Canady completed her training class after O'Riain. Her classmates voted Canady as their most valuable player, which she described as recognition for being a "cheerleader who motivated people to continue with their training, who spoke up for issues." Canady's work performance was not exceptional. The calls received by the PSS employees are monitored on a random basis. Canady acknowledges being counseled regarding "some quality issues" in her calls. Although Canady thought that she had met the Company's goals, on February 14, Team Developer Miller met with her and explained that the numbers that she had been looking at were the "PSS team averages and not her personal numbers." Canady also had an issue regarding the chain of command. The software used by PSS employees was provided by General Electric from its headquarters in Louisville, Kentucky. Sally Johnson, a General Electric manager in charge of training for GE Consumer and Industrial, met with the PSS employees and encouraged them to provide input regarding how the software could be improved. Canady offered to assist and, on January 29, sent an e-mail to Johnson in which she stated that she was following up on her offer to "edit/write text to help you & the very hard-working TRAC team," and asking whether Johnson was able to "get me on board." Johnson replied that there was a "misunderstanding," that her team of technical writers had an average of 12 years experience creating text, that what she wanted from Canady were suggestions on "how to reorganize the Cooking Product Troubleshoot text" and that that Canady should "[p]lease work with Brian [Miller] and Frank [Pilgrim] on the best way to accomplish if you're interested."

Employees were expected to offer GE Factory Service if that was available to a customer. An exception was made to this policy for one week in early December 2005 due to a "center" being "down." On January 25, Miller counseled both O'Riain and Canady for volunteering the names of local appliance service providers without first being asked for an alternative to GE Factory Service.

While Canady was in training, the Company announced that it was, effective with the next class, increasing its new hire incentive to $500, with $200 being paid upon the successful completion of training and the remaining $300 being paid on the employee's six month anniversary. O'Riain testified that the bonus was increased for the class following his. The discrepancy is immaterial. Regardless of when the increase occurred, employees in the prior classes were not happy that subsequent classes were being offered a larger bonus. Some employees discussed quitting as soon as they received their $400 bonus. On Friday, February 3, Operations Director Pilgrim mentioned that he had heard rumors "that there are some folks

[3] On one application Canady reported working for a company identified as ACI as a telemarketer from June to November in 2000 and from January to April 2001. On the other she reported a single period of employment from June 2000 to April 2001, but notes that she "had to leave for a few weeks" to care for her father.

who are thinking about leaving when they get their six months bonus," that the Company was concerned about that and hoped that an employee who was thinking of leaving would "take advantage of the open door policy" in order to let management know what the employees would like to see "in order to keep people there, make people happy and want to stay on board."

On February 4, Kelly O'Riain and Katherine Canady spoke with several of their coworkers regarding their concerns about the impact that would be felt if a significant number of employees quit. O'Riain and Canady wrote e-mails to management about their concerns and urged other employees to do likewise. Five employees did so. One of the five, Jennifer Hall, wrote that she agreed with O'Riain and simply attached his e-mail.

O'Riain sent his e-mail to Pilgrim and Vice President Bancroft. He referred to the meeting that Pilgrim had held and stated that he "would highly suggest" that the Company "revisit the pay rates being offered to PSS team members, … that an extra $1.50-$2.00 an hour would be a strong incentive to … change the minds of any who are thinking of departing."

Canady sent her e-mail to Pilgrim with a copy to Bancroft. She referred to the meeting and noted that one associate mentioned that there were things "he'd rather be doing than be there for the amount of pay," and that team members were "openly discussing leaving." She assured Pilgrim that she and O'Riain were not leaving because they were "trying to save for a house," but was concerned that the team "cannot afford to lose more people" and that management needed to "take action before you lose more" employees.

On Monday, February 6, Bancroft met separately with O'Riain and Canady and two of the other three employees who sent e-mails. Human Resources Director Mary Drumm was present and took notes. Bancroft discussed with each employee the matters addressed in their e-mails as well as other concerns that they expressed during the course of the meeting.

O'Riain testified that, in the meeting, which he recalls lasted well over an hour, he stated that "getting some more money might be a good thing, a way to get people to stay." He noted that employees in the Phoenix call center, which was closing, were paid more than employees in Rapid City. (He learned this from data accessible on the computer.) Bancroft explained the Company policy "of grading a job based on the local economy's value for that job." O'Riain testified that, in their discussion, Bancroft "actually outright asked, you know, 'We've been kind of hearing of you thinking about starting a union.'" O'Riain replied that he had "not been" and that he "was not entirely convinced that that [a union] was a good thing for employees."

Bancroft testified that she informed O'Riain that she had received his e-mail and wanted to hear from him in person about "what his concerns were." She denied interrogating him in any manner. I credit her denial. O'Riain's embellished introduction of the purported question, that Bancroft "actually outright asked," does not enhance the believability of his testimony. Although employee Cheryl Schutterle recalled having one conversation with O'Riain about unions, there is no evidence that he ever spoke of starting a union. Unless he had spoken of his thoughts, Bancroft could not have known what O'Riain might have been thinking. She is not alleged to have asked about anything that he purportedly had said. I do not credit O'Riain.

Drumm's notes, placed in evidence by the General Counsel, reflect that, in the discussion, O'Riain told Bancroft that "smart people" were frustrated and that he did not feel good "about having to dumb himself down."

Following the meeting, when O'Riain returned to the floor, employee Jennie Reagan reported that he said, "Sweet Carol [Bancroft] had no idea we were being treated like crap. We

are definitely getting what we are asking for." O'Riain, although denying the "crap" comment, "That's not -- doesn't sound like something I would say," admitted saying "Sweet Carol hadn't been aware at all of any of the problems that we were having and we might actually get to see some change come out of this."

Canady testified that she, like O'Riain, shared her concerns with Bancroft. Drumm's notes report that Canady expressed her disappointment following what proved to be an unproductive discussion of "fun things [the] team could do" that she had with Pilgrim and that she commented that she did not feel "respected or valued." Canady testified that, at the conclusion of the meeting, Bancroft had to prompt Director Drumm to give her a "high five."

Operations Director Pilgrim had, prior to February 4, sent an e-mail to Human Resources Director Drumm, with a copy to Bancroft, in which he reported dissatisfaction with both O'Riain and Canady. Bancroft acknowledged that she was aware of the report but stated that her knowledge of the situation was only "superficial." In the meeting, she addressed the matters raised by the employees in their e-mails and other matters raised in the meeting. Bancroft did not mention any of the shortcomings cited by Pilgrim to either O'Riain or Canady.

The e-mail from Operations Director Pilgrim to Drumm requests her "advice and assistance regarding a potential 'hostile environment' concern" in regard to O'Riain and Canady. Pilgrim refers to "'passive-aggressive' behaviors that I'm [Pilgrim] concerned could detract from the PSS team's productivity." Pilgrim notes that O'Riain, in his cubicle, was displaying negative notes, "don't think, just use your resources," and a "blind monkey" and that Canady was "selectively choosing which PSS issues she brings to her leadership's attention" and that he felt she was circumventing management when she did not believe that she would "get the answer she wants." The e-mail concludes by noting that, if O'Riain and Canady cannot "remain positive (or at the least non-disruptive) whenever they don't agree with management, they need to consider whether or not they are appropriately suited to remain with the Team."

Team Developer Miller planned to meet with O'Riain and Canady to discuss the concerns noted by Pilgrim on February 1, but both were off that day. In an e-mail to Human Resources he stated his intention to meet on February 2, but that meeting did not occur.

As already noted, prior to February 4, Canady had been exchanging e-mails with Sally Johnson. Johnson had, on January 29, requested that Canady provide her limited input through Miller and Pilgrim. Despite this, Canady continued to send e-mails to Johnson in Louisville, Kentucky. On February 9, she questioned Johnson regarding when the PSS employees were going to receive on-the job training regarding warranties. Johnson forwarded Canady's e-mail to Bancroft and Miller stating that she, Johnson, had "no idea what she's talking about."

On February 14, Operations Director Pilgrim, deciding not to single out Canady, sent an e-mail all PSS employees stating that it was "an update to the current process for revising infobase … to assure that all changes to PSS resources are handled efficiently." The e-mail directs the PSS team members to forward ideas for improvements to their Team Developer and that their input would be consolidated. The e-mail concludes with the following paragraph:

> As a team, we need to be sensitive to Louisville's time and workload. With this in mind, please **do not** forward "recommendation e-mail messages" directly to Sally Johnson or any member of the Louisville Team. [Emphasis in the original e-mail.]

After receiving the foregoing e-mail Canady says that she "attempted to contact" Miller and "looked for" Pilgrim and then sent an e-mail to Johnson, asking "what she wanted me to

do." Contrary to that characterization, Canady's e-mail states that she "thought that you [Johnson] had communicated that you wanted our input on how to improve infobase as we found situations. I apologize that our quality team is making this job so difficult on us … and your trac team in Louisville. Is this how you wish to have our input now? (see below)." The "see below" was a reference to Pilgrim's e-mail, which Canady attached to her e-mail to Johnson.

Johnson sent Canady's e-mail to Pilgrim, together with a proposed response that she would send to Canady. Pilgrim advised Johnson that no response from her was necessary.

On February 17, Canady was called to Bancroft's office and informed that she was being terminated for communicating rudely with Pilgrim, a reference to a communication in which Canady had questioned the absence of Rock On cards—"are you out of cards or out of ink"-- and insubordination as a result of her communication with Johnson. The Separation Clearance Form states that Canady was terminated for "Violation of Standards of Conduct-Failure to follow established company procedures; insubordination or other disrespectful conduct. Within probationary period."

Canady made no response in the meeting. At the hearing she acknowledged having made the cards/ink communication to Pilgrim as well as sending the e-mail to Johnson. She testified that the words following "insubordination" were not on the document at the meeting; however, she did not receive a copy of the document. Bancroft, whom I credit, testified that the document was completely filled out.

O'Riain acknowledges that he displayed the Rock On cards upside down. He admits that he wrote words such as "respected," "honesty," and "professional" on the cards so that those words appeared immediately under the down pointing thumb. He testified that the words were from a company poster stating "core values," and that he wrote them on the cards because "they [the Company] were failing to show" those core values. He acknowledges creating two cartoon figures of a monkey, labeling them "trained monkey," and placing one on his desk and the other on his computer monitor where they were visible to any who saw his cubicle. One of the monkeys, in addition to the trained monkey caption, states, "Do not think, do not learn, Infobase/ROC," an acronym for Resources On Command. O'Riain testified that, "[w]hile performing the job duties as required" he considered himself to be a trained monkey.

Pilgrim confirmed that O'Riain told him that he "felt like he had to dumb down" to do the job in the manner that the Company desired. He recalled that, prior to January 27, O'Riain questioned why he had to go to the "Infobase" when he knew the answer. Pilgrim explained that information was subject to change and, in order to assure that accurate information was being given, the PSS employees needed "to make sure it hasn't changed every single time."

On February 9, O'Riain was heard making negative comments about a Resources On Command associate after a call. ROC associates are employees of General Electric available to the PSS employees for consultation and are considered to be "customers." Miller testified that O'Riain admitted making negative comments but explained why he had done so. Miller requested that O'Riain not make negative comments about customers.

On February 11, employee Jenelle Kirchoff sent an e-mail to Team Developer Miller noting that O'Riain was griping about the number of calls that had been routed to him and had stated that it was "not worth 30 cents an hour to take extra calls" and that "[t]his is why we are in hell." The e-mail concludes stating that "it is frustrating to be surrounded by such negativity."

On February 17, Operations Director Pilgrim called O'Riain to the testing room. Human

Resources Director Drumm was present. Drumm informed O'Riain that he was not "working out as a member of the team," was "found to be creating a hostile work environment and not really being a team player," and had been overheard making a rude comment about a customer. The Separation Clearance Form states that O'Riain was terminated for "Violation of Standards of Conduct-Boisterous or disruptive activity in the workplace, being rude to a customer, using offensive language on the floor and & hostile work environment within probationary period."

O'Riain stood up and said "Fine. You can do whatever you want. This is an at will state. I can't stop you."

The Company's employee handbook states that employees "work on a probationary basis" for 180 days and that "[f]ailure to perform up to ASI standards ... may lead to immediate termination …." The definitions of employee classifications repeat the provision that new employees are probationary for 180 days and states that "[u]nsatisfactory performance and/or attendance may justify termination without notice." Thus, unlike regular employees, probationary employees are not subject to the progressive disciplinary system which provides for a verbal warning, written warning, and final written warning prior to termination.

Operations Director Pilgrim periodically conducted informal meetings with available employees. On February 14, he held such a meeting, asking what was going well and what could be improved. He also asked if there were any "team issues." His notes reflect that several employees referred to "solicitations" by O'Riain and Canady. Pilgrim asked if the word "union" was mentioned. When informed that it was not, he continued the discussion in which the employees complained of feeling uncomfortable when approached by Canady. The General Counsel adduced no evidence that the "solicitations" that made the employees uncomfortable related to protected activity rather some nonwork activity in which Canady was involved. I disagree with the assertion in the brief of the General Counsel that Pilgrim's question "reveals Respondent's obvious concern" about unions. There is no complaint allegation regarding this conversation. Pilgrim acted in a professional manner in order to assure that there would be no interrogation in violation of the Act if the solicitations had been union related. When advised that the solicitations did not relate to a union, Pilgrim continued the discussion.

B. Contentions of the Parties

The Respondent denies that the action that it took against O'Riain and Canady was motivated by their protected concerted activity and contends that their terminations resulted from their conduct during their probationary period, conduct that was "incompatible with ASI's legitimate business expectations." It points out that Pilgrim's e-mail of January 27 establishes that it had serious concerns regarding the suitability of O'Riain and Canady for continued employment before February 4 and that their conduct thereafter justified the Respondent's conclusion that their behavior would not change.

The General Counsel argues that the January 27 e-mail from Pilgrim shows that the Respondent intended to address the issues cited therein with O'Riain and Canady but, following their protected concerted activity, did not do so but "focused on building a case for their termination." The foregoing argument discounts the final sentence of the e-mail in which Pilgrim notes that unless O'Riain and Canady "remain positive (or at the least non-disruptive) whenever they don't agree with management, they need to consider whether or not they are appropriately suited to remain with the Team." The General Counsel asserts that the Respondent, following the concerted activity of February 4 in which one employee simply adopted O'Riain's e-mail, was concerned that it "could soon be faced with a union campaign" and sought to "build a case" for the termination of O'Riain and Canady and, in support thereof, offered shifting and pretextual

reasons for their terminations.

With regard to the shifting reasons argument, the General Counsel cites variances between evidence adduced at trial and statements in the Respondent's position statement as well asserted variances in the testimony of the Respondent's witnesses.

Regarding O'Riain, the position statement states that O'Riain was terminated for using offensive language and engaging in inappropriate behavior. It cites an incident in which he allegedly touched employee Jana Martin by grabbing her leg, various comments overheard by employees, and his posting of the "trained monkey" and upside down "Rock On" cards. It states that Canady was discharged for poor performance, failure to follow procedures, and bypassing her manager. Regardless of the source of the Martin allegation, it was not stated to O'Riain as a basis for his termination, and there was no testimony in that regard at the hearing. The basic rationale for the terminations of these two employees did not change.

The General Counsel points out that Human Resources Director Drumm, who admitted that her knowledge of statements by O'Riain was on the basis of reports, could not recall exactly what O'Riain purportedly said. As hereinafter discussed, I find that the basis for O'Riain's termination was not the content of specific statements but his continuing behavior.

The General Counsel does not argue that conduct cited by the Respondent, and either admitted or not denied by O'Riain and Canady, did not occur. Thus, the issue with regard to pretext is whether the conduct was, in fact, the basis for the Respondent's decision.

The General Counsel argues that neither O'Riain nor Canady "received any indication that Respondent was unhappy with their performance" prior to their terminations. That argument is not totally accurate. Although the Respondent did not have a conversation with either regarding its hostile work environment concerns, O'Riain admits being told by Miller not to let a comment such as "complete idiot" happen again, and Canady admits that Miller spoke with her about "some quality issues" related to her calls. Neither O'Riain nor Canady denied that Miller told them to quit volunteering the names of local appliance service providers.

The General Counsel argues that Operations Director Pilgrim's testimony that he recommended terminating O'Riain or Canady because he saw "no change in behavior from the time that we started discussing" their behavior with them was not specific. I agree, and note that he admitted that, after the discussion prior to January 27 regarding the necessity for checking the Infobase "every single time," he did not have any discussion with either, but directed Miller to do that. Although Miller did speak to O'Riain regarding making derogatory comments about the ROC associate, he never spoke with O'Riain about the postings in his cubicle. There is no evidence that anyone spoke with Canady regarding her communications with Johnson. As pointed out by Counsel for the General Counsel in her excellent brief, the failure of a respondent to confront an employee with the conduct that constitutes the basis for an adverse personnel action is strong evidence of a discriminatory motive. Notwithstanding the presence of such strong evidence, an inference of the discriminatory motive is required. As hereinafter discussed, the facts in this case preclude my reliance upon such an inference.

C. Analysis and Concluding Findings

1. The Solicitation and Distribution Rule

This allegation is established by documentary evidence. The complaint, in subparagraph 4(a), alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining an

unlawfully broad solicitation and distribution rule that, inter alia, provided: "Solicitation by an employee of another employee is not permitted on ASI's premises" and "Distribution of advertising material, handbills, printed or written literature, or other material goods by employees or non-employees on ASI's premises is strictly prohibited."

The Respondent argues that any violation of the Act "has been cured by the implementation of its new solicitation and distribution policy, which became effective May 24, 2006." Until it was revised, the rule applicable to employees regarding solicitation was not limited to nonworking time and the distribution rule was not limited to nonworking time in nonworking areas. The violation has not been cured. The predicate for effective repudiation of such unlawful restrictions is retraction and an assurance that the protected conduct is permitted. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The Respondent, although promulgating a new rule, did not inform employees of the rescission or issue any such assurance. Insofar as a new rule has been promulgated, the proposed notice that I am recommending be posted will effectively inform employees of the rescission and give that assurance. Although replaced by a lawful rule prohibiting solicitation only on working time and distribution on working time and in working areas, the Respondent, by maintaining an unlawfully broad solicitation and distribution rule, violated Section 8(a)(1) of the Act. Insofar as a valid rule has been promulgated, the Respondent will not be ordered to repromulgate its new rule.[4]

2. The Allegation of Interrogation

Subparagraph 4(d) of the complaint alleges that the Respondent "interrogated an employee as to whether the employee intended to start a union." I have not credited O'Riain's testimony that Bancroft interrogated him in that regard. I shall recommend that this remaining allegation of interrogation be dismissed.[5]

3. The Discharges

The complaint alleges that O'Riain and Canady were discharged for engaging in protected concerted activity. Employee activity is concerted when it is "engaged in with or on the authority of other employees," and a respondent violates Section 8(a)(1) of the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is "motivated by the employee's protected concerted activity." *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984). The Respondent acknowledges the receipt of e-mails from five employees on February 4, one of whom specifically stated that she agreed with O'Riain's suggestion that the Respondent grant raises of $1.50 to $2 per hour. The Respondent, in its brief, admits that the employees who sent the e-mails, including O'Riain and Canady, were engaged in protected concerted activity, and I so find. There is no evidence establishing that any adverse action was taken against any of the three other employees who sent e-mails.

[4] At the hearing, Counsel established that Charging Party O'Riain was unfamiliar with the offending rule, which is alleged for the first time in an amended charge. Although the Respondent's brief does not raise this issue, should this issue be raised in the future, I note that "it is the duty of the General Counsel, in discharging his responsibilities as a public official charged with enforcing public rights, to take proper measures calculated to effectively remedy all of the unfair labor practices … revealed by the investigation." *Petersen Construction Corp.*, 128 NLRB 969, 972 (1960).

[5] Subparagraph 4(b) was dismissed at the hearing and the General Counsel has withdrawn subparagraph 4(c). See footnote 2, supra.

The General Counsel's central contention is that the Respondent intended to address with O'Riain and Canady the hostile work environment issue set out in Pilgrim's e-mail of January 27, but, following their protected concerted activity, "focused on building a case for their termination." As already noted, the e-mail states that, if O'Riain and Canady cannot "remain positive (or at the least non-disruptive) whenever they don't agree with management, they need to consider whether or not they are appropriately suited to remain with the Team."

The General Counsel points out that neither O'Riain nor Canady were aware that they were on the verge of termination, that the shortcomings noted by Pilgrim were never brought to their attention, and that they did not receive progressive discipline. The failure of the Respondent to meet with O'Riain and Canady to address the conduct that caused its concerns is explained by the circumstances that developed in February. Miller intended to address the hostile work environment issue on February 1, but neither O'Riain nor Canady worked that day. An intended meeting on February 2 did not occur. The meeting on February 6 related to the concerns expressed in the employee e-mails and did not address the concerns expressed by Pilgrim. No meeting was held on the following days because upper level management, including Human Resources Director Drumm and Vice President Bancroft, were in Florida for several days at a meeting. Thereafter, the Respondent reacted to events.

The events that occurred between February 9 and 14 establish that any meeting with O'Riain and Canady or any attempt at progressive discipline would have been futile. On February 9, Miller counseled O'Riain regarding derogatory comments on the floor about a ROC associate. Two days thereafter, O'Riain made the "[t]his is why we are in hell" comment. Despite Johnson's direction in January that Canady submit suggestions through Miller and Pilgrim, she continued to send e-mails directly to Johnson and, on February 14, Canady sent an e-mail to Johnson in direct contravention of Pilgrim's instruction. Even if the Respondent was, as the General Counsel argues, seeking to "build a case," no construction was necessary. O'Riain and Canady built the case for the Respondent.

The Respondent's personnel policy provides that new employees "work on a probationary basis" for 180 days. It provides that "[f]ailure to perform up to ASI standards ... may lead to immediate termination …." The policy makes no mention of the progressive discipline policy in effect for regular employees. The General Counsel argues that the memorandum of the meeting on November 28, 2005, following O'Riain's inappropriate comment to a female employee, establishes that the Respondent was "follow[ing] its progressive disciplinary system with a probationary employee." I disagree. The document is entitled "Memorandum: Employee Meeting." The subject is "Inappropriate Comments." The document is not a disciplinary document. It makes no reference to being a warning and does not threaten further discipline for future misconduct.

As stated by the administrative law judge in *Rock Island Franciscan Hospital*, 226 NLRB 291, 297 (1976), cited in the Respondent's brief, "[a]n employee in probationary status has all the rights and protections of the Act, as any other employee. However, unless it is intended to cloak an unlawful purpose, an employer's use of a wider discretion in determining not to continue employment of a probationary employee does not on its face constitute evidence of disparate treatment of this class." Similarly, in *In-Terminal Services Corp.*, 309 NLRB 23, 24 (1992), the Board noted that the "Respondent's emphasis on McInnis' [the probationary employee's] probationary status was directed towards showing that he was not subject to its system of progressive discipline, not that he was not protected under the Act." The Board reversed the administrative law judge and found that the respondent had lawfully discharged the probationary employee for violation of a safety rule.

It is axiomatic that an employer may discharge an employee for a good reason, a bad reason, or no reason at all, but that it "may not discharge employees for engaging in concerted activities protected by Sections 7 and 8(a)(1) of the Act." *Centurion*, 304 NLRB 1104, 1105 (1991). It is also well established that an employer may not discriminate against an employee "in anticipation that he would engage in more such protected activities in the future." *Westpac Electric*, 321 NLRB 1322, 1374 (1996).

Pilgrim's memorandum of January 27 makes no mention of activity protected by the Act, but it does refer to "negativity." That reference obviously relates to attitude, and I am mindful that references to "attitude" have been determined to be euphemisms for protected activity in numerous cases. In the instant case, Pilgrim's e-mail of January 27 refers to his concern and notes specific conduct, conduct that preceded the February 4 e-mails and conduct that that was neither concerted nor protected. Thus, rather than an euphemism for protected activity, I find, that Pilgrim, as stated in the e-mail, was referring to negativity as evidenced by O'Riain's upside down posting of "Rock On" cards, resulting in a "thumbs down" depiction, and his display of a trained monkey, and Canady's circumvention of management.

The General Counsel, citing cases, argues that displays similar to those of O'Riain have been found to be protected. The cases cited all relate to unfavorable depictions that were the product of concerted activity. In *Reef Industries*, 300 NLRB 957, 957 (1990), the cartoon depiction was specifically found to be the product of concerted activity. Id. at 959. In *Trover Clinic*, 280 NLRB 6, 17(1986), the cartoon depiction was "union literature." The posting in *Southwestern Bell Telephone Co.*, 276 NLRB 1053 (1985), was on a union bulletin board. O'Riain's postings were not the product of concerted activity. O'Riain admitted that the thumbs down Rock On cards reflected his personal belief that the Respondent was not showing its core values and that the trained monkey was a reminder to himself. It was neither unreasonable nor improper for Pilgrim to view O'Riain's postings, which he did not direct be removed, and conclude that they revealed a negative attitude on the part of O'Riain that was unrelated to any protected or concerted activity.

I am mindful that the conduct of O'Riain and Canady on February 4 suggested that they would, in the future, engage in protected conduct. I am also mindful that the Respondent was sensitive to disruptive conduct. Concerted activity and union activity are often disruptive. The Act gives employees the right concertedly to seek improvements in their wages, hours, and working conditions, and protects those employees from retaliation by their employer for doing so in a concerted manner. Notwithstanding the foregoing, an employee's participation in protected concerted activity does not shield that employee from having to meet management's expectations. Employees who express their disappointment in the failure of their employer to grant their concerted requests by disregarding management's lawful directives or by failing to cooperate in achieving managements goals are not entitled to indefinite continued employment.

Canady, whose job performance was less than stellar, disregarded Pilgrim's directive that employees not forward "recommendation e-mail messages" directly to Sally Johnson or any member of the Louisville Team" and sent an e-mail to Johnson, who had no supervisory authority over her, asking if that was "how you wish to have our input now?" Adverse employment actions are justified when the facts establish that an effective working relationship cannot be achieved as a result of unprotected conduct by an employee. In *Service Employees Local 434-B*, 316 NLRB 1059, 1089 (1995), the administrative law judge noted that a "working relationship … had become rather severely strained" due to an employee challenging the authority of her supervisor and going outside of normal channels. The Board affirmed the judge's dismissal of a claim of unlawful discharge.

In this case Canady continued to send e-mails to Johnson, despite Johnson's request that she provide her input through Miller and Pilgrim, and then she insubordinately ignored the specific direction of Pilgrim not to communicate directly with Johnson. Although, as the General Counsel argues, Canady did not violate the letter of the prohibition because her e-mail was not a recommendation, any contention that Canady did not understand that she was doing exactly what she had been told not to do is contradicted by her admission that she "attempted to contact" Miller and "looked for" Pilgrim before sending the e-mail. Insofar as Canady was purportedly seeking guidance, that guidance was to come from her supervisors whom she claimed she could not immediately locate. There was no immediacy to the situation.

O'Riain's continued expressions of dissatisfaction, including the "we are in hell" comment set out in the February 11 e-mail sent by employee Kirchoff, confirm that he was not a happy employee. O'Riain, by his own admission, felt that he had to "dumb down" to perform his job in the manner his employer required and considered himself to be a trained monkey when performing his job tasks. He visually displayed his dissatisfaction. I find that Pilgrim's assessment that this negativity "could detract from the PSS team's productivity" was fully justified. Insofar as the conduct that causes supervision to consider separating an employee is not conduct protected by the Act, supervisors may, when determining whether to retain an employee, properly consider an employee's "expressed disgruntlement as a major obstacle … to their [the supervisor's] personal success in performing their functions." *Service Employees Local 434-B*, supra at 1088 (1995). See also *Pacesetter Corp.*, 307 NLRB 514, 522 (1992), in which the employee "no longer show[ed] any real enthusiasm for the job."

From the standpoint of professional personnel management, I agree with the General Counsel that management should have met individually with these employees and discussed its concerns. The General Counsel's argument that the Respondent's failure to do so establishes an unlawful motive, although cogent, is not, however, persuasive. The record testimony establishes that any such meeting would have been futile. Although O'Riain was never asked to remove the postings in his cubicle, even if there had been a meeting and he had agreed to remove the postings, his credible testimony established that, when performing his job duties he felt that he had "dumb down" and considered himself to be a trained monkey. Although Canady may not have violated the letter of the prohibition regarding communications with Johnson, her admission that she sought to contact Miller and Pilgrim prior to sending the e-mail confirms that she was aware that she was circumventing her supervisors and doing what she effectively had been directed not to do.

Although the General Counsel established that these two individuals engaged in protected concerted activity, and although the Respondent may have expected that they would do so in the future, the Respondent had the right to determine whether these two probationary employees would be assets or obstacles in assuring the success of the PSS team. Their protected concerted activity did not insulate them from adhering to the standards established by the employer. O'Riain felt that the PSS employees were "in hell" and considered himself to be a trained monkey. Canady had continued to communicate with Louisville after being asked by Johnson to give input through her supervision in Rapid City, and she thereafter ignored the direction of Rapid City management not to communicate directly with Johnson in Louisville. Operations Director Pilgrim was fully justified in concluding that the unconcerted behavior of these two probationary employees jeopardized his success in assuring the productivity of the team. The Respondent has established that the protected concerted activity in which O'Riain and Canady engaged was not a motivating factor in its decision to terminate these two probationary employees. I shall recommend that the complaint be dismissed with regard to the unlawful discharge allegations.

Conclusions of Law

By maintaining a rule prohibiting employees from solicitation during nonworking time and distribution of literature during nonworking time in nonworking areas, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and post an appropriate notice. Insofar as the unlawfully broad rule has been superseded, an affirmative order would be superfluous.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Advanced Services, Inc., Rapid City, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an unlawfully broad rule prohibiting employees from solicitation during nonworking time and distribution of literature during nonworking time in nonworking areas.

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

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

(a) Within 14 days after service by the Region, post at its facility in Rapid City, South Dakota, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 2005.

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

[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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

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

Dated, Washington, D.C., July 21, 2006.

_____
George Carson II
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

The National Labor Relations Board had 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 a rule that prohibits you from solicitation during nonworking time and distribution of literature during nonworking time in nonworking areas, and
WE HAVE rescinded our former rule so that you are no longer prohibited from soliciting during nonworking time or distributing literature during nonworking time in nonworking areas.

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

ADVANCED SERVICES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

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

South Second Avenue, Suite 790, Minneapolis, MN 554012-2221
(612) 348–1757, Hours: 8:00 a.m. to 4:30 p.m. (CST)

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, (612) 348–1770