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

BRIEF IN SUPPORT OF EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Linda Rabin Hammell
Counsel for the Acting General Counsel
National Labor Relations Board
Region Seven
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226
Direct Dial: (313) 226-3329
Fax: (313) 226-2090
Email: Linda.Hammell@nlrb.gov

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The undersigned, on behalf of the Acting General Counsel (AGC), pursuant to §102.46 of the Board's Rules and Regulations, respectfully submits this Brief in Support of Exceptions to Administrative Law Judge Ira Sandron's decision dated May 30, 2012.[1]

Statement of the Case

GM implemented a Social Media Policy (Policy) in January 2011. (Tr 21) It consists of three pages, set forth in their entirety as an attachment to the amended complaint. (Tr 21; GC Ex. 1h, Exhibit A) As admitted in GM's amended answer, and as reflected by the date at the bottom right-hand corner of

[1] Dates refer to 2012 unless noted. The May 30 ALJ Decision was supplemented by ministerial errata on June 1.

the Policy's page 3, the Policy has existed in its current form since at least February 9, 2011.[2]

All individuals employed by GM anywhere in the world, including §2(3) employees, contractors, and representatives whom GM engages to work on its behalf, are subject to the terms of the Policy. (ALJD 4, lines 35-36; Tr 22-23) Some 50,000 unionized workers in the United States spread across some 50 plants are governed by it (Tr 93-94), and they are only an undisclosed percentage of the total number of statutory employees affected by the Policy, as §2(3) employees would include non-union hourly and non-supervisory salaried United States workers, as well.

The Policy covers all electronic communications – whether generated on GM or non-GM equipment, whether created and sent on work or non-work time, and whether posted to GM or non-GM sites. (Tr 23-24, 56) Web communications on such currently popular platforms as Facebook, Twitter, forums, blogs, and Goggle Plus are just some of those that GM polices by means of its Policy. (ALJD 3, lines 35-39; Tr 25)

GM Director of Social Media and Digital Communications Mary Henige, who participated in drafting the Policy, specifically confirmed that it applies to digital messages between GM employees, and between GM employees and their supervisors. (ALJD 3, lines 39-40; Tr 27-28) Henige testified without

[2] Whether any changes were made in the Policy between January 2011 and February 9, 2011, was not disclosed in the record. The ALJ found that the Policy went into effect in January 2011. (ALJD 3, line 30)

contradiction that the Policy covers employees' complaints to supervisors and managers. (ALJD 3, lines 39-40)

GM notified employees about the Policy by posting it on the corporation's intranet website to which all employees have access, by mentioning it in a daily electronic newsletter accessible to all employees, and by emailing it to salaried employees who regularly receive communications at their work email addresses. (ALJD 3, lines 30-33; Tr 21, 22)

One of the many web sites where the Policy applies is a blog created by GM called GM Overdrive. This tool allows all GM employees, and contractors with access rights, to post comments, views, and reactions on an unlimited number of subjects, and to form affinity groups. (Tr 39, 43-44) According to Director Henige, GM Overdrive is designed in part to allow employees to raise issues on topics such as personnel benefits and career development, and to facilitate supervisory responses to those questions. This latter use of the blog prompts GM supervisors to monitor the site daily. (ALJD 4, lines 1-9; Tr 41-42, 50, 54-55)

Significantly, whether any employee statement posted on GM Overdrive has ever been punished under the Policy was not revealed in the record.

The ALJ found that the following portions of the Policy violate §8(a)(1):

> ...be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site.... Non-public company information includes:
>
> - Any topic related to the financial performance of the company;....

- Information that has not already been disclosed by authorized persons in a public forum; and

- Personal Information about another GM employee, such as his or her…performance, compensation….

When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with GM Communications or GM legal to see if it's a good idea. Failure to stay within these guidelines may lead to disciplinary action. [3]

- …obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally shareable or that you have the owner's permission….

- Get permission before posting photos, video, quotes or personal information of anyone other than you online….

Questions Involved

The ultimate questions raised by the AGC's Exceptions, reflected in Exceptions 8 through 12, are whether GM is violating §8(a)(1) of the Act by maintaining the following rules in its Policy:

<u>Use Good Judgment About What You Share And How You Share</u> [4]

- Do not incorporate GM logos, trademarks…in your posts.

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[3] At trial, the ALJ permitted the AGC to modify ¶5(b) of the amended complaint by adding the sentence from the Policy, "Failure to stay within these guidelines may lead to disciplinary action." (Tr 14-17) The undersigned explained at trial that the amendment is meant to give fair notice that the AGC relies, in part, on the express potential of discipline in urging that the cited rules are overly broad. (Tr 15)

[4] As noted at the hearing and on brief, the AGC does not quarrel with the underlined headings themselves, which are included here, and in the amended complaint, to ease locating the challenged language in the body of the Policy.

Treat Everyone with Respect

> ...Offensive, demeaning, abusive or inappropriate remarks are as out-of-place online as they are offline....

Personal References on Social Media Sites

> ...Think carefully about "friending" coworkers...on external social media sites. Communications with co-workers on such sites that would be inappropriate in the workplace are also inappropriate on-line...

Internal Social Media

> ...
>
> - Report any unusual or inappropriate internal social media activity to the system administrator....

As correctly stated by the ALJ, made plain by the amended complaint, and as stated at the hearing, the AGC's theory is that the foregoing rules, set forth in ¶5(b) of the amended complaint, are facially overly broad and therefore violative of the Act. (ALJD 2, lines 38-40; GC Ex. 1h; e.g., Tr 9-11, 65-67, 70-71)

Additional questions raised herein, reflected in Exceptions 1 through 4, 6, and 7, concern the ALJ's flawed analyses as to whether employees would reasonably construe the challenged rules to restrict their §7 rights. In this regard, we respectfully except to the ALJ's failure to make essential factual, credibility, and evidentiary findings.

We also except on due process grounds, in Exceptions 5 and 6, to the ALJ's improper questioning of a witness.

Argument

1. General Legal Principles

An employer violates §8(a)(1) of the Act by maintaining a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights." ***Lafayette Park Hotel***, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The test for finding interference, restraint, or coercion under §8(a)(1) is an objective one, and does not turn on an employee's subjective interpretation of a statement or rule. ***Miami Systems Corp.***, 320 NLRB 71, fn. 4 (1995), enfd. in relevant part, 111 F.3d 1284, 1294 (6th Cir. 1997). When a rule may reasonably be read by employees to have a chilling effect on their §7 rights, an employer's mere maintenance of the rule violates the Act, and the General Counsel need not prove enforcement, actual chilling effect, or bad motive. ***MasTec Advanced Technologies***, 357 NLRB No. 17, JD slip op. at 14 (2011); ***Grapetree Shores, Inc.***, 356 NLRB No. 60, JD slip op. at 4 (2010); ***Manor Care of Easton PA, LLC***, 356 NLRB No. 39, JD slip op. at 21 and 35 fn. 61 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011); ***Joy Recovery Technology Corp.***, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); ***Quality Aluminum Products***, 278 NLRB 338, 340 (1986), enfd. 813 F.2d 795 (6th Cir. 1987); ***Blue Cross Blue Shield of Alabama***, 225 NLRB 1217, 1219-1220 (1976); ***Cintas Corp. v. NLRB***, 482 F.3d 463, 466 (D.C. Cir. 2007) (agreeing with Board that actual employee conduct cannot vindicate an overly broad rule, and an employer's failure to enforce it does not redeem it).

The Board has developed a two-step inquiry to determine if a work rule has such a chilling effect. First, a rule is unlawful if it explicitly restricts §7 activities. If a rule does not explicitly restrict protected activities, a second-stage analysis focuses on whether: (i) employees would reasonably construe the language to prohibit §7 activity; (ii) the rule was promulgated in response to union or other protected activity; or (iii) the rule has been applied to restrict the exercise of §7 rights. ***Lutheran Heritage Village-Livonia***, 343 NLRB 646, 647 (2004).

The second-stage inquiries are listed in the disjunctive, and are separable and independent. As the Board stated in ***Lutheran Heritage***, a violation is found on a showing of only one of the three. ***Id.*** As explained throughout the hearing, the AGC's theory of the instant case arises under scenario (i) of the second-stage analysis – that is, that GM is violating §8(a)(1) of the Act by maintaining the challenged portions of the Policy, because employees would reasonably construe the disputed language to prohibit §7 activity.

For a rule to be unlawful, it is sufficient to show only that there exists a reasonable interpretation that the rule infringes §7. It is not necessary to show that the overly broad interpretation is the only reasonable one. ***Double D Construction Group, Inc.***, 339 NLRB 303, 303-304 (2003); see ***Jordan Marsh Stores Corp.***, 317 NLRB 460, 463 (1995) ("Employees need not be lawyers, parsing every phrase to seek out permissible constructions.")

In determining how an employee would reasonably construe a rule, the Board urges that the rule be given a "reasonable reading," that particular phrases

not be read in isolation, and that improper interference with employee rights not be presumed. ***Lutheran Heritage***, supra at 646.

As always, however, ambiguity cuts against the drafter. ***D.R. Horton, Inc.***, 357 NLRB No. 184, JD slip op. at 17 (2012); ***Norris / O'Bannon***, 307 NLRB 1236, 1245 (1992). Where a rule may suggest competing interpretations, lawful and unlawful, the Board looks to whether the employer has communicated limiting language, a clarification, or a refining context to employees, so as to dispel any conclusion that the rule may invade §7 rights. ***W. D. Manor Mechanical Contractors, Inc.***, 357 NLRB No. 128, JD slip op. at 15 (2011); ***TeleTech Holdings, Inc.***, 333 NLRB 402, 403 (2001); ***Laidlaw Transit, Inc.***, 315 NLRB 79, 83 (1994). A narrowing interpretation of an overly broad rule must be communicated to the entire workforce covered by the rule. ***Bigg's Foods***, 347 NLRB 425, 425 fn. 7 (2006), and cases cited therein. If a potentially overly broad rule has not been clarified effectively or adequately, any remaining ambiguity is construed against the promulgator. ***Ark Las Vegas Restaurant***, 343 NLRB 1281, 1282-1284 (2004); ***Lafayette Park Hotel***, 326 NLRB at 828; ***Norris / O'Bannon***, 307 NLRB at 1245.

2. The Policy's "Context"

GM is fond of describing the Policy as "new tools, old rules." (Tr 11, 23; Policy, p. 1, ¶1) As Director Mary Henige testified, and the Policy expressly states, the Policy is to be read in conjunction with existing policies in GM's Corporate Policy Manual. (Tr 56, 60; Policy, p. 1, ¶1)

Yet at the hearing, GM did not seek to introduce the Corporate Policy Manual, any pre-existing "old rules," or any rules that may have issued subsequently, all of which the Policy assertedly complements. Nor is there a shred of evidence that GM has supplied employees with any explanations, definitions, or clarifications of the Policy since it became effective.

The ALJ inexplicably failed to note these essential aspects of the record. The omission contravened the Board's principle and practice to assess whether the employer has communicated limiting language, a clarification, or a refining context to employees, so as to dispel any conclusion that the rule may invade §7 rights. ***W. D. Manor Mechanical Contractors, Inc.***, supra; ***TeleTech Holdings, Inc.***, supra; ***Laidlaw Transit, Inc.***, supra. It also resulted, as shown below, in the ALJ's improperly substituting his own more scholarly interpretations of rules for the plain meaning that employees may reasonably reach. This disserved his legal reasoning and GM's employees.

As far as the record discloses, the three pages of the Policy are employees' only guide to what the Policy is and what GM's intentions behind it are. The only context in which a trier-of-fact or appellate tribunal may place the disputed portions of the Policy is the full three-page Policy itself.

3. Rule Against Incorporating Logos and Trademarks

Courts have identified three objectives advanced by trademark laws: (1) to preserve the senior user's ability to enter a related field at some future time; (2) to prevent the tarnishing of the trademark holder's good reputation by use of the

mark to sell inferior merchandise; and (3) to avoid the public's being misled as to the source of products offered for sale using confusingly similar marks. See, ***Scarves by Vera v. Todo Imports Ltd.***, 544 F.2d 1167, 1172 (2nd Cir. 1976). Black's Law Dictionary 785-786 (7th ed. 1999) defines trademark infringement as "the unauthorized use of a trademark – or of a confusingly similar name, word, symbol, or any combination of these – in connection with the same or related goods or services and in a manner that is likely to cause confusion, deception, or mistake about the source of the goods or services."

Although GM has a proprietary interest in its trademarked assets, neither that property interest, nor any of the three concerns listed above, is implicated by employees' non-commercial use of GM's name, logo, or other trademarks in the course of engaging in §7 activity related to working conditions. Even if trademark principles were triggered by employees' non-commercial §7 activity, which we do not concede, there is no unlawful infringement where use of a trademark would not confuse the public regarding the source, identity, or sponsorship of a product. See, e.g., ***Smith v. Chanel, Inc.***, 402 F.2d 562, 565, 569 (9th Cir. 1968) (use of trademark not unlawful because it did not create reasonable likelihood that purchasers would be confused). For an analogous ruling as to copyright, see ***Campbell v. Acuff-Rose Music, Inc.***, 510 U.S. 569, 576-577 (1994), relying on the Copyright Act of 1976, 17 U.S.C.A. §107 ("The fair use of a copyrighted work, including such use by reproduction in copies...or by any other means

specified by [Section 106], for purposes such as criticism, comment,...scholarship, or research, is not an infringement of copyright.")

An employee's online posting regarding wages, hours, and working conditions will not be misconstrued as an effort to sell a rival automotive product, whether or not the posting includes GM's logo or trademarked images. There is, therefore, no genuine conflict between GM's intellectual property rights and employees' §7 rights. GM's business defense for proscribing "incorporat[ing] GM logos, trademarks...in [employees'] posts" fails. Contrary to the ALJ's conclusion (ALJD 7, lines 22-23), GM has not offered a bona fide reason for promulgating such an overly broad rule.

Even assuming arguendo that GM's expansive proscription has some relationship to a defensible business goal, in the absence of further explanation, employees would reasonably construe the rule to impede, for example, posting photographs of picket signs or leaflets that bear GM's logo, or uploading employee-made videos of strike activity at GM buildings. GM's trademark counsel Timothy Gorbatoff, its primary witness on the anti-logo anti-trademark rule, admitted that it is difficult, in drafting a short document such as the Policy, to include all of the nuances that come into play when evaluating whether use of GM's intellectual property is or is not appropriate. (Tr 126) He testified that his office conducts a case-by-case analysis to determine if a logo or trademark is being fairly or inappropriately used. (Tr 125, 128) Significantly, however, he also admitted that his office does not issue any reports about the intellectual property

matters it considers, the outcomes of its analyses, or the factors it relies upon. (Tr 128) Nor has his office issued any amendment, clarification, or explanation, since the original Policy was promulgated, to shed light on how GM will interpret the Policy with respect to intellectual property concerns. (Tr 131-132) Asked whether his office has communicated anything to employees to explain how GM will reconcile their §7 rights with the intellectual property concerns of the Policy, attorney Gorbatoff replied, "I don't know if it has." (Tr 131)

What is true of attorney Gorbatoff's office mirrors GM generally. Thus, as mentioned above, there is no record evidence that GM, after promulgating the Policy in January 2011, has distributed any supplemental material to employees, or communicated further with employees orally, to clarify the Policy, explain what GM means by it, or provide examples to illustrate how GM will interpret and apply it.

GM is not permitted to hinder §7 activity by overzealously guarding its intellectual property rights. See, ***Sullivan, Long & Hagerty***, 303 NLRB 1007, 1013 (1991), enfd. 976 F.2d 743 (11th Cir. 1992) (unpubl. opin.) (employee tape recording at jobsite to provide evidence in a Dept. of Labor investigation is protected); ***Pepsi-Cola Bottling Co.***, 301 NLRB 1008, 1019-1020 (1991), enfd. 953 F.2d 638 (4th Cir. 1992) (unpubl. opin.) (rule prohibiting employees to wear "logos or trademarks of the Company's products while engaging in union activity during nonworking time, outside the plant" is unlawful, as "the Company has not provided any business reason which would outweigh the Section 7 right of its

employees to engage in union activity in a uniform bearing a product identification").

The ALJ criticized the undersigned's citation of ***Pepsi-Cola Bottling Co.***, and relied on what he characterized as a contrary holding in ***Flamingo-Hilton Laughlin***, 330 NLRB 287 (1999). (ALJD 7, lines 11-25) His conclusions are misplaced.

First, ***Pepsi-Cola Bottling Co.*** specifically upheld employees' rights to wear company logos and trademarks, while ***Flamingo-Hilton Laughlin*** did not address the issue of logos and trademarks at all. This makes ***Flamingo-Hilton Laughlin*** distinguishable from, and less germane than, ***Pepsi-Cola Bottling Co.***

Second, the ALJ described ***Pepsi-Cola Bottling Co.*** as unpersuasive because, assertedly, it involved discrimination, unlike the case at bar. While the logo/trademark rule in ***Pepsi-Cola Bottling Co.*** had an anti-union genesis, the judge's analysis of that particular rule did not turn on a finding of discrimination. Rather, the judge in ***Pepsi-Cola Bottling Co.*** determined that the logo/trademark restriction was simply a facially illegal "excessive impediment to employee union activity," the promulgation of which violated §8(a)(1). ***Pepsi-Cola Bottling Co.***, 301 NLRB at 1020. The ALJ herein had no warrant for disregarding its holding.

Third, in ***Flamingo-Hilton Laughlin***, the Board found it lawful for the hotel, for non-discriminatory reasons, to bar employees from wearing their work uniforms when off the premises. An employee wearing a work uniform conveys to the public that he is at work on behalf of the company, thus giving the employer

an arguably legitimate business interest in precluding the wearing of a uniform when the employee is not at work. In contrast, GM's anti-logo anti-trademark rule does not merely interdict the wearing of company uniforms while off-duty. Rather, it prohibits every online use of GM's name or logo, including the posting of all photographs that identify GM, its facilities, and its uniformed staff. GM's rule far more invasively interferes with employees' §7 rights than did the hotel's rule in ***Flamingo-Hilton Laughlin***, and GM's rule as drafted is unsupported by any business justification, just as the rule found overly broad in ***Pepsi-Cola Bottling Co.***

GM's anti-logo anti-trademark rule can reasonably be read to forbid protected activity. It appears as a bullet point under a paragraph that warns employees of possible disciplinary action for offending the Policy's rules. GM has failed to give employees any assurances, by examples or clarification, that the strictures as to logos, trademarks, and other intellectual assets will **not** apply to specific forms of §7 conduct. The rule prohibiting logos and trademarks in employees' online posts is overly broad.

4. Rule Against "Offensive, Demeaning, Abusive, or Inappropriate Remarks"

The Policy forbids "[o]ffensive, demeaning, abusive or inappropriate remarks," which it calls "as out-of-place online as they are offline." There is no evidence that GM has offered employees any guidance on how this section of the Policy will be reconciled with their §7 rights. Nor did GM introduce any rules

external to the Policy, to show whether it has elsewhere clarified its definitions of "out-of-place...offline" remarks, or the terms "offensive," "demeaning," "abusive," and "inappropriate." The only conclusion supported by this record is that employees will likely read this section of the Policy to proscribe a wide spectrum of communications, including protected criticisms of GM's labor policies or treatment of employees. As a result, GM is violating the Act. ***Claremont Resort and Spa***, 344 NLRB 832 (2005) (unlawful rule prohibiting "negative conversations" about associates and managers); ***Lafayette Park Hotel***, 326 NLRB at 828 (unlawful rule barring "false, malicious, vicious, profane statements" toward the Hotel or its employees); ***Flamingo Hilton-Laughlin***, 330 NLRB at 288 fn. 3, 294, 295 (unlawful rules forbidding making a "false, vicious, profane or malicious statement" or using "loud, abusive or foul language"); ***Southern Maryland Hospital Center***, 293 NLRB 1209, 1222 (1989) (unlawful rule against "derogatory attacks"), enfd. in pertinent part, 916 F.2d 932 (4th Cir. 1990). Compare, ***Tradesmen Int'l.***, 338 NLRB 460, 460-462 (2002) (prohibition of "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on clearly illegal or egregious unprotected activity).

The ALJ found GM's rule lawful under ***Hyundai America Shipping Agency***, 357 NLRB No. 80 (2011), ***Palms Hotel & Casino***, 344 NLRB 1363, 1368 (2005), and ***Lutheran Heritage***, 343 NLRB at 647. All are distinguishable. In ***Hyundai***, the Board permitted a rule against "harmful gossip," in part because

gossiping suggested mere griping rather than communication that could lead to concerted action. In contrast, GM's rule strikes at the tone, tenor, and substance of employee speech, whether or not it is concerted. In ***Palms Hotel***, the Board approved a rule forbidding employees from engaging in "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons." That rule targeted misconduct commonly recognized as flagrant, capable of resulting in injury and palpable harm, thus making it far less reasonable for employees to suppose that it aimed at §7 activity. In contrast, GM's rule targets "offensive, demeaning, abusive or inappropriate" words. The terms themselves are vague and not limited to injurious conduct, making it far more likely for employees to view it as a ban on protected §7 speech. In ***Lutheran Heritage***, a deeply divided Board found lawful a rule barring "abusive or profane language," without adequately distinguishing an inconsistent holding in ***Lafayette Park Hotel***, supra. ***Lutheran Heritage***, supra at 647 fn. 9.

The ALJ conceded that the "line between permissible and impermissible as far as vagueness is a fine one." (ALJD 8, lines 22-23) The vagueness of GM's rule, unredeemed by clarification, examples, or definitions, may reasonably be read to reach innocuous and protected conduct. The weight of authority as shown above tips not toward the aberrant and inapt holdings cited by the ALJ, but to the conclusion that the rule is facially unlawful.

5. Rule Regarding "Friending" Co-Workers on External Social Media Sites and "Inappropriate" Communications There with Co-Workers

As the U. S. Supreme Court observed in ***Central Hardware Co. v. NLRB***, 407 U.S. 539, 543 (1972), organizational rights are not viable in a vacuum, and depend in some measure on the ability of employees to communicate with each other. GM's instruction to employees to "[t]hink carefully about 'friending' coworkers...on external social media sites" is overly broad, because it discourages communications among co-workers and thereby interferes with §7 activity. The following sentence, warning that "[c]ommunications with co-workers on such sites that would be inappropriate in the workplace are also inappropriate on-line," is similarly pernicious, without evidence, absent here, that GM has provided employees with a lawful clarification of which workplace communications are "inappropriate." The next phrase, "...and what you say in your personal social media channels could become a concern in the workplace," is too ambiguous to save the fatally broad strokes of the preceding passages.

The ALJ characterizes the rule as admonitory, speaking only of thought but not employee conduct, with no reference to possible discipline. (ALJD 8, lines 36-39) We disagree. The rule impliedly but clearly enjoins "inappropriate" communications with co-workers, thereby discouraging, but not limning, a realm of employee conduct. The rule must also be read in the context of the Policy's earlier general warning that "Failure to stay within these guidelines may lead to disciplinary action." It is error to conclude that the rule is merely in the nature of

advice or toothless suggestion. Employees may, indeed will, construe it as a mandate.

Curiously, the ALJ admitted that the rule is ambiguous. (ALJD 8, lines 35-36) That conclusion alone should have resulted in a finding of a violation, as ambiguity cuts against the drafter. ***D.R. Horton, Inc.***, supra; ***Norris / O'Bannon***, supra.

We urge the Board to reject the ALJ's reasoning, and to find the rule facially unlawful.

6. Rule Requiring Employees to Report "Unusual or Inappropriate" Social Media Activity

An employer violates the Act by encouraging employees to report to management the protected activities of other employees. ***Greenfield Die & Mfg. Corp.***, 327 NLRB 237, 238 (1998) and cases cited at fn. 6; ***Tawas Industries, Inc.***, 336 NLRB 318, 322 (2001). The rationale is that such encouragement has the potential to chill protected conduct. ***Bloomington-Normal Seating Co.***, 339 NLRB 191, 191 fn. 2 (2003), enfd. 357 F.3d 692 (7th Cir. 2004); ***Eastern Maine Medical Center***, 277 NLRB 1374, 1375 (1985).

GM's direction to employees to "[r]eport any unusual or inappropriate internal social media activity to the system administrator" runs afoul of this principle. The terms "unusual" and "inappropriate" are subjective and nowhere defined, leaving employees no way of knowing what kind of social media activity is protected by the Act and therefore not subject to the Policy's reporting

requirement. The fact that many sections of the Policy encompass §7 conduct, as found by the ALJ, increases the probability that employees will feel compelled to report such activity to management.

The ALJ's analysis of this rule once again undervalued the effect of ambiguity. He is correct that the rule is a "general one" that on its face is "not linked to employees' union or other protected activity." (ALJD 9, lines 20-21) However, a rule does not pass muster simply by not expressly proscribing §7 rights. Rather, and as here argued, the question is whether the rule is broad enough to allow a reasonable reading that would infringe §7 rights. Ambiguity can be fatal. The ALJ, extrapolating from Board precedent, concluded that employees would not reasonably read the rule to invade their §7 rights. (ALJD 9, lines 21-23) Yet neither the ALJ nor GM has answered the practical question raised by the rule as to exactly what social media activity falls under the description "unusual or inappropriate."

We ask the Board to find the ALJ's reasoning flawed, and to hold the reporting rule illegally broad.

7. Evidentiary and Due Process Errors

(i) Disputed Testimony of GM Witness Gorbatoff

During re-direct examination, the ALJ, over the undersigned's objection, asked GM attorney Gorbatoff a speculative and admittedly leading question, eliciting conclusionary testimony that GM will not enforce the Policy's restrictions as to logos and trademarks so as to violate §7. (Tr 133-134) The undersigned,

during re-cross, was foreclosed from asking the logical and relevant question of what specific measures GM has taken to give employees that assurance. (Tr 135-136) [5]

GM did not proffer any evidence, such as trademark case pleadings or cease-and-desist letters, to buttress Gorbatoff's naked assertion that GM would never violate the Act while pursuing its intellectual property interests. Even more crucially, the undersigned's legitimate question that the ALJ disallowed was never answered. Consequently, the record does not establish that GM has ever given employees the same kind of §7 assurances that witness Gorbatoff glibly gave to the ALJ.

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[5] Salient passages of the exchange are as follows:
JUDGE SANDRON: Well, let's put it this way, and I think I'm going to just ask in a very leading fashion and get the answer on the record: Would GM enforce the restrictions on use of logos or trademarks if it violated Section 7?
MS. RABIN HAMMELL: Objection, relevance.
JUDGE SANDRON: Go ahead and answer. See, I can ask the question, so go ahead and answer. I assume the answer is no.
THE WITNESS: I mean, we don't enforce our trademarks in any way that's in violation of any law.
JUDGE SANDRON: All right, that's fine...
BY MS. RABIN HAMMELL: How will employees know that?
MS. CELESTINE: Objection. How will he know how employees will know...
BY MS. RABIN HAMMELL: What has General Motors done to make it clear to employees that under no circumstances will their Section 7 activity be curbed by the social media policy?
MS. CELESTINE: Objection, asked and answered...
MS. RABIN HAMMELL: Don't you want to take the answer? I mean –
JUDGE SANDRON: We'll take the answer. We have to assume at this point that the Company would – that his testimony would be that they would not violate the law, Section 7 or otherwise.
MS. RABIN HAMMELL: What kind of self-serving testimony is that?
JUDGE SANDRON: Well –
MS. RABIN HAMMELL: We don't know that, and more importantly we don't know that employees know that.
JUDGE SANDRON: Well, that's a separate question.
MS. RABIN HAMMELL: But the latter is the central issue of the case, Your Honor....I'm asking him -- ...to state whether or not employees have any reason to believe that under no circumstances will their Section 7 rights be infringed by the social media policy; what, if anything, has your office issued.
JUDGE SANDRON: All right. Do you object, Ms. Celestine?
MS. CELESTINE: I do object.
JUDGE SANDRON: Sustained. Any other questions?
(Tr 133-136)

On brief, we asked, on evidentiary and due process grounds, that Gorbatoff's self-serving answer be given no weight. (AGC's Post-Hearing Brief to ALJ, p. 10) The ALJ did not rule on our application in his Decision. However, he found, on no evidence beyond Gorbatoff's testimony, that GM permits "descriptive use of the logo that will not confuse people into believing that they come from GM." (ALJD 4, lines 16-17) He also ruled, on no evidence other than Gorbatoff's testimony, that GM "offered a bona fide reason" for promulgating the anti-logo anti-trademark rule. (ALJD 7, lines 22-23)

Due process demanded that the ALJ explicitly and genuinely disavow relying upon Gorbatoff's self-serving conclusionary assertion. Because it is impossible to be certain that Gorbatoff's impermissible testimony did not infect the ALJ's reasoning, due process also required a more fulsome explanation in the Decision of the bases of the ALJ's conclusions noted above. At the very least, our timely raised quarrel with Gorbatoff's testimony, and the ALJ's mode of interrogation that elicited it, should have precluded the ALJ from finding, as he did (ALJD 2, line 44), that the facts in this case are undisputed.

(ii) Disputed Testimony of Witness Ridgell

Senior Policy Consultant Sharon Denise Ridgell testified that at an unspecified time in **2010**, GM voluntarily posted a notice at all of its 90 United States facilities, advising employees that they "have a right to organize and that Employers do not have a right to refrain [sic] or coerce these individuals in regards to union activities." (Tr 105, 107, 110-111) GM did not introduce any such

posting into the record, thereby preventing inspection of it. It is implausible that the witness was describing the Board's now-enjoined Employee Rights Notice, as it strains belief that GM would have posted a general rights notice in 2010, before the Board's proposed rule on the subject was promulgated on December 22, 2010, 75 F.R. 80410, and before the rule was finalized on August 30, 2011, 76 F.R. 54006, dates as to which we asked the ALJ to take administrative notice. Because it is difficult to ascertain to what Ms. Ridgell referred, and impossible to know with precision exactly what the alleged posting states, we urged that little weight be given to this testimony. (AGC's Post-Hearing Brief to ALJ, pp. 9-10)

The ALJ did not rule on this credibility issue. Although his Decision did not clearly rely on the disputed testimony, it is difficult to know how it may have affected his reasoning. Again, at minimum, the ALJ was incorrect in describing all facts as undisputed. We renew our objection to Ms. Ridgell's testimony on this point, and the ALJ's failure to grapple with it, in order to preserve our rights on appeal.

(iii) Hearsay Objection With Respect to Resp. Ex. 1

At trial, GM introduced an array of postings culled on the day before the hearing from GM's blog Overdrive. According to Director Henige, the collection comprising Resp. Ex. 1 was the sum total generated by searching for the key terms "union," "UAW," "organize," "labor organizer," and "labor." (Tr 47-48) Although Resp. Ex. 1 identifies the bloggers by name, the record is silent regarding their status under §2(3), §2(11), §2(12), or §2(13) of the Act. Whether

the individuals who posted the messages in Resp. Ex. 1 escaped punishment under the Policy is a matter of speculation, because, as noted above, GM did not elicit evidence on the point.

GM did not indicate at any time that it sought to introduce Resp. Ex. 1 in order to prove the truth of the out-of-court declarants' statements. Such a purpose would be irrelevant to this proceeding. The only relevance of the cherry-picked postings of Resp. Ex. 1, a document that does not exist in the ordinary course of business and was created for the purpose of this litigation, is to show that certain electronic statements were (apparently) made. Whether the statements themselves are true or false is not material.

Accordingly, after Resp. Ex. 1 was admitted, the undersigned sought a limitation, on hearsay grounds, that it not be considered for the truth of the matters asserted in the posts. (Tr 87-89) The ALJ deferred ruling. (Tr 90)

As we argued on brief (AGC's Post-Hearing Brief to ALJ, p. 6), GM's only stab at establishing the foundational requirements of any hearsay exception in the Federal Rules of Evidence (FRE) was to elicit the following from Director Henige, the record custodian:

> Q. BY MS. CELESTINE: Okay, so are these documents kept in the regular course of business at GM?
> A. Well, not kept. I mean, it's retained because it's on the site, like the portal.
> Q. So they're – are they in a place where they can be accessed?
> A. Yes.
> Q. Are they maintained somewhere at General Motors?
> A. Right, on the server.

(Tr 46) The foregoing exchange does not meet any hearsay exception, including the standard of FRE 803(6), which requires a threshold showing that the document reflects reports, made by persons with knowledge, whose regular practice is to make such reports, on behalf of an entity that keeps such reports in the course of its regularly conducted business activity. Not one of these elements is demonstrated on this record. While Resp. Ex. 1 may be regarded as what it is – a selected sampling of certain messages on GM Overdrive – it may not be the basis of any finding as to the truth of any statement or opinion contained in it.

The ALJ found that, on the blogs, "employees can voice questions, concerns, or comments about GM, and they most commonly address benefits." (ALJD 4, lines 7-8) However, he did not render the promised verdict as to whether Resp. Ex. 1 is admitted without limitation, or for the limited purpose of establishing the kind of statements made by unidentified bloggers on GM Overdrive. To preserve our rights on appeal, we except.

8. Insufficiency of Recommended Remedial Notice to Employees

The ALJ's recommended Order properly specifies exactly which rules are to be rescinded. (ALJD 12, lines 3-4) However, his recommended Notice to Employees provides only a vague and confusing description of the rules to be rescinded:

> WE WILL rescind provisions in our social media policy, including confidentiality rules, that unlawfully restrict you in the exercise of the rights listed above, including your ability to discuss wages, hours, and other terms and conditions of employment.

It is vital for employees to obtain a precise account of the rules being rescinded, in order that they are clearly informed which rules no longer bind them, and whether they may be entitled to the ALJ's properly recommended make-whole remedy. Accordingly, we ask that the ALJ's Notice be modified to include a specific recital of the rules being rescinded.

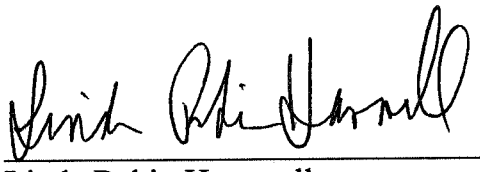
Conclusion

As the Supreme Court stated in ***NLRB v. Gissel Packing Co.***, 395 U.S. 575, 617 (1969):

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

Employees may reasonably interpret the above-cited portions of the Policy to interfere with their rights under the Act. GM has not presented probative evidence that it has specifically and meaningfully informed employees how it will subordinate the Policy to the varieties of conduct available to them under §7. This record contains no larger "context" of rules, policies, explanations, or clarifications that might mitigate the unlawfulness of the overly broad rules. Neither GM's conduct, nor the ALJ's reasoning, has dispelled the conclusion that

the rules covered by these Exceptions violate §8(a)(1) of the Act. We respectfully ask the Board to grant our Exceptions.



Linda Rabin Hammell
Counsel for the Acting General Counsel
National Labor Relations Board
Region Seven
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226
Direct Dial: (313) 226-3329
Fax: (313) 226-2090
Email: Linda.Hammell@nlrb.gov

Date: August 22, 2012

CERTIFICATE OF SERVICE

I certify that on August 22, 2012, I caused copies of Exceptions of Counsel for the Acting General Counsel to the Administrative Law Judge's Decision, and Brief in Support of Exceptions of Counsel for the Acting General Counsel to the Administrative Law Judge's Decision, in ***General Motors, LLC, Case 7-CA-53570***, to be served upon all parties of record, by electronic transmission, as follows:

Respondent:

Onika Celestine, Atty.
onika.celestine@gm.com

General Motors, LLC
300 Renaissance Center
P. O. Box 300
Mail Code: 482-C25-B21
Detroit MI 48265-3000

Charging Party:

Michael Anthony Henson
mikeahenson@gmail.com

2423 Miami Beach Drive
Flint MI 48507

Linda Rabin Hammell