

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

**UPMC and its subsidiaries
UPMC Presbyterian Shadyside and
Magee-Womens Hospital of UPMC,
Single Employer, d/b/a Shadyside Hospital
and/or Presbyterian Hospital and/or
Montefiore Hospital and/or
Magee-Womens Hospital**

and

Case 06-CA-081896

**SEIU Healthcare Pennsylvania,
CTW, CLC**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING
BRIEF IN OPPOSITION TO RESPONDENTS' EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Submitted by:

**Janice A. Sauchin
Counsel for the Acting General Counsel
NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222-4111
Email: janice.sauchin@nrb.gov**

**Dated at Pittsburgh, Pennsylvania,
this 31st day of May 2013**

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I. PRELIMINARY STATEMENT

Counsel for the Acting General Counsel hereby files and respectfully requests that the Board consider this Answering Brief in Opposition to Respondents' Exceptions to Administrative Law Judge David I. Goldman's April 19, 2013, Decision in the above-captioned matter. Counsel for the Acting General Counsel does not concede or agree to the validity or applicability of any of the statements or arguments made by Respondents in their Exceptions, including those which are not specifically addressed herein.

The Administrative Law Judge correctly found that UPMC Presbyterian Shadyside (Respondent Presbyterian Shadyside) and Magee-Womens Hospital of UPMC (Respondent Magee), d/b/a Shadyside Hospital and/or Presbyterian Hospital and/or Montefiore Hospital and/or Magee-Womens Hospital (collectively called Respondent herein) violated the Act, both by maintaining an overly broad and ambiguous Electronic Mail and Messaging policy, and by promulgating and maintaining an Acceptable Use of Information Technology Resources policy, each in violation of Section 8(a)(1).

Examination of Respondent's Exceptions reveals that Respondent has chosen to attack many of the conclusions of law reached by the Administrative Law Judge (ALJ). However, Respondent's Exceptions are, in many instances, a repetition of arguments made in Respondent's Brief to the Administrative Law Judge. Therefore, Respondent's arguments and authorities presented in support of its Exceptions have previously been cogently considered and correctly rejected by the ALJ in his Decision. The ALJ's opinion carefully analyzes appropriate precedent and applies it to the facts of this case. Because of the well-reasoned opinion issued by the ALJ, Respondent's request that the Board not adopt the ALJ's recommendations in this matter should be denied.

It is herein submitted that ALJ Goldman's Decision fully supports all of his findings of fact and conclusions of law therein and should be adopted, in full, by the Board. Although it follows that Respondent's Exceptions should be disallowed, certain statements and arguments advanced in Respondent's Brief,¹ deserve further comment.²

¹ Unless otherwise noted, references herein to "Respondent's Exception" refer to Respondents' Exceptions to Administrative Law Judge's Decision and references to "Respondent's Brief" refer to its Brief in Support of Exceptions to the Administrative Law Judge's Decision, both filed May 17, 2013.

² The ALJ's Decision is referenced herein as ALJD. The hearing transcript is T. Acting General Counsel exhibits are referenced as GCX, Joint exhibits are JTX, and Respondent exhibits are referenced as RX. The Union's exhibits 1 and 2, which were rejected, were designated as U1 and U2.

II. FINDINGS OF FACT

The ALJ's Findings of Fact accurately describes the underlying facts concerning the allegations in this case, so they will not be repeated herein. As there were no witnesses presented for testimony at the hearing, the ALJ's findings are based upon Stipulations entered into by all of the parties.³ Further, all of Respondent's policies which are the basis of findings by the ALJ, including all versions in effect for various times within the pertinent 10(b) period, may also be found in the record in their entireties.⁴

Respondent excepts to the ALJ's Decision as it found certain portions of Respondent's policies unlawful after said policies were modified as part of the parties' pre-hearing settlement which resolved many of the issues originally involved in this case. As noted above, the ALJ determined that both Respondent's Electronic Mail and Messaging (Email) policy and its Acceptable Use of Information Technology Resources (IT Resources) policy were unlawful.

On February 7, 2013, prior to the February 20th hearing in this matter, the Regional Director of Region Six approved two separate informal Board Settlement Agreements: one which was executed by Respondent Presbyterian Shadyside and another which was signed by Respondent Magee-Womens [JTX 3 and 4]. Each Notice to Employees attached to the respective Settlement Agreements sets forth the policies which were to be rescinded pursuant to that settlement. Each Notice specifies the Solicitation, Social Networking, Confidential Information, Code of Conduct and UPMC Name, Logo and Tagline policies as overbroad policies maintained or promulgated which were to be rescinded. Ergo, the five policies named above were the only policies which were settled. If the Email or IT Resources policies had been

³ See JTX 2

⁴ The Solicitation policies are GCX 2 and 3; the Electronic Mail policies are GCX 4, 5, and 6; and the Information Technology policies are GCX 7, 8, and 9.

rescinded as part of either settlement, these policies would have been specifically identified in the Notices.

The only aspect of the Email and IT Resources policies which was included in the Settlement Agreements was the discriminatory enforcement of those policies and this is clear as it is referenced in a separate paragraph on each of the Notices.⁵ The limitation of the Settlement Agreements is apparent upon reading the identical language contained in the sections entitled Scope of the Agreement in each of the Settlement Agreements which state: “This Agreement does not settle certain allegations of the Amended Consolidated Complaint in Case 06-CA-081896 with respect to the Solicitation, Electronic Mail and Messaging, and the Acceptable Use of Information Technology Resources policies.” As Respondents are well aware, these specific policies were exempted from the settlements to preserve the *Register Guard*⁶ issues which were later litigated and are at issue herein.⁷ The ALJ correctly found the Email and IT Resources policies to be unlawful for the reasons set forth in his Decision as the issues concerning these policies were not resolved prior to hearing. Respondent’s Exception on the basis of a prior settlement of these policies should be disregarded.

Respondent excepts to the ALJ’s reliance upon cases that were decided by the Board during periods in which the Board “did not have a proper statutorily-required quorum”. In similar circumstances, the Board has found that it is not appropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled “presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the

⁵ It should be noted that the Solicitation policy was settled only in part. The section of the Solicitation policy at issue herein was specifically excluded and reserved by both Settlement Agreements

⁶ 351 NLRB 1110 (2007), enf. denied in part, 571 F.3d 53 (D.C. Cir. 2009).

⁷ It should also be noted that as the Settlement Agreements predated the issuance of the Second Amended Complaint, the Amended Consolidated Complaint is referenced in the Settlement Agreements and not the Second Amended Complaint. The allegations concerning the unsettled policies from the Amended Consolidated Complaint [GCX 1(y)] were preserved and restated in the Second Amended Complaint [GCX 1(rr)] in accordance with the express terms of those Settlement Agreements.

contrary." *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). Therefore, Respondent's contention in this regard should likewise be rejected.

In the Acting General Counsel's Limited Exceptions, Counsel for the Acting General Counsel has argued that *Register Guard* should be overturned for reasons cited therein. In his Decision, the ALJ declined to do so, based on the limitations of his authority with respect to Board precedent.⁸ Respondent's brief at fn. 2, without citation to the ALJD, states that the ALJ concluded that *Register Guard* is "binding precedent that should not be overturned." [emphasis added] The ALJ did not express that opinion but merely noted that a judge's duty is to apply established Board law, and he did so.

In Respondent's brief at section IV. C., third sentence, page 9, Respondent refers to "...break facilities and other non-work areas..." and their alleged uses. The record is devoid of any evidence with respect to break rooms or their uses by employees. RX 1 and RX 2 list a number of locker rooms and staff lounges where, at the time of the hearing, Respondent anticipated it would post the Notices to Employees pursuant to the informal Settlement Agreements (T. 32-33, JX 3, JX 4). There is no information contained in RX 3, RX 4, or in the transcript, as to any break rooms or the manner in which they are used. As any such facts are not in evidence, Counsel for the Acting General Counsel submits that this sentence should be stricken for the Board's consideration of this case and Respondent's Exceptions.

Respondent excepts to the ALJ's dismissal of UPMC's Motion for Judgment on the Pleadings as unsupported in this matter. The ALJ properly found that UPMC agreed to be bound in this proceeding and is a party for "purposes of remedial relief."⁹ As evidenced from the formal papers in this case [GCX 1], the caption of this case has included UPMC as

⁸ ALJD, p. 11, fn. 4.

⁹ ALJD, p. 22, ln. 24-29.

Respondent since the filing of the original charge and it has been stipulated by Respondent that the policy approval and promulgation function for all of the various UPMC subsidiaries has been vested in Respondent Presbyterian Shadyside by UPMC [JTX 2, paragraphs 5 and 6].

However, by entering into the above-referenced Stipulations, neither the Regional Office nor the Acting General Counsel agreed or conceded that UPMC has no further relevance in this matter. UPMC, not Respondent, remains the parent company of the various entities. As the standard Board remedy for unlawful policies is to expunge such policies wherever they exist,¹⁰ the Acting General Counsel believed then and continues to believe that, for remedial purposes, UPMC remains a necessary party to this proceeding. Hence, the original pleadings in this case [GCX 1(s) and 1(y)] reflected the Acting General Counsel's Single Employer theory and the Acting General Counsel was prepared to litigate that theory, in order to ensure that the requisite compliance would be eventually achievable. The parent company, UPMC here, is the link between Respondents and the other UPMC subsidiaries for whatever remedy may be deemed necessary in this case.

The Board's Casehandling Manual, Part Three, Compliance Proceedings, at Section 10682.3(E) provides:

A corollary of the doctrine of piercing the corporate veil is the direct participation theory of intercorporate liability—when a parent or affiliated corporation disregards the separateness of its subsidiary or affiliated corporation(s) and exercises direct control over a specific transaction(s), derivative liability for the subsidiary's or affiliated corporation's unfair labor practices will be imposed on the parent or affiliated corporation(s).¹¹

Although UPMC may not have promulgated or maintained the allegedly unlawful policies at issue herein, it delegated its agent Respondent Presbyterian Shadyside to do so on its

¹⁰ See *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54 (January 25, 2013), slip op. at page 5, and cases cited therein.

¹¹ *American Electric Power Co.*, 302 NLRB 1021, 1023 (1991), *enfd. mem.* 976 F.2d 725 (4th Cir. 1992). See also, *Allegheny Graphics, Inc.*, 320 NLRB 1141 (1996).

behalf. Thus, UPMC is derivatively liable for Respondent Presbyterian Shadyside's actions. The Acting General Counsel's theory therefore requires UPMC as a necessary party for compliance purposes. During settlement discussions, all parties agreed on the Stipulation which provides for compliance in the event of settlement or subsequent litigation and which eliminated the potential for production by Respondents of voluminous subpoenaed material and lengthy litigation by all parties [JTX 1]. Based on the parties' agreement on this Stipulation as well as pursuant to the terms of the two Settlement Agreements reached in this case, the Single Employer allegations were intentionally omitted from the Second Amended Complaint [GCX 1(rr)].

Nevertheless, the caption of the case remained the same and UPMC was intentionally not removed from the proceeding although UPMC was not alleged in the Second Amended Complaint to have committed any unfair labor practices. The existence of UPMC as "Respondent" on that Stipulation (JTX 1) is evidence that UPMC continues to be part of this case. UPMC remains a necessary party in this case to remedy any violations found to exist at any or all of UPMC's other subsidiaries and/or affiliates, other than the two Respondents herein, which may not be under the governance of Respondent Presbyterian Shadyside.

Thus, UPMC's Motion was properly denied by the ALJ as there remains a claim upon which relief can be granted by UPMC's presence in this case. UPMC, not Respondent Presbyterian Shadyside, retains ultimate control over UPMC's subsidiaries, not just with respect to Respondent Presbyterian Shadyside's ability to rescind any policies adjudicated as unlawful but for UPMC to order the physical and electronic posting of any Notices to Employees, as well as the distribution of emails, newsletter notifications, and other additional remedies recommended by the ALJ, or which the Board may order. It would not effectuate the policies of the Act to reverse the ALJ's denial of UPMC's Motion as any potential remedy in this case could be jeopardized.

Although not relied upon by the ALJ in his decision, Counsel for the Acting General Counsel further asserts that UPMC's Motion for Judgment on the Pleadings was untimely filed. Regardless of how it is styled, the Motion is, at its core, a Motion for Summary Judgment, which was not filed until after the close of the hearing. While it is true that the Second Amended Complaint issued less than 28 days prior to the February 20, 2013, hearing date and therefore it was impossible for the Motion to be timely filed [See Board's Rules and Regulations, Section 102.24(b)], as the Second Amended Complaint issued on February 11, 2013 [GCX 1(rr)], UPMC had over a week to file its Motion prior to the opening of the hearing. Thus it is clear that UPMC failed to act in as timely a manner as the circumstances permitted.

UPMC's Motion for Judgment on the Pleadings is also defective as it was improperly served. UPMC failed to serve the Acting General Counsel while serving other parties by email and overnight mailing its Motion to the Executive Secretary's office in Washington, DC.¹² Thus, the Motion does not comply with the requirements of Section 102.114 of the Board's Rules and Regulations.

Additionally, Counsel for the Acting General Counsel asserts that UPMC's Motion for Judgment on the Pleadings also fails to conform with the requirements of Federal Rule of Civil Procedure Rule 12 in that this issue should have been raised and decided prior to trial. FRCP Rule 12(i) states "Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial." UPMC's motion is defended on the basis enunciated in Rule 12 (b)(6) - failure to state a claim upon which relief can be granted which, as stated in Rule 12(i) should have been *raised and decided* prior to the hearing. Here, UPMC filed its Motion for Judgment on the Pleadings at 12:19 p.m. on the day

¹² See Appendix A of Counsel for the Acting General Counsel's post-hearing brief to the ALJ.

of the hearing,¹³ after the official record before the ALJ closed in Pittsburgh at 11:25 a.m. [T. 40]. Therefore, the Motion is clearly untimely filed and should not be considered at this point in the proceeding.

Based on the above and considering all of the substantive and technical deficiencies which exist with respect to UPMC's Motion, it is respectfully submitted that the ALJ's denial of UPMC's Motion for Judgment on the Pleadings should be affirmed.

III. THE ALJ CORRECTLY FOUND THAT RESPONDENT VIOLATED THE ACT

A. The Applicable Precedent Was Utilized by the ALJ

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."¹⁴ The Board has developed a two-step inquiry to determine if a work rule would have such an effect.¹⁵ 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 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 activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.¹⁶ In determining how an employee would reasonably construe the rule, the Board has instructed that particular phrases should not be read in isolation, but rather, considered in context.¹⁷ The ALJ followed the Board's guidance and properly evaluated the policies at issue herein according to this standard and found them unlawful.

¹³ *Id.*

¹⁴ *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf. mem., 203 F.3d 52 (D.C. Cir. 1999).

¹⁵ *Lutheran Heritage Village-Livonia*, 343 NLRB 646 at 646-647 (2004).

¹⁶ *Id.* at 647.

¹⁷ *Id.* at 646.

Employees have a Section 7 right to discuss their wages and other terms and conditions of employment.¹⁸ A rule that precludes employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with each other or with non-employees, violates Section 8(a)(1).¹⁹ Rules that entirely prohibit employees from revealing information regarding their employer's business are also unlawful.²⁰

Rules that are ambiguous, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.²¹ In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.²²

¹⁸ *Cintas Corp.*, 344 NLRB 943 (2005) (the unqualified prohibition on the release of any information regarding its partners could reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the union); *Double Eagle Hotel & Casino*, 341 NLRB 112, 114-115 (2004), *enfd.*, 414 F.3d 1249 (10th Cir. 2005).

¹⁹ *Bigg's Foods*, 347 NLRB 425, 425 n.4 (2006) (rule prohibiting employees from discussing their own or their "fellow employees'" salaries with "anyone outside the company" violates Section 8(a)(1)). *See also*, *Albertson's, Inc.*, 351 NLRB 254, 258 (2007) (employer unlawfully used its confidentiality rule to discipline an employee for engaging in protected concerted activity, namely, providing employee names to assist the union's organizing campaign).

²⁰ *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3, 291-292 (1999) (rule prohibiting employees from revealing confidential information regarding hotel's customers, fellow employees, or hotel business, unlawful).

²¹ *See*, *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001) (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."); *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005) (rule proscribing "negative conversations" with no further clarification or examples was unlawful).

²² *Compare Tradesmen Intl.*, 338 NLRB 460, 460-462 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity) with *HTH Corp.*, 356 NLRB No. 182, slip op. at 1, 25 (June 14, 2011) (affirming ALJ finding that an employer's conflict of interest policy which prohibited employees from giving advice either "solicited or unsolicited, for the intended purpose of discouraging any potential or actual customer from utilizing services of [the employer] to aid another organization," violated Section 8(a)(1) because "[i]nformation sharing such as this is specifically protected by Section 7 of the Act."), *enfd. on other grounds*, 693 F.3d 1051 (9th Cir. 2012).

B. The ALJ correctly found that Respondent promulgated and maintained an unlawful Acceptable Use of Information Technology Resources policy in violation of Section 8(a)(1) of the Act.

The ALJ correctly found, based on Board precedent, that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining its IT Resources policy. Respondent excepts to this finding, suggesting that the ALJ's finding is not properly supported by recognized Board law. Counsel for the Acting General Counsel submits that Board law fully supports the findings of the ALJ, and requests that the Board adopt the ALJ's recommendations in this regard.

In *Costco Wholesale Corp.*,²³ properly analyzed in this case by the ALJ, it was determined that a handbook rule that prohibited employees from using the employer's technology or electronic communications to electronically post statements that "damage the Company, defame any individual or damage any person's reputation," was unlawful because, by its terms, the prohibition against making those kinds of statements clearly encompassed concerted communications protesting the employer's treatment of its employees. In so doing, the Board distinguished rules addressing conduct that was reasonably associated with actions that fall outside the Act's protection, such as conduct that is malicious, abusive, or unlawful.²⁴ It was noted that the *Costco* conclusion did not implicate *Register Guard* because the rule did not prohibit email for all non-job purposes but rather was reasonably understood to prohibit the expression of certain protected viewpoints.²⁵

Here, the provisions in Respondent's IT Resources policy that prohibit employees from using the Respondent's information technology resources to engage in social media

²³ 358 NLRB No. 106 (Sept. 7, 2012).

²⁴ *Id.* at 2, citing *Lutheran Heritage*, 343 NLRB at 647-649 (rule addressing "verbal abuse," "abusive or profane language," and "harassment") and *Palms Hotel & Casino*, 344 NLRB 1363, 1367-1368 (2005) (rule addressing "conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees).

²⁵ *Ibid.* at 2, n.6.

communications that disparage or misrepresent Respondent, or make false or misleading statements regarding Respondent,²⁶ are very similar to the provisions recently found unlawful in *Costco* and *Knauz BMW*.²⁷ These provisions clearly encompass concerted communications protesting the Respondent's treatment of its employees.

Further, the portion of the IT Resources policy that prohibits employees from sending emails without obtaining Respondent's written approval, and that requires employees to use "appropriate security controls" when they transfer "sensitive, confidential, and highly confidential information" over the Internet,²⁸ is unlawfully overbroad because employees would reasonably interpret a prohibition on "sensitive" information to cover Section 7 activity, such as employee criticism of management or working conditions.²⁹ In addition, employees would reasonably construe the terms "sensitive" and "confidential" to include employee wages, benefits, performance evaluations, and discipline, absent limiting or clarifying language.³⁰

Next, the provision prohibiting employees from using Respondent's logos or other copyrighted or trademarked materials when engaging in social media communications using Respondent's information technology resources³¹ is also unlawfully overbroad because, in the absence of any further explanation, employees would reasonably interpret these provisions as

²⁶ ALJD, p. 6.

²⁷ 358 NLRB No. 164 slip op. at 1 (September 28, 2012) (finding employer's "courtesy rule" which prohibited "disrespectful" conduct and "language which injures the image or reputation" of the employer, to be unlawful, because nothing in the rule or elsewhere in the employee handbook "would reasonably suggest...that employee communications protected by Section 7...are excluded from the rule's broad reach").

²⁸ ALJD, p. 7.

²⁹ See *Southern Maryland Hosp. Ctr.*, 293 NLRB 1209, 1222 (1989) (unlawful rule against "derogatory attacks"), *enfd. in rel. part*, 916 F.2d 932 (4th Cir. 1990); *Cincinnati Suburban Press*, 289 NLRB 966, n.2, 975 (1988) (rule against "improper or unseemingly" conduct unlawful).

³⁰ See fns. 20 and 21, *supra*.

³¹ ALJD, p. 7.

proscribing the use of photos and videos of employees engaging in Section 7 activities, including photos of picket signs containing UPMC's logo.³² Although Respondent may have a proprietary interest in the UPMC trademarks, including the logo if trademarked, employees' use of the logo or trademarks while engaging in Section 7 activities would not infringe on that interest.

Courts have identified three interests that are protected by the trademark laws: (1) the trademark holder's interest in protecting the good reputation associated with his mark from the possibility of being tarnished by inferior merchandise sold by another entity using the trademark; (2) the trademark holder's interest in being able to enter a related commercial field at some future time and use its well-established trademark; and (3) the public's interest in not being misled as to the source of products offered for sale using confusingly similar marks.³³ These interests are not remotely implicated by employees' non-commercial use of UPMC's name, logo, or other trademarks in the course of engaging in Section 7 activities related to their working conditions.³⁴ Thus, Respondent has no legitimate basis upon which to prohibit the use of the UPMC name or service marks in this manner, and thus the rule is unlawfully overbroad.

Finally, the provision of the IT Resources policy prohibiting employees from using Respondent's information technology resources to engage in social media communications that

³² Cf. *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991) (employee tape recording at jobsite to provide evidence in a Department of Labor investigation is protected), *affd.*, 976 F.2d 743 (11th Cir. 1992); *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-1020 (1991) (finding unlawful prohibition against employees wearing company logo or insignia while engaging in union activity during non-working time away from the plant), *enfd. sub nom.*, 953 F.2d 638 (4th Cir. 1992).

³³ See *Scarves by Vera v. Todo Imports, Ltd.*, 544 F.2d 1167, 1172 (2d Cir. 1976).

³⁴ Even if trademark principles were applicable to this kind of use, there is no unlawful infringement where use of a trademark would not confuse the public regarding the source, identity, or sponsorship of the product. See, e.g., *Smith v. Chanel, Inc.*, 402 F.2d 562, 565-569 (9th Cir. 1968) (use of trademark in an advertisement comparing the alleged infringer's product to the trademark holder's product not unlawful because it did not create a reasonable likelihood that purchasers would be confused as to the source, identity, or sponsorship of the advertiser's product).

“[d]escribe any affiliation” with UPMC³⁵ is unlawful because it limits employees’ ability to enlist third-party support regarding employment concerns and to find and communicate with one another regarding their terms and conditions of employment.³⁶

The ALJ found that Respondent’s IT Resources policy violates the Act in that employees would reasonably construe its language to prohibit their Section 7 activities. *Costco Wholesale Corp.*, supra, and cases cited at ALJD, p. 18. Based on all of the above, Counsel for the Acting General Counsel respectfully submits that the Administrative Law Judge properly recommended that by the promulgation and maintenance of its Acceptable Use of Information Technology Resources policy with overly broad and vague restrictions on employees’ use of technology resources, Respondent violated Section 8(a)(1) of the Act. The Administrative Law Judge’s recommendations should be affirmed and Respondent’s Exceptions in this regard should be denied.

C. The ALJ correctly found that Respondent maintained an overly broad Electronic Mail and Messaging policy in violation of Section 8(a)(1) of the Act.

The ALJ correctly found, based on Board precedent, that Respondent violated Section 8(a)(1) of the Act by the maintenance of its Email policy. Respondent excepts to this finding, suggesting that the ALJ’s finding is not properly supported by Board law. Counsel for the Acting General Counsel submits that existing Board law fully supports the findings of the ALJ and requests that the Board adopt the ALJ’s recommendations on this issue and disallow Respondent’s Exceptions.

In finding Respondent’s Email policy to be unlawful, the ALJ relied on extant precedent in finding the provisions of that policy to be ambiguous, overbroad, and vague. The ALJ cited

³⁵ ALJD, p. 6.

³⁶ See fns. 19 and 21, supra.

and scrupulously analyzed many recent Board cases in coming to his conclusions.³⁷ However, the cases cited in Respondent's brief are all distinguishable from those relied upon by the ALJ. Respondent cites *Fiesta Hotel Corp.*, 344 NLRB 1363 (2005) in support of its position but the rule in that case was found to address conduct which fell outside of the Act's protection. In *Tradesmen Int'l.*, 338 NLRB 460 (2002), also cited by Respondent, the policy at issue was not found unlawful because that rule's focus was found to pertain to clearly illegal or egregious activity. In *Albertson's, Inc.*, 351 NLRB 254, 259 (2007), the Board declined to find a violation as it viewed the rule at issue as intended to address serious misconduct, and not protected activities. Neither does the Board's decision in *DirectTV*, 359 NLRB No. 54 (2013), support Respondent's contention it its Exception, although the case is cited on page 16 of Respondent's brief.

In short, Respondent has proffered no cases of precedential value on point with the cases utilized by the ALJ in his analysis of this issue, or which would indicate that the ALJ was erroneous or deficient in his findings regarding the Email policy. Rather, the ALJ correctly found, for the reasons set forth in detail in his Decision, that Respondent's Email policy violates the Act. The ALJ correctly concluded that employees would reasonably construe its language to prohibit their Section 7 activities and therefore they would be chilled in their protected activities, as Respondent's rule is facially overbroad and ambiguous. Based on all of the above, Counsel for the Acting General Counsel respectfully submits that the Administrative Law Judge properly recommended that by the promulgation and maintenance of its Electronic Mail and Messaging policy, Respondent violated Section 8(a)(1) of the Act and the Administrative Law Judge's recommendations in this regard should be affirmed and Respondent's Exceptions should be rejected.

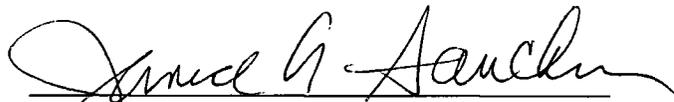
³⁷ ALJD, p. 12 – 16.

IV. CONCLUSION

It is respectfully submitted that the record evidence amply supports all of the conclusions of law made by the Administrative Law Judge to which Respondent takes exception. Counsel for the Acting General Counsel respectfully requests that the Board adopt, in full, the recommendation of the Administrative Law Judge and issue an order requiring Respondent to cease and desist from the unlawful conduct alleged; to post appropriate notices, both at its facilities and electronically,³⁸ and to take any other remedial action which may be deemed necessary to remedy Respondent's unfair labor practices, as argued herein and as included in Counsel for the Acting General Counsel's Limited Exceptions to the Administrative Law Judge's Decision, which was filed on May 16, 2013.

Dated at Pittsburgh, Pennsylvania, this 31st day of May, 2013.

Respectfully submitted,



Janice A. Sauchin
Counsel for the Acting General Counsel
NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222-4111
412-395-6886
Email: janice.sauchin@nrlrb.gov

³⁸ ALJD, p. 27, ln. 14-29.