

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: October 5, 2010

TO : Jonathan B. Kreisberg, Regional Director
Region 34

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: American Medical Response of 506-4033-3000
Connecticut, Inc. 512-5012-0125
Case 34-CA-12576 512-5012-0133-2275
512-5072-2400
524-3350-6200

The Region submitted this Section 8(a)(1) and (3) case for advice on whether the Employer violated the Act by: (1) denying an employee Union representation in accordance with Weingarten for the completion of a written incident report; (2) discharging an employee for violating the blogging and internet posting policy and refusing to prepare a written incident report without Union representation; (3) maintaining a standards-of-conduct policy that prohibits employees from engaging in "rude or discourteous behavior" and "use of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature"; (4) maintaining a blogging and internet posting policy that prohibits employees from posting pictures in any media depicting the Employer "in any way"; and (5) maintaining a solicitation policy that prohibits all solicitation over its e-mail system and limits other employee solicitation to "approved announcements posted on designated break room bulletin boards."

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by denying the employee her Weingarten rights and by threatening her with discipline for invoking those rights. The Region should also allege that the Employer violated Section 8(a)(1) and (3) by terminating the employee for engaging in protected activity, and that it violated Section 8(a)(1) by maintaining unlawful internet and blogging, standards-of-conduct, and solicitation policies. But the Region should dismiss, absent withdrawal, the allegation that the Employer's prohibition of all solicitation over its e-mail system violated Section 8(a)(1).

FACTS**A. The Events of November 7 and 8, 2009**

American Medical Response (AMR or the Employer) provides emergency medical services in New Haven, Connecticut. Teamsters Local 443 represents a bargaining unit of paramedics and emergency medical technicians employed by AMR. Dawnmarie Souza, the alleged discriminatee, is an eleven-year veteran paramedic and a Union member.

On November 7, 2009,¹ Souza and her partner worked the 4:00 p.m. to 12:00 a.m. shift. Soon after the shift began, they responded to a car accident. The partner approached the first car involved in the accident, while Souza approached the second car. [FOIA Exemptions 6 and 7(C)], the driver of the first car, refused to respond to the partner's questions and began shouting that she wanted the other driver arrested and would sue her. [FOIA Exemptions 6 and 7(C)] husband soon arrived, but was unable to calm his wife. When a police officer arrived, [FOIA Exemptions 6 and 7(C)] continued her verbal attack on the other driver to him,² and stated that she was not injured and that she did not want to go to the hospital. The partner told Souza that [FOIA Exemptions 6 and 7(C)] did not appear to be injured and had refused their help. The two then left the scene and reported the events to AMR. The call-in supervisor told Souza to document the refusal-of-care as a "cancel."

Later in the shift, Souza and her partner responded to a "fall" at the New Haven police station. Upon arrival, they found [FOIA Exemptions 6 and 7(C)] lying in the lobby, complaining that she was injured. Souza questioned the desk sergeant, while her partner attended to [FOIA Exemptions 6 and 7(C)]. [FOIA Exemptions 6 and 7(C)] was apologetic, and stated that she had gone to the police station to file a complaint, but became dizzy and lost consciousness. She also told the partner that her head hurt and that she is diabetic. Souza and her partner then decided to transport [FOIA Exemptions 6 and 7(C)] to Yale New Haven Hospital. [FOIA Exemptions 6 and 7(C)] husband drove himself to the hospital.

¹ All dates are in 2009.

² [FOIA Exemptions 6 and 7(C)] continually threatened to have the second driver arrested and to sue her. She also threatened to shoot the second driver after the police officer informed her that he did not intend to arrest the second driver.

At the hospital, Souza discussed the accident with the triage nurse. She told the nurse that [FOIA Exemptions 6 and 7(C)] was involved in a minor accident and that her injuries did not qualify as trauma. [FOIA Exemptions 6 and 7(C)] husband, a Yale New Haven Hospital employee, disputed Souza's accident description. He told the triage nurse that the accident was serious and that his wife required a full examination. Souza then asked the husband to wait outside while she gave her report and examined his wife, but he refused to leave. Souza finished making her report in the presence of the husband, transferred [FOIA Exemptions 6 and 7(C)] to a hospital stretcher, and then reported the events to the call-in supervisor. The call-in supervisor told her not to worry about the incident and laughed.

Souza and her partner completed their shift and returned to AMR early in the morning of November 8. Soon after Souza entered the facility, supervisor Frank Filardo called her to his office to discuss the incidents involving [FOIA Exemptions 6 and 7(C)]. Filardo informed Souza that a complaint had been filed against her and that she could be disciplined. He then instructed Souza to write an incident report describing her interaction with [FOIA Exemptions 6 and 7(C)]. The Employer uses incident reports as the first step in investigating patient complaints, and the reports regularly lead to discipline. Souza requested the presence of a Union representative while she completed the report. A back-and-forth then commenced between Filardo and Souza, with Filardo repeating his directive to complete the incident report and Souza refusing to do so unless a Union representative was present. Souza eventually wrote a brief report in which she merely stated that she had requested and was denied a Union representative. After reviewing the report, Filardo told Souza that it was unsatisfactory and called the General Manager of AMR New Haven. The General Manager repeated the directive to fill out the incident report. Souza then left the AMR facility, and after speaking with her steward, wrote the incident report. She later faxed it to AMR.

On Sunday, November 8, Souza posted several comments on her Facebook page concerning her confrontation with Filardo. (Many of Souza's coworkers and supervisors have access to her Facebook page and regularly use the site to communicate, including to criticize management). Her first post states, "Looks like I'm getting some time off. Love how the company allows a 17 [AMR code for a psychiatric patient] to be a supervisor." An AMR supervisor then responded, "What happened?," and a current AMR employee posted, "What now?" Souza answered, "Frank being a dick." A former AMR employee next wrote "I'm so glad I left there," and the current AMR employee stated, "Ohhh, he's back, huh?" Souza replied, "Yep he's a scumbag as usual." The

thread ended with the current AMR employee telling Souza to "[c]hin up!"

Filardo gave a written statement concerning the events of November 7 and 8 as part of AMR's subsequent investigation. In the statement he acknowledges that Souza repeatedly requested a Union representative and that he told her that a refusal to immediately prepare the incident report could lead to discipline. Filardo also made a written complaint to AMR concerning Souza's Facebook postings.

The Employer suspended Souza from work on November 9 and terminated her on December 1. Her termination letter states that she was discharged for the following reasons:

On or about October 27, 2009, the Company received written complaints from the Chairman of the Emergency Department and a Charge Nurse at the Hospital of Saint Raphael regarding your alleged rude and unprofessional interaction with Hospital staff after you arrived with a patient you had transported for AMR.³

On or about November 7, 2009, the Company received additional complaints concerning your alleged poor attitude and unprofessional behavior, this time from Emergency Staff at Yale New Haven Hospital. The patient involved in the incident, and the patient's husband, also filed a complaint with AMR alleging inappropriate conduct on your part involving your care and treatment of the patient and your interactions with the patient, her husband and YNHH staff It has also been determined that you failed to appropriately document the patient's refusal of medical treatment and transportation at the scene of the accident. In addition, on a subsequent call with the same patient an hour later, you did not follow appropriate New Haven Sponsor Hospital medical protocols or AMR policies in your treatment and care of the patient.⁴

In addition, after AMR received the initial complaint from YNHH, you were directed while still on-duty to immediately write and submit a written report

³ The October 27 complaint concerns a confrontation between Souza and a doctor who had formerly treated her and whom she is currently suing for malpractice.

⁴ The Employer refers here to Souza's failure to save [FOIA Exemptions 6 and 7(C)] EKG to the ambulance laptop pursuant to company policy.

documenting this incident. You repeatedly refused to comply with this directive, even after being given multiple direct work orders to do so by your supervisor . . . and by me as your General Manager.

In addition, shortly after this incident during your November 7 shift, you posted derogatory remarks about your supervisor on "Facebook."

B. Standards-of-Conduct Policy

The AMR employee handbook contains a section entitled "Standards of Conduct," which contains a non-exhaustive list of 20 bulleted activities that may result in discipline. The following prohibitions are alleged as unlawful:

- Use of language or action that is inappropriate in the workplace whether racial, sexual, or of a general offensive nature; and
- Rude or discourteous behavior to a client or coworker.

Neither of the challenged standards-of-conduct is cited as grounds for Souza's discipline, nor is there any evidence concerning their application to other employees.

C. Blogging and Internet Posting Policy

The AMR employee handbook also contains a section entitled "Blogging and Internet Posting Policy." The provisions below have been alleged as unlawful:

- Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;
- Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

The Employer cited the Blogging and Internet Posting Policy as a reason for Souza's termination.

D. Solicitation and Distribution Policy

The AMR employee handbook also contains a section entitled "Solicitation/Distribution." The policy states in relevant part:

It is the policy of the Company to prohibit solicitation and distribution by non-employees on Company premises and through Company mail and e-mail systems, and to permit solicitation and distribution by employees only as outlined below.

* * *

Solicitation of others regarding the sale of material goods, contests, donations, ect., is to be limited to approved announcements posted on designated break room bulletin boards. Use of the electronic mail system for solicitation is strictly prohibited.

The Employer did not cite the solicitation rule as grounds for Souza's termination. Nor is there any evidence concerning the application of this rule to other employees.

ACTION

We first conclude that the written incident report constitutes an investigatory interview and that Souza had a right to Union representation when completing the report. Thus, the Employer violated Section 8(a)(1) of the Act by denying Souza a Union representative and threatening to discipline her for invoking her Weingarten rights. We next conclude that Souza was engaged in protected activity and that the Employer violated Section 8(a)(1) and (3) by terminating her for engaging in such activity. We further conclude that the Employer violated Section 8(a)(1) of the Act by maintaining its blogging and internet posting and standards-of-conduct policies, as well its policy of limiting employee solicitation to certain bulletin boards because they either explicitly prohibit Section 7 activity or employees would reasonably construe them as prohibiting Section 7 activity. Last, we conclude that the Employer's prohibition of all solicitation over its e-mail system did not violate Section 8(a)(1).

A. Denial of Weingarten Rights and Threat of Discipline for Invoking Weingarten Rights

In NLRB v. J. Weingarten Inc., the Supreme Court held that an employee in a unionized workplace may request the presence of a union representative at any investigatory interview that the employee reasonably believes may result

in discipline.⁵ The Supreme Court recognized that union representation is necessary to help employees articulate favorable facts and extenuating circumstances.⁶ An employer violates Section 8(a)(1) of the Act by denying an employee his Weingarten rights.⁷ The Board has not considered whether a directive to complete a written incident report constitutes an investigatory interview.

We first conclude that a directive to complete a written incident report constitutes an investigatory interview. There is no meaningful distinction between an employer orally asking an employee questions concerning a complaint and requiring the employee to produce a written statement describing the events. The completion of a written statement inherently involves answering the implicit question of "what happened?" An employer should not be able to deny employees their Weingarten rights by merely requiring that they produce a written statement instead of answering questions orally. Concluding that a written statement constitutes an investigatory interview also furthers the policies recognized by the Supreme Court in Weingarten. When producing a written statement, an employee has the same need of a union representative to help him articulate helpful, relevant facts and extenuating circumstances as during oral questioning.

The Board's jurisprudence concerning drug or sobriety tests used for investigatory reasons supports this conclusion. In Safeway Stores, Inc., the Board concluded that the employer violated the Act by denying an employee's Weingarten request prior to a drug test.⁸ The Board held that a drug test constituted an investigatory interview because the test was part of the inquiry into the employee's attendance record.⁹ Likewise, in System 99, the Board concluded that a sobriety test constituted an investigatory interview because the test was investigatory in nature.¹⁰ Here, the evidence shows that the Employer uses the written incident report as the first step of its investigation process and that incident reports can lead to

⁵ 420 U.S. 251, 260-261 (1975).

⁶ Id., at 261-262.

⁷ T.N.T. Red Star Express, Inc., 299 NLRB 894, 895, fn. 6 (1990); Safeway Stores, Inc., 303 NLRB 989 (1991).

⁸ 303 NLRB at 989.

⁹ Id.

¹⁰ 289 NLRB 723, fn. 2 (1988).

discipline. Thus, as in Safeway and System 99, the written incident report is investigatory in nature and constituted an "interview" under Weingarten.

We further conclude that the Employer violated Section 8(a)(1) of the Act by denying Souza a Union representative for the completion of the incident report. It is uncontroverted that Souza requested Union representation after her supervisor directed her to complete the report. The evidence shows that employees were aware that incident reports may lead to discipline. Indeed, in this case Filardo told Souza that she could face discipline due to the complaint. In light of our conclusion that the written incident report constituted an investigatory interview for Weingarten purposes, Souza was entitled to Union representation, and the Employer's denial of her Weingarten rights violated the Act.¹¹

The Employer's threat of discipline also violated Section 8(a)(1) of the Act. In T.N.T Red Star Express and Good Hope Refineries, the Board held that the employers violated the Act by issuing warning letters threatening to discipline employees for refusing to participate in investigatory interviews without union representation.¹² Here, Filardo admittedly threatened to discipline Souza for her refusal to complete the incident report without Union representation.

B. Souza's Discharge

Under Wright Line, the General Counsel has the burden of proving by a preponderance of the evidence that animus against protected conduct was a motivating factor in an adverse employment action.¹³ In doing so, the General

¹¹ See T.N.T. Red Star Express, 299 NLRB at 895, fn. 6; Safeway Stores, Inc., 303 NLRB at 989.

¹² T.N.T. Red Star Express, 299 NLRB at 895, fn. 6; Good Hope Refineries, 245 NLRB 380, 382-383 (1979), enfd. 620 F.2d 57 (5th Cir. 1980).

¹³ 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981). A Wright Line and not a Burnup and Sims, 379 U.S. 21 (1964) analysis is appropriate in this case because the Employer did not base Souza's termination exclusively on misconduct engaged in during the protected, concerted activity. See e.g. Sprint/United Management Co., 339 NLRB 1012, 1017 (2003) (Wright Line analysis appropriate to analyze dual motives); Corrections Corp. of America, 347 NLRB 632, 636 (2006) (applying Wright Line analysis to termination based in part on misconduct engaged in during protected, concerted activity).

Counsel must establish that: (1) the employee engaged in protected activity; (2) the employer knew of that activity; and (3) the employer was motivated, at least in part, by animus towards the protected activity.¹⁴ Once the General Counsel makes such a showing, the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity.¹⁵

We conclude that the evidence establishes a prima facie case, and that the Employer has not met its Wright Line burden.

Souza engaged in protected activity by, as discussed above, exercising her Weingarten rights and by discussing supervisory actions with coworkers in her Facebook post.¹⁶ We must, however, determine if Souza lost the protection of the Act by referring to her supervisor as a "17," "dick," and "scumbag" in the Facebook post. The Act protects statements made during the course of protected conduct unless they are so egregious as to remove the employee's conduct from the protection of the Act.¹⁷ The Board considers four factors when determining whether an employee who is engaged in protected, concerted activity has by opprobrious conduct lost the protection of the Act: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.¹⁸

Applying these factors here, we conclude that Souza's conduct was not so opprobrious as to lose the protection of the Act. As to the first factor, the Facebook postings did not interrupt the work of any employee because they occurred outside the workplace and during the non-working time of both Souza and her coworkers. As to the second

¹⁴ Wright Line, 251 NLRB at 1089.

¹⁵ Id.

¹⁶ It is well established that the protest of supervisory actions is protected conduct under Section 7. See Datwyler Rubber and Plastics, Inc., 350 NLRB 669 (2007); Groves Truck and Trailer, 281 NLRB 1194 (1986).

¹⁷ Atlantic Steel Co., 245 NLRB 814, 816 (1979). See also Dreis & Krump Manufacturing, 221 NLRB 309, 315 (1975), enfd. 544 F.2D 320 (7th Cir. 1976).

¹⁸ Atlantic Steel Co., 245 NLRB at 816.

factor, the comments were made during an online employee discussion of supervisory action, which is, as noted above, protected activity. Regarding the third factor, although Souza called Filardo a "17," "dick," and "scumbag," the name-calling was not accompanied by any verbal or physical threats, and the Board has found more egregious name-calling protected.¹⁹ The fourth factor strongly favors a finding that the conduct was protected; Souza's Facebook postings were provoked by Filardo's unlawful refusal to provide her with a Union representative for the completion of the incident report and by his unlawful threat to discipline her. Considering these factors, we conclude that Souza did not lose the protection of the Act.

The remaining elements of a prima facie case are also met. It is clear that the Employer knew of Souza's protected activities because it explicitly relied upon them in her discharge. That, and AMR's other unlawful conduct alleged in a recently-issued complaint,²⁰ provide ample evidence of animus. Therefore, the burden of persuasion shifts to the Employer to demonstrate that it would have taken the same action in the absence of the protected activity.

We conclude that the Employer has not met its Wright Line burden, and therefore that it violated Section 8(a)(1) and (3) by discharging Souza. The Employer cited four grounds for terminating Souza: (1) unprofessional conduct on October 27; (2) unprofessional conduct and failure to follow company protocol on November 7 and 8; (3) refusal to complete the incident report concerning the events of November 7 and 8; and (4) the posting of derogatory comments about a supervisor on Facebook. Since reasons three and four are based on protected conduct, they cannot be legitimate grounds for discipline. With regard to the first two reasons, the Employer has not presented any

¹⁹ See e.g. Stanford Hotel, 344 NLRB 558, 558-559 (2005) (holding the calling of supervisor a "liar and a bitch" and a "fucking son of a bitch" not so opprobrious as to cost the employee the protection of the Act). See also Alcoa Inc., 352 NLRB 1222, 1226 (2008) (holding reference to supervisor as an "egotistical fuck" protected).

²⁰ The Region has recently issued complaint against the Employer for committing a multitude of unfair labor practices, including soliciting employees to decertify the Union, discouraging Union membership, discriminating in regard to hire and tenure due to protected or Union activities, and confiscating Union-related items from employees.

evidence that it has terminated other employees for similar conduct.

Further, the first two reasons given by the Employer appear to be pretextual. The complaint concerning the October 27 conduct was made by a nurse who Souza never spoke to on that day and a doctor whom she had recently informed that she was suing for malpractice. And Souza was never told that she was facing possible discipline for those complaints. As for the November 7 and 8 incident, [FOIA Exemptions 6 and 7(C)] and her husband filed a complaint against the "redheaded" paramedic, but Souza has dark brown hair (and her partner on November 7 and 8 has blonde hair). Beyond this confusion, Souza's partner was not disciplined even though she was the person who primarily dealt with [FOIA Exemptions 6 and 7(C)] at both the accident scene and the police station. The Employer also contends that Souza improperly documented the refusal-of-care and failed to save the patient's EKG to a laptop. But the evidence shows that Souza was told by the call-in supervisor to treat the patient's refusal-of-care as a "cancel" and that AMR employees did not save EKGs to the laptop because they were never trained how to do that.

For these reasons, we conclude that the Employer has not shown that it would have terminated Souza notwithstanding her protected conduct.²¹

C. Maintenance of Unlawful Work Rules

An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule would "reasonably tend to chill employees in the exercise of their Section 7 rights."²² The Board has developed a two-step inquiry to determine if a work rule would have such an effect.²³ First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, it will violate the Act only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union

²¹ If the Region concludes that the Employer suspended Souza because of her protected conduct, then it should also allege that the suspension violated Section 8(a)(1) and (3). See, generally, Wright Line, 251 NLRB at 1089.

²² Lafayette Park Hotel, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).

²³ Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004).

activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.²⁴

1. Standards-of-Conduct Policy

The first rule alleged as unlawful prohibits the “[u]se of language or action that is inappropriate ... or of a general offensive nature,”²⁵ and the second prohibits “[r]ude or discourteous behavior to a client or coworker.” We conclude that employees would reasonably construe these challenged provisions as prohibiting Section 7 activity.

Applying the Lafayette Park standard in University Medical Center, the Board found a work rule that prohibited “disrespectful conduct towards [others]” unlawful because it included “no limiting language [that] removes [the rule’s] ambiguity and limits its broad scope.”²⁶ Like the rule in University Medical Center, the prohibition here of “offensive conduct” and “rude or discourteous behavior” proscribes a broad spectrum of conduct and contains no limiting language to remove the rule’s ambiguity in prohibiting Section 7 activity.²⁷

²⁴ Id.

²⁵ The rule also prohibits “racial” and “sexual” language. We conclude that the prohibition of such remarks is lawful because employees would not reasonably interpret that prohibition as restricting Section 7 activity. Such remarks are also often unprotected by the Act. See e.g. Honda of America Manufacturing, Inc., 334 NLRB 746, 747-748 (2001) (holding unprotected an employee’s accusation that coworker was a homosexual because statement was offensive and vulgar).

²⁶ University Medical Center, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003).

²⁷ Given the Employer’s prior unlawful actions demonstrating animus towards Section 7 activity (see footnote 20, above), the references in the Employer’s standards-of-conduct policy to other primarily egregious misconduct are insufficient to clarify to employees that Section 7 activities would not be prohibited by this rule. Cf. Tradesman International, 348 NLRB 460, 462 (2002), where the Board held that a rule prohibiting “statements [that] are slanderous or detrimental to the company or its employees” was lawful where the rule addressed legitimate business concerns and was found in a list of egregious activities such as sabotage and racial or sexual harassment. In that case the Board noted that the employer

2. Blogging and Internet Policy

The first challenged bullet of the Blogging and Internet policy states that “[e]mployees are prohibited from posting pictures of themselves in any media . . . which depicts the Company in any way, including but not limited to a Company uniform, corporate logo, or an ambulance.” We conclude that this language restricts the Section 7 rights of employees in violation of Section 8(a)(1) because it would prohibit an employee from engaging in protected activity; for example, an employee would be prohibited from posting a picture of employees carrying a picket sign depicting the Company’s name, or wearing a t-shirt portraying the company’s logo in connection with a protest involving the terms and conditions of employment. ²⁸

We also conclude that the bullet prohibiting employees from “making disparaging . . . comments when discussing the Company or the employee’s superiors, co-workers, and/or competitors” is unlawful.²⁹ In University Medical Center, the Board found that a similar rule prohibiting “disrespectful conduct” towards others violated Section 8(a)(1).³⁰ The Board noted that the rule in that case was ambiguous because it contained no limiting language or context that would clarify to employees that the rule did not restrict Section 7 rights.³¹ Like the rule in University

had not by other actions led employees to believe that the rule prohibited Section 7 activity. Id., at 461.

²⁸ See, e.g., Pacific Northwest District of Carpenters, 339 NLRB 1027, 1029 (2003) (finding picket signs depicting employer’s name protected); Boise Cascade Corp., 300 NLRB 80, 86 (1990) (finding that wearing of a t-shirt depicting employer’s logo in connection with a protest of terms and conditions of employment was protected).

²⁹ We would not attack as unlawful the rule’s prohibition on discriminatory or defamatory remarks, because employees would not reasonably interpret that language as restricting Section 7 activity. Such remarks are also often unprotected by the Act. See, e.g., Honda of America Manufacturing, Inc., 334 NLRB at 747-748.

³⁰ 335 NLRB at 1320-1321. See also Southern Maryland Hospital Center, 292 NLRB 1209, 1222 (1989), enfd. in pertinent part 916 F.2d 932 (4th Cir. 1990) (holding unlawful rule that prohibited “derogatory attacks on [others]” because employees would reasonably construe the language as prohibiting protected activity).

³¹ University Medical Center, 335 NLRB at 1320.

Medical Center, the challenged rule here contains no limiting language to inform employees that it does not apply to Section 7 activity. Further, the rule appears in a list that includes the unlawful prohibition on depicting the Employer's logo or equipment, such that employees would reasonably construe the rule as also prohibiting protected activity.³²

3. Solicitation/Distribution Policy

We conclude that the Solicitation/Distribution policy is unlawful because it expressly prohibits Section 7 activity. Solicitation rules that prohibit employee solicitation on company property during non-work time are presumptively unlawful.³³ Further, any rule that requires employees to secure permission from their employer as a precondition to engaging in protected activity in non-work areas during non-work time is also unlawful.³⁴ In the instant case, the first challenged clause of the policy permits solicitation by employees "only as outlined below." The rule continues by stating that "[s]olicitation of others" is limited to "approved announcements posted on designated break room bulletin boards." Read together, the policy prohibits unapproved solicitation at any time and limits approved solicitation to certain bulletin boards. As such, the rule violates Section 8(a)(1).

The second section of the Solicitation/Distribution policy, however, which states that the "[u]se of the electronic mail system for solicitation is strictly prohibited," is not unlawful. In Register Guard, the Board held that employees have no statutory right to use employer e-mail systems for Section 7 matters, and that an employer "may lawfully bar employees' nonwork-related use of its email system, unless the [employer] acts in a manner that discriminates against Section 7 activity."³⁵ Because the Employer's policy in this case does not discriminate along Section 7 lines but rather prohibits *all* solicitation via e-mail, we conclude that it is facially lawful under Register Guard.

³² Cf. Tradesman International, 338 NLRB at 462.

³³ See Stoddard-Quirk Manufacturing Co., 138 NLRB 615 (1962); Our Way, Inc., 268 NLRB 394 (1983).

³⁴ See Brunswick Corp., 282 NLRB 794, 795 (1987); Norris/O'Bannon, 307 NLRB 1236, 1245 (1992).

³⁵ 351 NLRB 1110, 1116 (2007), enf. granted in part and remanded, 571 F.3d 53 (D.C. Cir. 2009).

Accordingly, absent settlement, complaint should issue on all of the allegations as discussed above, except for the allegation involving the Employer's prohibition of employee solicitation via e-mail.

B.J.K.