

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

THREE D, LLC d/b/a TRIPLE PLAY
SPORTS BAR AND GRILLE

and

JILLIAN SANZONE, AN INDIVIDUAL

Case 34-CA-12915

THREE D, LLC d/b/a TRIPLE PLAY
SPORTS BAR AND GRILLE

and

VINCENT SPINELLA, AN INDIVIDUAL

Case 34-CA-12926

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS
LIMITED CROSS-EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE NO.
I. <u>STATEMENT OF THE CASE</u>	1
II. <u>FACTS</u>	2
III. <u>ARGUMENT</u>	3
A. The Legal Analysis Applied in Determining Whether <u>An Employer's Work Rules Are Lawful</u>	3
B. Respondent's Internet/Blogging Policy is Overbroad and Unlawful Because Employees Would Reasonably View Various Protected Activities To Fall Within the <u>Ambit of the Rule</u>	5
C. The Judge Improperly Found that Respondent's Internet/Blogging Policy Handbook Did Not Violate <u>Section 8(a)(1) of the Act</u>	6

I. STATEMENT OF THE CASE

On August 17, 2011, based on charges filed by Jillian Sanzone and Vincent Spinella against Three D, LLC d/b/a Triple Play Sports Bar and Grille (herein "Respondent") on February 6, 2011, amended on March 7 and April 5, 2011 and on February 24, 2011, amended on April 8, 2011, respectively, Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued alleging that Respondent violated Section 8(a)(1) of the Act by interrogating employees about their protected concerted activities; threatening employees with discharge for engaging in protected concerted activities; terminating employees Sanzone and Spinella because of their protected concerted activities; threatening employees with legal action because of their protected concerted activities; and maintaining overly broad rules prohibiting Section 7 activities (GCX 1(k)).¹

On October 18, 2011,² a hearing was held in Hartford, Connecticut before Administrative Law Judge Lauren Esposito. On January 3, 2012, the judge issued her decision. While the judge found six violations of Section 8(a)(1) by Respondent, the judge found that Respondent did not violate Section 8(a)(1) of the Act by maintaining an overly broad Internet/Blogging policy in its Employee Handbook. On February 27, 2012, Respondent filed Exceptions to the judge's findings that Respondent violated Section 8(a)(1).

¹ References to the exhibits of Counsel for the Acting General Counsel and Respondent will be cited herein as "GCX__" and "RX__", respectively, followed by the appropriate exhibit number or numbers, and where appropriate, the page number(s). Joint exhibits will be cited herein as "JTX__," followed by the appropriate exhibit number. References to the official transcript of the instant hearing are cited as "Tr. __", followed by the appropriate page numbers or number(s). References to the judge's Decision will be cited herein as "ALJD, followed by the appropriate page and line numbers.

² All dates herein are in 2011 unless otherwise noted.

While otherwise in agreement with the judge's well-reasoned decision, Counsel for the Acting General Counsel hereby files these limited Cross Exceptions to: 1) the judge's failure to find that Respondent violated Section 8(a)(1) of the Act by maintaining the Internet/Blogging policy in its Employee Handbook; 2) the judge's finding that "Respondent's Internet/Blogging policy is not unlawful under the *Lutheran Heritage Village* standard." (See ALJD 20, lines 42-43); and 3) the judge's finding that "under the existing caselaw, the Internet/Blogging policy would not be reasonably construed as prohibiting Section 7 activity" and that the "Internet/Blogging policy's caution against 'inappropriate discussion about the company, management, and/or co-workers' is similar to restrictions on speech having a potentially detrimental impact on the company which the Board has found to be permissible." (See ALJD 21, lines 1-5). Accordingly, pursuant to Section 102.46(c) of the Board's Rules and Regulations, Counsel for the Acting General Counsel submits this brief in support of her Limited Cross Exceptions to the judge's findings solely with respect to the allegedly overbroad rule.

II. FACTS

During the investigation of the charges, Respondent provided a copy of its Employee Handbook. (GCX 7). The judge properly found that Respondent had effectively maintained the handbook. (ALJD 6, lines 28-30). Respondent's owner DelBuono admitted that employee Sanzone attended the employee orientation where the Employee Handbook was passed around. (Tr. 139-141). The Employee Handbook contains the following "Internet / Blogging Policy":

The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information

about the Company, or engaging in inappropriate discussions about the company, management, and/or coworkers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

(GCX 7, at page 7; ALJD 6, lines 37-48). This is the rule at issue in these limited cross exceptions.

III. ARGUMENT

A. The Legal Analysis Applied in Determining Whether An Employer's Work Rules Are Lawful

This part of the case concerns the legality of an employer work rule's mere maintenance. The Board has repeatedly recognized that mere maintenance of overbroad work rules can violate Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825, 828 (1998); *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), *enfd.* 600 F.2d 132 (8th Cir. 1979). Indeed, the Board has held that a work rule that prohibits, *inter alia*, unprotected behavior may be unlawful if it *also* contains prohibitions so broad that they can reasonably be understood as encompassing protected conduct. See e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 4, 294 (1999) (rule prohibiting "false, vicious, profane, or malicious statements" unlawful because it prohibits statements that are "merely false" and might include union propaganda); *Lafayette Park Hotel*, *supra*, at 828. Therefore, the Board has stated that the appropriate inquiry in such a case is whether the rule in question "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, *supra*, at 825.

In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of their Section 7 rights, the Board applies the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 fn.5 (2004). Under that framework, the first inquiry is "whether the rule *explicitly* restricts activities protected by Section 7." (Emphasis in original). If the rule does not explicitly restrict such activity, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activities; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647. The Board consistently recognizes that rules which can reasonably be interpreted as precluding employees from discussing terms and conditions of employment, or enlisting support in seeking changes in terms and conditions of employment, violate Section 8(a)(1). *Claremont Resort and Spa*, 344 NLRB 832, 832 (2005) (rule prohibiting "negative conversations" about employees or managers); *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001) (rule prohibiting "disrespectful conduct"), *enf. denied*, 335 F.3d 1079 (D.C. Cir. 2003); *Flamingo Hilton-Laughlin*, *supra*, at 291-292 (rule prohibiting employees from revealing confidential information regarding fellow employees, hotel's customers, or hotel's business); *Southern Maryland Hospital Center*, 293 NLRB 1209, 1222 (1989) (rule prohibiting "malicious gossip or derogatory attacks on fellow employees . . . or hospital representative[s]"), *enfd.* in pertinent part, 916 F.2d 932 (4th Cir. 1990).

The Board further instructs that in determining the legality of the rule, it must be given a reasonable reading, particular phrases should not be read in isolation, and there should not be a presumption of improper interference with employee rights. *Lafayette*

Park Hotel, supra at 825, 827; see also *Palms Hotel and Casino*, 344 NLRB 1363, 1368-1369 (2005) (“We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it”). Applying this instruction, the Board held in *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005) that a rule proscribing “negative conversations” about managers which was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity. On the other hand, the Board found in *Tradesmen International*, 338 NLRB 460, 462 (2002), that a rule forbidding “statements which are slanderous or detrimental to the company” which appeared on a list of prohibited conduct including “sexual or racial harassment” and “sabotage” could not be reasonably understood to restrict Section 7 activity. In that context, the Board found that “employees would not reasonably believe that the ... rule applies to statements protected by the Act” because it was listed alongside examples of egregious misconduct. *Id.*

B. Respondent’s Internet/Blogging Policy is Overbroad and Unlawful Because Employees Would Reasonably View Various Protected Activities To Fall Within the Ambit of the Rule

Applying those standards here, Respondent’s Internet/Blogging policy provision stating that employees will be subject to discipline for “engaging in inappropriate discussion about the company, management, and/or co-workers” can reasonably be interpreted as restraining Section 7 activity. The language of the policy is quite broad, and the term “inappropriate discussion” would easily apply to protected criticism of Respondent’s labor policies, treatment of employees, and terms and conditions of

employment. Moreover, the policy does not define what is encompassed by the broad term “inappropriate discussions” by offering specific examples; nor does the policy limit the phrase in any way that would make clear that it does not exclude employees from engaging in Section 7 activity. See *University Medical Center*, supra at 1320-1322 (work rule that prohibited “disrespectful conduct” held unlawful because it included no “limiting language [that] removes [the rule’s] ambiguity and limits its broad scope” and was “likely to chill employees in the exercise of their Section 7 rights”). Absent such guidance or clarification, employees would reasonably interpret the rule to prohibit their discussion of terms and conditions of employment amongst themselves or with third parties. The rule thus violates Section 8(a)(1).

C. The Judge Improperly Found that Respondent’s Internet/Blogging Policy Handbook Did Not Violate Section 8(a)(1) of the Act

As noted above, the judge found that Respondent’s Internet/Blogging policy did not violate Section 8(a)(1) of the Act because: 1) she did not find the policy unlawful under the *Lutheran Heritage Village* standard; and 2) because the policy is similar to those restrictions on speech which could have a detrimental impact on the company that the Board has found lawful.

With regard to the judge’s first basis for dismissal, i.e., the *Lutheran Heritage Village* standard, it is respectfully submitted that the judge is only partially correct in her analysis. The judge correctly found that under the *Lutheran Heritage Village* standard Respondent’s policy does not explicitly restrict Section 7 activity, that it was not issued in response to an organizing campaign or other protected concerted activity, and that it was applied to restrict the exercise of Section 7 rights. (ALJD 20, lines 42-46).

Therefore, the judge correctly determined that, “the legality of the policy is contingent

upon whether employees would reasonably construe it to prohibit Section 7 activity.” (ALJD 20, lines 47-48).

However, the judge’s subsequent analysis concerning whether employees would *reasonably construe* Respondent’s policy to prohibit Section 7 activity is flawed. In this regard, the judge equated Respondent’s prohibition on “inappropriate discussions” to rules prohibiting employees from improper conduct which could damage or discredit the company. See *Lafayette Park*, supra at 826-27 (rules prohibiting conduct which does not meet employer’s “goals and objectives,” and “improper conduct, which affects the employee’s relationship with the job, fellow employees, supervisors or the hotel’s reputation or good will in the community”). However, the lawful rules in those cases are not similar to the one at issue herein. So-called “conduct” rules are much easier for the average employee to understand, as their restrictions are usually much clearer. Here, by contrast, “inappropriate discussion” is simply too amorphous or vague a term for the average employee to be able to divine what types of discussion may be viewed “appropriate” or “inappropriate”. For this reason, Respondent’s policy is properly analyzed under the Board’s line of cases regarding prohibitions on inappropriate speech and discussions. See *Id.* at 828, rule prohibiting “making false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees” is unlawful).

In her analysis, the judge relied upon *Tradesmen International*, 338 NLRB 460, 462-463 (2002) in which the Board held that a rule prohibiting “any conduct which is disloyal, disruptive, competitive, or damaging to the company” was permissible. (emphasis added). In making this determination, the Board relied on its holding in

Lafayette Park, supra at 826-827, regarding “[u]nlawful or improper conduct” and its progeny. See *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, fn. 2, 1291-1292 (2001) (rules prohibiting “any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company,” and “conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company” not unlawful) (emphasis added); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288-289 (1999) (rule prohibiting “off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel” did not violate Section 8(a)(1)) (emphasis added); see also *Albertson’s, Inc.*, 351 NLRB 254, 258-259 (2007) (rule prohibiting “[o]ff the-job conduct which has a negative effect on the Company’s reputation or operation or employee morale or productivity”) (emphasis added).

Since Respondent’s policy clearly prohibits “inappropriate discussions”, the correct analysis is properly under the Board’s analysis of *Lafayette Park’s* rule prohibiting making of “false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees” rather than its analysis under *Lafayette Park’s* “unlawful or improper conduct” rule. The Board has repeatedly held rules prohibiting “false” statements violate Section 8(a)(1) of the Act because they would reasonably be construed by employees to bar them from engaging in Section 7 activity. *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *Lafayette Park Hotel*, supra; *Southern Maryland Hospital Center*, supra; *Cincinnati Suburban Press*, 289 NLRB 966, 975 (1988); *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979). In *Claremont Resort and Spa*, supra, the Board extended this

principle to a rule prohibiting “negative conversations” about associates and managers – not because the rule was promulgated in response to union activity (as the judge stated) but because “the 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, thereby causing employees to refrain from engaging in protected activities.” 344 NLRB at 832, 836.

Similarly, in *Southern Maryland Hospital Center* the Board found a rule prohibiting “derogatory attacks” on hospital representatives (which is similar if not stronger language than “inappropriate discussions”) went beyond a prohibition on “merely false” statements “to prohibit even truthful union propaganda, which may be regarded as ‘derogatory’ because it places the Hospital or its representatives . . . in an unfavorable light.” 293 NLRB at 1222. In *University Medical Center*, *supra*, the Board found a rule prohibiting disrespectful conduct towards others, which is analogous to inappropriate discussions about the company, management, and/or coworkers, unlawful because it is “inherently subjective” and could lead employees to believe they could be reported for expression of views that are not welcome or agreed with. 335 NLRB at 1321-1322. The Board further stated that it was not up to employees to guess at the limitations of an undefined term. *Id.* at 1322. As the Supreme Court stated in *Linn*, citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), an “erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *Id.* at 271-272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). As the Court and/or Board have found

that rules prohibiting “false” statements, “negative conversations”, “derogatory attacks” and “disrespectful conduct” sweep too broadly and are likely to deter Section 7 activity, a rule prohibiting any “inappropriate discussion” would cause similar if not greater harm to employees’ Section 7 rights than those in the above-cited cases.

The judge’s reliance on the *Lafayette Park* rule “unlawful or improper conduct” line of cases is further misplaced because the conduct at issue in those cases was limited to that which could injure the company’s reputation. Here, Respondent could deem any discussions “inappropriate”. Furthermore, in *Tradesmen International* the rules were accompanied by examples of the types of conduct proscribed; and in *Ark Las Vegas Restaurant Corp.* the Board felt the rule could be clarified by “knowledgeable union officials”. *Tradesmen International*, supra at 461; *Ark Las Vegas Restaurant Corp.*, supra at 1291. Here, no examples of “inappropriate behavior” were provided and there is no union for employees to turn to.

Additionally, in each of the *Lafayette Park* rule “unlawful or improper conduct” line of cases the Board also found that employees would not reasonably fear that the respondent would use the rule to punish them for engaging in protected activity. *Tradesmen International*, supra at fn.2, 461; *Ark Las Vegas Restaurant Corp.*, supra at 1291; *Flamingo Hilton-Laughlin*, supra at 89. In both *Tradesmen International*, supra, and *Flamingo Hilton-Laughlin*, supra, the employer had not committed other violations in addition to the unlawful rule allegations. On this basis, the Board specifically distinguished *Tradesmen International* from *GHR Energy Corp.*, 294 NLRB 1011 (1989), affd. 924 F.2d 1055 (5th Cir. 1991) where the Board found a disloyalty policy unlawful. The Board said that in *GHR* employees arguably would associate the

employer's hostility towards the type of protected concerted activity at issue in the other 8(a)(1) violations to fall within the rule and as such the rule violated the Act. *Tradesmen International*, supra. Here, given that the judge found correctly that Respondent discharged two employees for their protected comments on Facebook, threatened employees with discharge because of their protected comments on Facebook, and threatened employees with legal action for their protected comments on Facebook, it appears self-evident that employees would reasonably fear that their "inappropriate" yet legal discussions could result in discharge, and that Respondent's policy could be used against them to punish them for engaging in protected activity. (ALJD 22, lines 25-44). See also *GHR Energy Corp.*, 294 NLRB 1011 (1989), affd. 924 F.2d 1055 (5th Cir. 1991).

The judge also relied on the Board's holding in *Tradesmen International* that a rule prohibiting "[v]erbal or other statements which are slanderous or detrimental to the company or any of the company's employees" was lawful. (ALJD 21, lines 2-7). However, in *Tradesmen International*, the Board found that the rule prohibited slander, which, by definition, is "the utterance of false charges or misrepresentations which defame and damage another's reputation" and detrimental statements meaning "obviously harmful: damaging". *Id.* at 462. Since the rule prohibited maliciously false statements (which have been held by the Board to be unprotected) the rule was lawful. *Id.* See *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953); *Emarco, Inc.*, 284 NLRB 832 (1987). As discussed above, Respondent's policy is not limited to "maliciously false" statements and for that additional reason violates Section 8(a)(1) of the Act given the overall context contained herein. *Linn v. United*

Plant Guard Workers, 383 U.S. 53 (1966); *Claremont Resort and Spa*, *supra*; *University Medical Center*, *supra*; *Lafayette Park Hotel*, *supra*; *Southern Maryland Hospital Center*, *supra*; *Cincinnati Suburban Press*, *supra*; *American Cast Iron Pipe Co.*, *supra*.

Finally, the judge buttressed her conclusion that Respondent's policy was lawful by citing the context of the allegedly unlawful segment of the policy. (ALJD 21, lines 24-33). However, reading the segment of this rule in the context of the entire policy does not render an overbroad rule lawful. While the policy begins by stating that Respondent "supports the free exchange of information" among its employees, this preamble does not negate the clear prohibition on Section 7 activity given that the rule then states that "engaging in inappropriate discussions . . . is subject to disciplinary action, up to and including termination of employment" (emphasis added). In this regard, in *Claremont Resort and Spa*, the employer assured employees that its prohibition on "negative conversations" did not apply to employees' rights to discuss union matters. However, the Board held that these assurances were not sufficient. *Id.* at 832.

Similarly, Respondent's "savings clause", which states that "[i]n the event state or federal law precludes this policy, then it is of no force or effect," does not save this rule. As the Board has repeatedly held, an employer may not prohibit protected activity and then seek to escape the consequences of the prohibition by a general reference to rights protected by law. See e.g., *Allied Mechanical*, 349 NLRB 1077, 1084 (2007) (employer's unlawful conditioning of the settlement of employee wage claims upon the requirement that employees not engage in protected activity was not saved by clause stating "unless . . . permitted by federal or state law including but not limited to the National Labor Relations Act"); *Ingram Book Co.*, 315 NLRB 515, 516 (1994) (finding

employer maintenance of a disclaimer that “[t]o the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law” did not salvage the employer’s overbroad no-distribution policy). The Board’s rationale is that employees may not know what conduct is protected and, “rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act.” *McDonnell Douglas Corporation*, 240 NLRB 794, 802 (1979) (*citations omitted*). See also *Ingram Book Co.*, supra at 516 n.2 (“Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules . . . and cannot be expected to have the expertise to examine company rules from a legal standpoint”).

Accordingly, for all of the above reasons it is respectfully submitted that the judge erred in finding that Respondent’s Internet/Blogging policy did not violate Section 8(a)(1) of the Act as the overly broad rule is unlawful.

Dated at Hartford, Connecticut, this 27th day of March 2012.

Respectfully submitted,



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