

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

GENERAL MOTORS, LLC

Respondent

and

CASE 07-CA-053570

MICHAEL ANTHONY HENSON, an Individual

Charging Party

**REPLY BRIEF IN SUPPORT OF GENERAL MOTORS LLC'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

I. Introduction

Administrative Law Judge Ira Sandron (“ALJ”) erroneously concluded that certain provisions set forth in General Motors LLC’s (“GM” or “Company”) GM EMPLOYEE AND REPRESENTATIVE SOCIAL MEDIA POLICY (“Social Media Policy” or “Policy”),¹ violated Section 8(a)(1) of the National Labor Relations Act (“NLRA” or “Act”). GM timely submitted 22 exceptions (“Exceptions”) to the ALJ’s May 30, 2012 decision (“ALJD”), asserting in pertinent part that the ALJ erred by reading particular phrases in the Policy in isolation, applying erroneous legal standards, and ignoring the disclaimer clause in the Policy that makes clear that the Social Media Policy will not be construed to infringe upon rights protected by Section 7 of the Act. In her Answering Brief to Respondent’s Exceptions, counsel for the Acting General Counsel (the “AGC”) reiterates the same dubious arguments supporting her position that GM’s Social Media Policy is overly broad and violative of Section 8(a)(1) of the Act. These arguments

¹ GM’s Social Media Policy was offered and admitted into evidence at the March 15, 2012 hearing as GC Exhibit 1(h), Exhibit A. References to GM’s Social Media Policy herein are cited as (“Policy, p. ___”).

are unpersuasive, and the ALJ's decision should be reversed in part. Read as a whole and in context, GM's Social Media Policy is facially lawful and does not violate the NLRA.

II. ARGUMENT

GM's Social Media Policy is facially neutral, designed and intended to provide guidance to employees with respect to the appropriate use of social media communications tools. The ALJ concluded that the Policy was not implemented in response to protected activities, nor applied to discipline any employees for engaging in such activities. Notwithstanding the legitimate purposes of the Policy and the non-discriminatory manner in which it has been applied, the ALJ nevertheless concluded that certain provisions in the Policy violate the Act. For the reasons explained in GM's Exceptions and Brief in Support, these conclusions are erroneous.

A. *The AGC Failed to Carry the Government's Burden of Proof.*

In its Exception Nos. 2, 5, 7, 12, 16, 17, 18, 20, 21 and 22, GM excepts to the ALJD because the AGC failed to discharge her burden of proof to establish that the Company violated Section 8(a)(1) of the Act. The AGC's Answering Brief is replete with references to the absence of various different pieces of evidence in the record. (*see e.g.*, Answering Brief, pp. 1-24, 6, 7-8, 9, 10, 12, 13, 19, 22, 25) However, the AGC conveniently ignores the obvious fact that the government bears the *burden of proof* to establish that GM's Social Media Policy violates the Act, and the absence of any evidence or witnesses to advance the government's position is fatal to her case. Where the AGC fails to offer evidence or witnesses, the result is that the evidence offered by the respondent is undisputed. Here, the General Counsel simply has not carried her burden of proof. Delchamps, Inc. v. NLRB, 588 F.2d 476, 478 (5th Cir. 1979) (declining to enforce Board order where General Counsel failed to satisfy burden of proof); NLRB v. Louis A. Weiss Memorial Hospital, 172 F.3d 432, 446 (7th Cir. 1999) (concluding in a Section 8(a)(1)

and 8(a)(3) case that the “failure of General Counsel to create a factual record in no way supports a finding that General Counsel met its burden of proof”).

B. The AGC Concedes that No Extant Law Protects Employees’ Rights to Engage in Protected Activity on Social Media Sites.

In its Exception Nos. 5, 7, 12 and 17, GM excepted to the ALJD because the NLRB has never recognized any protected right under Section 7 of the NLRA for employees to utilize social media communications. The AGC concedes this point. (Answering Brief, pp. 15-16) (“The undersigned has not found a Board case squarely holding that employees possess a Section 7 right with respect to communications on social networking sites.”) Given this concession, the ALJ’s decision should be reversed since the law does not recognize social media communications as Section 7 concerted activity. Further, if the Board does ultimately conclude that such a right exists, such a decision should not be applied retroactively to conduct that occurred prior to the recognition of such a right.

C. The Social Media Policy Must be Read on a Holistic Basis and in Context.

In its Exception Nos. 1, 4 and 17, GM excepted to the ALJD to the extent that the ALJ read provisions of the Social Media Policy in isolation, rather than evaluating the Policy as a whole and in context. Based upon well-established principles of Board law, this “parsing” of the language in GM’s Social Media Policy was clearly erroneous. *See Lafayette Park Hotel*, 326 NLRB 824, 825-26 (1998); Tradesmen Int’l, 338 NLRB 460, 461 (2002).

In her Answering Brief, the AGC asserts that “[w]hat GM really objects to is that the ALJ failed to find that the lawful portions of the Policy magically neutralize the unlawful portions.” (Answering Brief, p. 7). Not so. Despite reiterating the same ineffectual arguments, the AGC continues to ignore the obvious point that GM’s Social Media Policy must be read in context and not dissected so as to assign unreasonable interpretations to the plain meaning of the Policy’s

language. Palms Hotel & Casino, 344 NLRB 1363, 1367 (2005) (“[T]he rule must be given a reasonable reading, phrases should not be read in isolation, and improper interference with employees’ rights is not to be presumed.”); Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004). When read in context, GM’s comprehensive Social Media Policy cannot reasonably be read to infringe on employees’ Section 7 rights, and record evidence establishes that GM’s employees do not interpret the Policy to do so.

In her zeal to find a violation, the AGC advocates a myopic and jaundiced view of GM’s Social Media Policy, and in so doing perceives problems where none exist. The ALJ likewise adopted this view. Failure to read the Policy as a whole constitutes reversible error by the ALJ.

D. GM’s Legitimate Purposes for Implementing the Policy are Relevant to Whether the Policy is Facially Unlawful.

In its Exception Nos. 3, 6, 8, 9, and 10, GM asserted that the ALJ failed to accord appropriate weight to the fact that GM implemented its Social Media Policy for legitimate business reasons, and has applied the facially-neutral Policy on a non-discriminatory basis. These facts, which are well-established by the record, negate any inference that the Policy infringes on employees’ Section 7 rights. *See, e.g., Lafayette Park Hotel*, 326 NLRB at 825 (noting that work rules are valid where they promote “legitimate business concepts”); Southwestern Bell Telephone Co., 200 NLRB 667, 670 (1972) (noting that work rules designed to promote “decorum and discipline” are valid).

In her Answering Brief, the AGC argues that “GM’s motive for implementing the Policy is irrelevant....” (Answering Brief, p. 5) The AGC is wrong. In evaluating the lawfulness of facially neutral employment policies, the Board must consider the reasons that the employer promulgates the policy. *See, e.g., Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001) (“It defies explanation that a law enacted to facilitate

collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace.”); University Medical Center v. NLRB, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003). Failure to consider an employer's motive would violate the Board's admonition that facially neutral rules should not be *presumed* to inhibit Section 7 activity. Palms Hotel & Casino, 344 NLRB at 1368; Lutheran Heritage Village-Livonia, 343 NLRB at 647.

At the March 15, 2012 hearing, GM provided ample evidence to support its legitimate business reasons for promulgating the Policy. (Tr. 56, 123-128).² These legitimate reasons -- which were never disputed by the AGC -- would also be reasonably understood by GM employees. In particular, the record establishes that GM implemented its Social Media Policy to provide guidance to its employees with respect to the appropriate use of social media communications tools such as Facebook, Google Plus, LinkedIn and Twitter. (Tr. 24-26). The Policy also seeks to promote its legitimate business objectives and to minimize potential liabilities under numerous federal and state laws, ranging from securities laws to employment discrimination statutes to intellectual property rights. (Tr. 120-127). On its face, GM's Social Media Policy provides reasonable guidelines for employee use of social media tools, and expressly protects the rights of employees to utilize these tools for purposes protected by the NLRA. No reasonable employee reading this Policy would construe its language to prohibit Section 7 activities.

The AGC repeatedly asserts in her Answering Brief, as she did at the March 15, 2012 hearing, that “the issue is not whether GM can advance a legitimate business reason” for promulgating the Policy. (Answering Brief, p. 6). However, repetition of this mantra does not make it so. In the real world, context matters. Here, employees' reasonable understanding of

² All references to testimony adduced at the March 15, 2012 unfair labor practice hearing are to the official transcript and are cited as (“Tr. ____”).

GM's legitimate business concerns for promulgating the Social Media Policy matters. The way in which other GM policies inform employees' understanding of the Social Media Policy matters. And, the way in which GM's actions impact employees' understanding of the Social Media Policy matters. The fact is that the Board has given consideration to employers' proffered business reasons for promulgating a rule when determining whether the rules have a reasonable tendency to chill Section 7 activity. *See Lafayette Park Hotel*, 326 NLRB at 827 (employees would understand the legitimate reasons given by the employer for promulgating a rule); *Tradesmen Int'l*, 338 NLRB at 461.

The Board must construe GM's Social Media Policy in its entirety and reject the AGC's approach, which urges the Board to ignore the context of the language and the overall objectives of the Company's Social Media Policy. The reasons for the implementation of the Policy are legitimate and further GM's obligations under numerous federal and state laws. The AGC's suggestion that the Board should ignore these legitimate reasons and distort the Policy's language would lead to absurd results. Moreover, the AGC's argument runs counter to the law.

E. The ALJ Erroneously Failed to Recognize that References to GM's Other Employment Policies Provide Context for the Social Media Policy.

In its Exceptions Brief, GM points out that the Policy specifically references GM's other existing employment policies, and that these policies provide context for the interpretation and application of the Policy's terms. Although Counsel for the AGC repeatedly objected to the admission of *any evidence* outside the four corners of the Policy to establish the scope and application of the Policy, she now points to GM's alleged failure to introduce any of its other rules and policies to clarify the scope of the Social Media Policy. The AGC simply cannot have it both ways. On the one hand, she argues that extrinsic evidence is irrelevant, and at the same time she argues in her Answering Brief that the Company's failure to present the excluded

evidence somehow supports an unfair labor practice finding. At the same time, the AGC argues that the Policy must stand or fall upon “the four corners of its three pages.” (Answering Brief, p. 7). The ACG’s inconsistent arguments must be rejected.

GM’s Social Media Policy need not exhaustively reference every other applicable policy in order to be understood by employees. Contrary to the circular arguments advanced by the AGC, the inclusion of references to other pre-existing employment policies provides context and guidance for GM’s social media rules. Moreover, the Board recognizes that “work rules are necessarily general in nature.” Lutheran Heritage, 343 NLRB at 648. Employers are not required to “anticipate and catalogue in their work rules every instance in which ... language might conceivably be protected by (or exempted from the protection of) Section 7.” Id. Compliance with Section 8(a)(1) does not require GM to promulgate a Policy setting forth an “exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply.” Lafayette Park Hotel, 326 NLRB at 826.

The Policy clearly references other GM policies, and as the ALJ correctly held, the Policy “starts with the statement that it is a restatement of existing policy being applied in the social media context.” (ALJD, p. 10). Further, GM’s Director of Social Media, Mary Henige (“Henige”), testified without contradiction that “[t]his is just one of many GM policies, and all GM’s other policies apply.” (Tr. 60). Henige explained the interpretation and application of the Social Media Policy as follows:

We wanted employees to understand that all of GM’s other policies still applied, but because of the prevalence of the web and mobile devices, that whether they’re at work or they’re not at work they can have access to postings, we wanted them to know that the same laws that we have from the FTC, the SEC, privacy issues, confidentiality and protecting GM business information all apply, and we also wanted to sensitize them to the fact that things really stay on the web forever, and that their conversations, it’s not -- they’re not private, that they’re very visible or discoverable.

(Tr. 56).

These references must also be understood in light of the highly organized workforce at GM. As the ALJ concluded in upholding the Policy's logo provision, GM is a heavily unionized company whose actions were not prompted by an anti-union animus. (ALJD, p. 7). At the hearing, GM introduced posts from employee discussions about wages and benefits demonstrating that employees have not interpreted the Policy as restricting their Section 7 rights. (Exhibit R1).

While the AGC argues that it is not enough to show that some of GM's employees freely engage in Section 7 discussions on GM's internal social media sites, she ignores the fact that the Board has found such discussions persuasive. In a December 4, 2009 Advice Memorandum, the General Counsel noted that despite an allegedly overbroad provision of Sears' social media policy, "list members openly continued to use the listserv to discuss the Union campaign and the relative merits of unionization." Id. at 3. Furthermore, there is record evidence to support the fact that GM's employees have not raised concerns about the alleged chilling effect of the Policy, despite countless opportunities to do so. (Tr. 94, 104, 117).

The AGC argues that it is impossible to know if the posts on GM's Overdrive site are from GM employees. (Answering Brief, p. 4). This argument fails because some individuals actually identified themselves as GM employees. The AGC also asserts that there is no way to know whether these employees "escaped punishment," but she could have cross-examined GM's witnesses on this point. (Id.) She did not do so.

F. The ALJ Erred By Failing to Give Adequate Weight to the NLRA Disclaimer in the Policy.

In its Exception Nos. 13, 14 and 15, GM excepts to the ALJ's conclusion that the disclaimer in the Policy does not ameliorate any perceived overbreadth in the language of the

Policy. The AGC argues that the disclaimer clause “fails to cure the infirmities and ambiguities of the overly broad rules.” (Answering Brief, p. 24). Like the ALJ, the AGC fails to give adequate consideration to the impact of the language on employees’ understanding of the Policy.

The disclaimer in the Policy extinguishes any doubts regarding whether the Policy is intended to apply, or even could apply, to Section 7 activities.³ This disclaimer clearly and unambiguously states that GM’s Social Media Policy will be administered in compliance with applicable laws and regulations, including Section 7 of the Act. (See Policy, p. 3). This language could not possibly be any clearer -- the Policy states *on its face* that it will not be administered to violate the law. Yet, the ALJ incorrectly concluded that the disclaimer should not be given any weight because “employees cannot be expected to know what conduct is protected under the Act and, as a result, may well choose to abstain from engaging in what is protected activity rather than risk engaging in unprotected activity and facing lawful discipline.” (ALJD, p. 9). The ALJ’s ruling constitutes reversible error.

Board members have repeatedly counseled employers that they can avoid liability under the Act and insulate their policies from facial challenges by including disclaimers in employment policies clarifying that the policies will not be enforced to violate Section 7 rights. *See, e.g., Palms Hotel & Casino*, 344 NLRB at 1370 n.4 (Member Liebman, dissenting) (“[E]mployers might minimize facial challenges to their workplace rules by notifying employees of their rights under Sec. 7 of the Act and advising them that work rules [sic] are not intended, and should not be construed, to interfere with the employees’ rights.”); Lutheran Heritage Village-Livonia, 343 NLRB at 652 n.7 (Members Liebman and Walsh, dissenting); Safeway, Inc., 338 NLRB 525,

³ The ALJ concluded that the disclaimer language in the Policy was inadequate to cure any alleged overbreadth in the Policy because “employees cannot be expected to know what conduct is protected under the Act...” (ALJD, p. 9). Given that the overwhelming majority of GM’s employees are represented by labor unions, this “conclusion” is pure speculation and contrary to law. *See, e.g., Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1291 (2001).

528 (2002) (Member Liebman, dissenting); Lafayette Park Hotel, 326 NLRB at 830 (Chairman Gould, concurring). GM should not be penalized for following this well-reasoned guidance by the NLRB. Accordingly, the Board should give effect to all provisions in GM's Social Media Policy, and construe the disclaimer as a limitation on the remaining provisions of the Policy. If it does so, the Board cannot possibly find that the Policy infringes upon Section 7 rights.

When employees read GM's Social Media Policy, they will see that the Policy will be administered in compliance with Section 7 of the NLRA. Any remaining doubts about Section 7 are addressed by the compulsory notice posting that GM has maintained since 2010. (Tr. 105, 110-11). The uncontradicted testimony adduced at the hearing shows that the Company has posted notices of employees' Section 7 rights since 2010.⁴ Moreover, the NLRB recently endorsed notice posting as a particularly effective method for informing employees of their rights under the Act. *See* PROPOSED RULES GOVERNING NOTIFICATION OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT, 75 Fed. Reg. 80410, 80412 (Dec. 22, 2010) (internal quotations and citations omitted). GM should not be penalized for following the Board's express guidance on this point.

III. Conclusion

For the foregoing reasons, GM's Exceptions to the Administrative Law Judge's Decision must be granted in their entirety.

⁴ Federal contractors and subcontractors, like GM, pursuant to EXECUTIVE ORDER 13496, were required to post notices of employees' rights under the NLRA in 2010. Because the AGC did not call a witness to testify that the Company did *not* post notices informing employees of their Section 7 rights, the un rebutted testimony adduced by GM must be credited.

CERTIFICATE OF SERVICE

I, Onika C. Celestine, hereby certify that on September 19, 2012, I caused copies of Respondent's Reply Brief in Support of General Motors LLC's Exceptions to the Administrative Law Judge's Decision, in *General Motors, LLC, Case 07-CA-053570*, to be served upon all parties of record, by electronic transmission, as follows:

Linda Rabin Hammell
Board Attorney
National Labor Relations Board
Region 7
Patrick V. McNamara Federal Bldg.
477 Michigan Avenue, Room 300
Detroit, Michigan 48226
linda.hammell@nlrb.gov

Michael Anthony Henson
2423 Miami Beach Drive
Flint, Michigan 48507
mikeahenson@gmail.com



Onika C. Celestine