Karl Knauz Motors, Inc., d/b/a Knauz BMW *and* Robert Becker. Case 13–CA–046452

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND BLOCK

On September 28, 2011, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Acting General Counsel and the Respondent each filed exceptions and a supporting brief, an answering brief to the other party's exceptions, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found that the Respondent, which owned and operated a BMW dealership, violated Section 8(a)(1) of the Act by maintaining a rule[3] in its employee handbook stating:

> (b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

For the following reasons, we agree with the judge's finding.[4]

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends 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). If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). If it does not, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. At 647.

We find the "Courtesy" rule unlawful because employees would reasonably construe its broad prohibition against "disrespectful" conduct and "language which injures the image or reputation of the Dealership" as encompassing Section 7 activity, such as employees' protected statements—whether to coworkers, supervisors, managers, or third parties who deal with the Respondent—that object to their working conditions and seek the support of others in improving them. First, there is nothing in the rule, or anywhere else in the employee handbook, that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the rule's broad reach. See generally *Costco Wholesale Corp.*, 358 NLRB 1100 (2012) (finding unlawful the maintenance of a rule prohibiting statements posted electronically that "damage the Company . . . or damage any person's reputation"). Second, an employee reading this rule would reasonably assume that the Respondent would regard statements of protest or criticism as "disrespectful" or "injur[ious] [to] the image or reputation of the Dealership." Cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (in evaluating employer statements alleged to violate Sec. 8(a)(1), "assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting" and "must take into account the economic dependence of the employees on their employers"). As we recently observed:

> Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive

[1] The Acting General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find that the high threshold for reversing a judge's credibility findings has not been met.

We adopt the judge's finding that the Respondent lawfully discharged employee Robert Becker solely because of his unprotected Facebook postings about an auto accident at a Land Rover dealership also owned by the Respondent. Accordingly, we find it unnecessary to pass on whether Becker's Facebook posts concerning a marketing event at the Respondent's BMW dealership were protected.

The Respondent does not except to the judge's finding that it violated Sec. 8(a)(1) of the Act by maintaining the "Unauthorized Interviews" and "Outside Inquiries Concerning Employees" rules in its employee handbook. The Acting General Counsel does not except to the judge's dismissal of the allegation that the "Bad Attitude" rule in the handbook was unlawful.

[2] We shall modify the judge's recommended Order to conform to the violations found, and we shall substitute a new notice to conform to the Order as modified.

[3] The judge found that the Respondent rescinded this and the unlawful "Unauthorized Interviews" and "Outside Inquiries Concerning Employees" rules shortly before the hearing.

[4] In deciding this issue, we do not rely on *Crowne Plaza Hotel*, 352 NLRB 382 (2009), a case issued by a two-member Board and cited by the judge. See *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010); *Hospital Pavia Perea*, 355 NLRB 1300, 1300 1 fn. 2 (2010) (recognizing that the two-member Board "lacked authority to issue an order").

> meaning—are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights[,] whether or not that is the intent of the employer.

Flex Frac Logistics, LLC, 358 NLRB 1131, 1132 (2012).

Our dissenting colleague contends that we have read the crucial phrases of the rule out of context. In support, he argues that the first section of the rule, encouraging "courteous, polite, and friendly" behavior, clearly establishes that the rule is nothing more than a "commonsense behavioral guideline for employees." If the rule only contained the first section, we might agree.[5] By going further than just providing the positive, aspirational language of the first section, the rule conveys a more complicated message to employees. The second section of the rule is in sharp contrast to the first, specifically proscribing certain types of conduct and statements. A reasonable employee who wishes to avoid discipline or discharge will surely pay careful attention and exercise caution when he is told what lines he may not safely cross at work.

There is no merit to our colleague's accusation that we have departed from Board precedent holding that an employer rule is unlawful if employees would reasonably understand it to apply to protected activity. *Lutheran Heritage Village*, supra, which we apply here, does *not* stand for the proposition that an employer rule "must be upheld if employees could reasonably construe its language *not* to prohibit Section 7 activity." *Flex Frac Logistics*, supra at 1132. Nor, in finding the rule unlawful, do we rely on our own subjective views, or those of the Acting General Counsel, as our colleague claims, but on well established precedent. See *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990) (unlawful rule prohibited "derogatory attacks on . . . hospital representative[s]"); *Claremont Resort and Spa and Hotel*, 344 NLRB 832 (2005) (unlawful rule prohibited "negative conversations about associates and/or managers"); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000), enfd. 297 F.3d 468 (6th Cir. 2002) (unlawful rule prohibited "[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates").[6]

In other words, compliance with the first sentence of the rule is no assurance against sanctions under the second sentence of the rule. Reasonable employees would believe that even "courteous, polite, and friendly" expressions of disagreement with the Respondent's employment practices or terms and conditions of employment risk being deemed "disrespectful" or damaging to the Respondent's image or reputation. Thus, contrary to the dissent's contention, the second sentence of the rule proscribes not a manner of speaking, but the content of employee speech—content that would damage the Respondent's reputation. For example, here we find that the Respondent unlawfully coerced its employees by promulgating two other rules that restrict employees' ability to communicate about their terms and conditions of employment. Presumably, even if employees shared with third parties information about our findings of the Respondent's unlawful conduct in the most genteel manner, such sharing would be injurious to the Respondent's image or reputation. A reasonable employee, consequently, would believe that such a communication would expose him or her to sanctions under the Respondent's rule.

For these reasons, we affirm the judge's finding that the Respondent's maintenance of this rule violates Section 8(a)(1).

ORDER

The National Labor Relations Board orders that the Respondent, Karl Knauz Motors, Inc., d/b/a Knauz BMW, Lake Bluff, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the "Courtesy" rule in its employee handbook that prohibits employees from being disrespectful or using profanity or any other language which injures the image or reputation of the Dealership.

(b) Maintaining the "Unauthorized Interviews" and "Outside Inquiries Concerning Employees" rules in its employee handbook that prohibit employees from discussing their terms and conditions of employment or information about other employees with third parties.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[5] See, e.g., *Costco Wholesale Corp.*, supra, in which the Board adopted the judge's dismissal of the complaint allegation that the employer violated Sec. 8(a)(1) by maintaining a different rule requiring employees to use "appropriate business decorum" in communicating with others. Unlike the rule in this case, the rule there contained no prohibition on employee statements or conduct that would reasonably apply to protected activity.

[6] The cases cited by the dissent in support of this argument are distinguishable. The rules at issue in those cases more clearly described conduct that was outside the protections of the Act, such as malicious, abusive, unlawful, or unethical actions or statements.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the "Courtesy" rule in its employee handbook that prohibits employees from being disrespectful or using profanity or any other language which injures the image or reputation of the Dealership.

(b) Rescind the "Unauthorized Interviews" and "Outside Inquiries Concerning Employees" rules in its employee handbook that prohibit employees from discussing their terms and conditions of employment or information about other employees with third parties.

(c) Furnish all current employees with inserts for the current employee handbook that

1. advise that the unlawful rules have been rescinded, or
2. provide the language of lawful rules or publish and distribute a revised employee handbook that
   a. does not contain the unlawful rules, or
   b. provides the language of lawful rules.

(d) Within 14 days after service by the Region, post at its Lake Bluff, Illinois facility copies of the attached notice, in English and Spanish, marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER HAYES, dissenting in part.

My colleagues find that the Respondent's facially neutral "Courtesy" rule, which encourages workplace civility and discourages disrespectful, profane, or injurious language, violates federal law. They reach that result by reading words and phrases in isolation and by effectively determining that the National Labor Relations Act invalidates any handbook policy that employees conceivably could construe to prohibit protected activity, regardless of whether they *reasonably* would do so. Because the majority's analysis departs from precedent, and because employees and employers alike have a right to expect a civil workplace, promoted through policies like the one that my colleagues find unlawful, I respectfully dissent.[1]

The Respondent owns and operates a BMW dealership. Its employee handbook included the following rule:

> (b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

The rule plainly does not explicitly restrict Section 7 activity. Neither was it promulgated in response to, or applied to restrict, such activity. Thus, under the practical approach adopted by the Board in *Lutheran Heritage Village-Livonia*,[2] the issue here is whether employees would reasonably construe the rule to prohibit Section 7 activity. In deciding that issue, the Board is supposed to give the challenged rule a reasonable reading and "refrain from reading particular phrases in isolation."[3] My colleagues depart from these strictures. They focus on one word—"disrespectful"—and one phrase—"language which injures the image or reputation of the Dealership"—in isolation from the rest of the rule. They assert that employees would reasonably believe that even courteous and friendly expressions of disagreement with employment terms might be deemed "disrespectful" or damaging to the Respondent's image or reputation.[4]

[1] I join my colleagues' dismissal of the allegation that Respondent unlawfully discharged employee Becker and, like them, I find it unnecessary to decide whether Becker's Facebook posts concerning "The Ultimate Driving Event" were protected.

[2] 343 NLRB 646, 646 (2004).

[3] Id.

[4] My colleagues even go so far as to posit that employees would reasonably fear violating the rule if they were to share information about the uncontested judge's findings that two other rules maintained by the Respondent are unlawful. Inasmuch as the Respondent has effectively conceded its obligation to rescind those rules and to post a Board remedial notice about them, I can only wonder why any employee would

This sort of piecemeal analysis has for good reason been rejected by the D.C. Circuit,[5] as well as by the Board itself in its more reflective moments.[6] Purporting to apply an objective test of how employees would reasonably view rules in the context of their particular workplace and employment relationship, the analysis instead represents the views of the Acting General Counsel and Board members whose post hoc deconstruction of such rules turns on their own labor relations "expertise." In other words, the test now is how the Board, not affected employees, interprets words and phrases in a challenged rule. Such an abstracted bureaucratic approach is in many instances, including here, not "reasonably defensible."[7] It is clearly unnecessary for the protection of employees' Section 7 rights and impermissibly fetters legitimate employer attempts to fashion workplace rules.

Reasonably construed and read as a whole, the rule is nothing more than a common-sense behavioral guideline for employees. Courtesy—"well-mannered conduct indicative of respect for or consideration of others"[8]—is to be extended to customers, vendors, suppliers, and coworkers. Accordingly, in communications with individuals in those groups, employees are not to "be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." Nothing in the rule suggests a restriction on the content of conversations (such as a prohibition against discussion of wages); rather the rule concerns the tenor of any conversation. In short, by its "Courtesy" rule the Respondent sought to promote civility and decorum in the workplace and prevent conduct that injures the dealership's reputation—purposes that would have been patently obvious to Respondent's employees, who depend on the dealership's image for their livelihoods. Such rules, the Board and the D.C. Circuit have held, are lawful.[9]

The majority's analysis departs from precedent in another respect. The Board is supposed to ask whether employees would *reasonably* understand a challenged rule to prohibit protected activity, not whether they *could*, in theory, do so. This is not a distinction without a difference. As the Board has explained, where a rule "*does not* address Section 7 activity . . . the mere fact that it could be read in that fashion will not establish its illegality." *Palms Hotel & Casino*, supra. "To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity. *Lutheran Heritage Village*, supra at 647.

My colleagues state the correct standard, but they fail to faithfully apply it. Instead, citing *Costco Wholesale Corp.*,[10] they find the Courtesy rule unlawful because it does not suggest that "employee communications protected by Section 7 of the Act are *excluded*" from its reach. In other words, they find that the rule is unlawful because it *could* be read to include protected communications, and it lacks limiting language making it clear that such communications are excluded. That is the *dissenting* view in *Lutheran Heritage Village*. See supra at 649–652. The majority in that case stated that "[w]e will not require employers to anticipate and catalogue in their work rules every instance in which, for example, the use of abusive or profane language might conceivably be protected by . . . Section 7." Id. at 648. The majority's finding today cannot be reconciled with this precedent.[11] For that matter, it cannot even be reconciled with the judge's finding and analysis in *Costco* that a rule requiring employees to use "appropriate business decorum" in communicating with others was lawful. The judge there

reasonably think that the Courtesy rule would nevertheless prohibit civil discussion of these rules.

[5] See *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003) (stating that allegedly unlawful language in a rule must be read in context).

[6] In addition to *Lutheran Heritage Village*, supra, see *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (rejecting an analysis that finds "arguable ambiguity . . . through parsing the language of the rule, viewing [a] phrase . . . in isolation, and attributing to the [employer] an intent to interfere with employee rights"), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

[7] *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497, 99 S. Ct. 1842, 60 L.Ed.2d 420 (1979).

[8] *Webster's Third New International Dictionary* (1981) at 523.

[9] See, e.g., *Palms Hotel & Casino*, 344 NLRB 1363, 1368 (2005) (finding challenged rule lawful where its terms were not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace"); *Tradesmen International*, 338 NLRB 460, 462 (2002) (collecting cases in which the Board has found lawful a variety of rules that prohibit conduct "tending to damage or discredit an employer's reputation"); *Adtranz*, supra at 25–28 (upholding rule prohibiting "abusive or threatening language").

[10] 358 NLRB 1100 (2012). I did not participate in *Costco*.

[11] My colleagues' reliance on *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990), is misplaced. The rule held unlawful there prohibited "derogatory attacks" on others, including the employer. The Board has specifically distinguished that rule from lawful rules, such as the one at issue here, that prohibit using language that is actually damaging to the employer. *Tradesmen International*, supra, 338 NLRB at 462 fn. 4. My colleagues' reliance on *Claremont Resort & Spa*, 344 NLRB 832 (2005), is similarly misplaced. There, a rule prohibiting "negative conversations about associates and/or managers" was held unlawful. That rule is far broader than the one here, was issued during an organizing campaign along with other work rules, and would have been read to restrict complaints about those rules. Further, the respondent there previously had been found to have unlawfully prohibited employees from discussing the union while at work. Id. at 836. *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000), enfd. 297 F.3d 468 (6th Cir. 2002), is also inapposite, as the rule there prohibited false statements, not injurious ones.

specifically rejected reliance on the dissenting view in *Lutheran Heritage Village*, and the Board specifically affirmed his reasoning.[12]

The majority additionally claims that it is "settled" that "ambiguous employer rules—rules that could be read to have a coercive meaning—are construed against the employer," citing *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012), a case in which I dissented. That principle has generally been applied to rules limiting solicitation or distribution of literature—i.e., rules that explicitly touch on Section 7 activity. Its application to rules that do *not* explicitly address Section 7 activity, as here, contradicts *Lutheran Heritage Village*, as the Board explained in *Palms Hotel*, supra, 344 NLRB at 1368. The majority's resurrection of that concept in this context defies precedent as well.[13]

My colleagues say the problem with the language at issue here is that it is "broad" and "ambiguous." This rationale fails on two grounds. First, language both the Board and the D.C. Circuit have upheld could be characterized in precisely the same way. Words like "appropriate," "injurious," "offensive," "intimidating,"[14] "abusive,"[15] and the phrase "satisfactory attitude,"[16] surely are subject to the same critique the majority levels at "disrespectful." Thus, the majority's approach fails to adequately reconcile conflicting precedent and warrants reversal on that ground alone.

Second, the unassailable fact is that people use words that could be construed broadly all the time, yet manage to make themselves understood. That is because words do not exist in a vacuum; they are informed by context and experience. Reasonable employees know that a work setting differs from a barroom, and they recognize that employers have a genuine and legitimate interest in encouraging civil discourse and noninjurious and respectful speech. Indeed, as the courts have reminded us, reasonable employees are quite capable of exercising their Section 7 rights within acceptable norms of behavior. See, e.g., *Adtranz*, supra, 253 F.2d at 26 (ridiculing the notion that employees cannot be expected "to comport themselves with general notions of civility and decorum" when engaging in protected speech). There is nothing in the record in this case to indicate that reasonable employees would feel incapable of exercising Section 7 statutory rights within the behavioral norms of the Respondent's Courtesy rule. If the Respondent had *applied* the rule to punish such conduct, that would be a different case, analyzed under a different prong of the *Lutheran Heritage Village* test. However, in a "mere maintenance" case such as this, our precedent requires, and so should we, more than hypothetical and strained interpretations to make out a violation of Federal law.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the "Courtesy" rule in our employee handbook that prohibits you from being disrespectful or using profanity or any other language which injures the image or reputation of the Dealership.

WE WILL NOT maintain the "Unauthorized Interviews" and "Outside Inquiries Concerning Employees" rules in our employee handbook that prohibit you from discussing your terms and conditions of employment or information about other employees with third parties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the "Courtesy" rule in our employee handbook that prohibits you from being disrespectful or using profanity or any other language which injures the image or reputation of the Dealership.

[12] 358 NLRB 1100, 1112–1113.

[13] Persisting in a mischaracterization that I have previously rejected, the majority ascribes to me the view that *Lutheran Heritage Village* stands for the proposition that an employer rule "must be upheld if employees could reasonably construe its language *not* to prohibit Section 7 activity," quoting *Flex Frac Logistics*, supra at 1132. As I explained in my dissent in that case, I am quite aware that *Lutheran* says no such thing. See id at 1134 fn. 5. I recognize that a rule is unlawful where employees reasonably would read it as such, even if that is not the only conceivable construction. My point here, as in *Flex Frac*, is that employees would not reasonably so read the rule at issue.

[14] *Palms Hotel*, supra at 1367.

[15] *Adtranz*, supra.

[16] *Flamingo Hilton-Laughlin*, 330 NLRB 287, 287 (1999) (finding lawful a rule prohibiting failure to have or maintain a "satisfactory attitude . . . and/or relationships" with guests or other employees). Contrary to the majority's attempt to distinguish *Palms Hotel* and *Adtranz* as involving rules aimed at serious misconduct, the finding in *Flamingo* shows that the Board has not required that a rule be limited to serious misconduct to pass muster under the Act.

WE WILL rescind the "Unauthorized Interviews" and "Outside Inquiries Concerning Employees" rules in our employee handbook that prohibit you from discussing your terms and conditions of employment or information about other employees with third parties.

WE WILL furnish all of you with inserts for the current employee handbook that

1. advise that the unlawful rules have been rescinded, or
2. provide the language of lawful rules or publish and distribute a revised employee handbook that

a. does not contain the unlawful rules, or

b. provides the language of lawful rules.

KARL KNAUZ MOTORS, INC., D/B/A
KNAUZ BMW

Charles Muhl, Esq., for the General Counsel.
James Hendricks Jr., Esq. and *Brian Kurtz, Esq. (Ford & Harrison, LLP)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on July 21, 2011, in Chicago, Illinois. The first amended complaint, which issued on July 21, 2011, and was based upon an unfair labor practice charge that was filed on November 30, 2010,[1] by Robert Becker, alleges that Karl Knauz Motors, Inc., d/b/a Knauz BMW (the Respondent) discharged Becker on June 22 because he engaged in protected concerted activities, in violation of Section 8(a)(1) of the Act. The amended complaint (as amended at the hearing) also alleges that since at least August 28, 2003, the Respondent has maintained four rules in its employee handbook that contain language that makes them unlawful. They are entitled: (a) Bad Attitude, (b) Courtesy, (c) Unauthorized Interviews, and (d) Outside Inquiries Concerning Employees. While admitting that from August 23, 2003, these provisions were contained in its employee handbook, the Respondent defends that on July 19, 2011, it notified its employees that these provisions had been rescinded, and that this allegation has been remedied.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACTS

A. Becker's Termination

The Respondent operates a BMW dealership in Lake Bluff, Illinois (the facility), selling new BMW automobiles, as well as used cars. The Respondent also owns an adjoining dealership that sells Land Rover automobiles, as well as other nearby dealerships that are not relevant to this proceeding. Becker began working at the Land Rover dealership in 1998; he transferred to the Respondent's BMW facility in July 2004, where he was employed until his termination on June 22. His immediate supervisor at the facility was Phillip Ceraulo, the general sales manager; Peter Giannini and Robert Graziano were the sales director and sales manager at the facility, and Barry Taylor was the vice president and general manager.

There are three contributing elements to the pay of the Respondent's salespersons: the first is a 25-percent commission of the profit derived from the sale of the vehicle, the profit being the difference between the selling price and the cost of the vehicle. The second element is based upon volume; in order to qualify for this bonus, the salesperson must sell 12 cars in a month, including, at least, 2 used cars. The final element is the Customer Satisfaction Index, which is based upon survey questionnaires sent to customers who purchased a car: "It's based on how well we perform for our clients."

The event that precipitated the situation here was an Ultimate Driving Event (the Event) held on June 9 to introduce a redesigned BMW 5 Series automobile. Everybody considered this to be a significant event, especially because the BMW Series 5 automobile is their "bread and butter" product. To make the event even more special, BMW representatives, rather than the Respondent's sales people, were to be present on June 9 to take the clients on test drives.

Becker testified that about a day or two prior to the Ultimate Driving Event all the sales people met with Ceraulo in his office to discuss the event. In addition to Becker, the other sales people were Greg Larsen, Fadwa Charnidski, Steve Rayburn, Chad Holland, Howard Krause, and Dave Benck. Ceraulo told them about the Event and what was expected of them. He told them that for food they were going to have a hot dog cart serving the clients, in addition to cookies and chips. He testified that the sales people rolled their eyes "in amazement" and he told Ceraulo, "I can't believe we're not doing more for this event." Larsen said the same thing and added: "This is a major launch of a new product and . . . we just don't understand what the thought is behind it." Ceraulo responded: "This is not a food event." After the meeting the sales people spoke more about it and Larsen told him that at the Mercedes Benz dealership they served hors d'oeuvres with servers. Becker also testified that Larsen said, "[W]e're the bread and butter store in the auto park and we're going to get the hot dog cart." As to why this was important, Becker testified:

> Everything in life is perception. BMW[is] a luxury brand and . . . what I've talked about with all my co-workers was the fact that what they were going to do for this event was absolutely not up to par with the image of the brand, the ultimate driving machine, a luxury brand. And we were concerned about the fact that it would . . . affect our commissions, especially in the sense that it would affect . . . how the dealership looks and, how it's presented . . . when somebody walks into our dealership . . . it's a beautiful auto park . . . it's a beautiful place . . . and if you walk in and you sit down and your waiter serves you a happy meal from McDonald's. The two just don't mix . . . we were very concerned about the fact . . . that it could potentially affect our bottom line.

[1] Unless indicated otherwise, all dates referred to here relate to the year 2010.

Larsen testified that the meeting with Ceraulo took place on the morning of the Event, June 9, telling them what was going to happen: "BMW comes up and they give us a tutorial of the new car, answer some questions that we may have. That's pretty much about it." There was no discussion of food being served, so Larsen asked, "what was going to be served and [I] hoped that they weren't going to use the hotdog cart." He thought that the Event should be catered: "It's our bread and butter car for BMW. I thought it should be more professionally done." There was "a little banter back and forth among the salespeople," and Becker said something about the food being offered, but he could not recollect more specifically what was said.

Ceraulo testified that prior to the Event a mailing was sent to customers and potential customers notifying them of the Event; there was no mention of food in this mailing. He and Graziano met with the sales people about the Event at their regular Saturday sales meeting on June 5. At this event they discussed the car that was being introduced, the incentives that were being offered by BMW, and what was expected of the sales people. Sometime during this meeting Larsen asked what food was being served, but he could not recollect what was asked and what was said, and he cannot remember if anybody else asked about the food that was to be served.

On the day of the Event, there was the hot dog cart (with hot dogs), bags of Doritos, cookies, and bowls of apples and oranges. Becker took pictures of the sales people holding hot dogs, water and Doritos and told them that he was going to post the pictures on his Facebook page.

As stated above, the Respondent also owns a Land Rover dealership located adjacent to the facility. On June 14 an accident occurred at that dealership. A salesperson was showing a customer a car and allowed the customer's 13-year-old son to sit in the driver's seat of the car while the salesperson was in the passenger seat, apparently, with the door open. The customer's son must have stepped on the gas pedal and the car drove down a small embankment, drove over the foot of the customer[2] into an adjacent pond, and the salesperson was thrown into the water (but was unharmed, otherwise).

Becker was told of the Land Rover incident and could see it from the facility. He got his camera and took pictures of the car in the pond. On June 14, he posted comments and pictures of the Ultimate Driving Event of June 9, as well as the Land Rover accident of June 14 on his Facebook page.[3] The Event pages are entitled: "BMW 2011 5 Series Soiree." On the first page, Becker wrote:

> I was happy to see that Knauz went "All Out" for the most important launch of a new BMW in years . . . the new 5 series. A car that will generate tens in millions of dollars in revenues for Knauz over the next few years. The small 8 oz bags of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch . . . but to top it all off . . . the Hot Dog Cart. Where our clients could attain a over cooked wiener and a stale bunn.

Underneath were comments by relatives and friends of Becker, followed by Becker's responses. On the following page there is a picture of Holland with his arm around the woman serving the hot dogs, and the following page has a picture of Holland with a hot dog. Page 4 shows the snack table with cookies and fruit and page 5 shows Charnidski holding bottles of water, with a comment posted by Becker:

> No, that's not champagne or wine, it's 8 oz. water. Pop or soda would be out of the question. In this photo, Fadwa is seen coveting the rare vintages of water that were available for our guests.

Page 6 shows the sign depicting the new BMW 5 Series car with Becker's comment below: "This is not a food event. What ever made you realize that?" The final two pages again show the food table and Holland holding a hot dog.

On June 14, Becker also posted the pictures of the Land Rover accident, as well as comments, on his Facebook page. The caption is "This is your car: This is your car on drugs." The first picture shows the car, the front part of which was in the pond, with the salesperson with a blanket around her sitting next to a woman, and a young boy holding his head. Becker wrote:

> This is what happens when a sales Person sitting in the front passenger seat (Former Sales Person, actually) allows a 13 year old boy to get behind the wheel of a 6000 lb. truck built and designed to pretty much drive over anything. The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a $50,000 truck. OOOPS!

There are a number of comments on the first page, one of which was from an employee of the Respondent in the warranty department, stating: "How did I miss all the fun stuff?" On the second page, under the photo of the car in the pond, Becker wrote: "I love this one . . . The kid's pulling his hair out . . . Du, what did I do? Oh no, is Mom gonna give me a time out?" Below, there were comments from two of Respondent's employees. Counsel for the General Counsel also introduced in evidence a Facebook page of Casey Felling, a service advisor employed by the Respondent, containing Becker's picture of the car in the pond with Felling's comment: "Finally, some action at our Land Rover store."

By the next day, the Respondent's representatives had learned of, and had been given copies of, Becker's Facebook postings for the BMW Event and the Land Rover accident. As a result, Ceraulo asked Becker to remove the postings, which he did, and Taylor decided that he wanted to meet with Becker on the following day to discuss the postings.

On June 16, at Taylor's request, Becker met with Taylor, Giannini and Ceraulo in a conference room at the facility.

[2] On the following day, the salesperson met with management and, as punishment for what had happened the prior day, her "demo" vehicle was taken from her, along with gas and insurance, and in lieu thereof, she was given a $500 "demo allowance" and, until she was able to purchase her own car, the dealership gave her a used car for her use. She was told: "You need to slow down with your judgment and your decisions."

[3] At the time, Becker had approximately 95 Facebook "Friends" 15 or 16 of whom were employed by the Respondent, who would be able to access his Facebook account. He testified that, at the time, his "Privacy Settings" allowed access, as well, to "friends of Friends," so that they could also see his postings.

Becker testified that Taylor had the Facebook postings of the BMW Event and the Land Rover accident in his hand and tossed them to him and asked, "What were you thinking?" Becker responded that it was his Facebook page and his friends: "It's none of your business." Taylor asked, "That's what you're going to claim?" and Becker said, "That's exactly what I'm going to claim." Taylor again asked what he was thinking and Becker said that he wasn't thinking anything. Taylor said that they received calls from other dealers and that he thoroughly embarrassed all management and "all of your coworkers and everybody that works at BMW." Giannini then said, "You know, Bob, the photos at Land Rover are one thing, but the photos at BMW, that's a whole different ball game." Becker responded that he understood. Taylor then said that they were going to have to think about what they were going to do with him, and that they would contact him. Meanwhile, he was told to hand in the key to his desk. On the way out, he told Ceraulo that there was no maliciousness on his part and Ceraulo told him to let things settle down, and he left. After he got home, he called Giannini and apologized for what had occurred; Giannini testified that he does not recall receiving any apology from Becker. Becker later called William Knauz and apologized to him as well. Knauz told him that he should have apologized during the meeting with Taylor, Giannini, and Ceraulo.

Notes of this June 16 meeting, taken by Giannini, state, inter alia, that the meeting was to discuss:

> . . . several negative articles on his Facebook directly pertaining to situations which happened at the Knauz Automotive Group.
>
> We were alerted to this action by receiving calls from other LR dealers who saw pictures/comments (negative) on the internet.
>
> Mr. Taylor showed Bob Becker copies of the postings and posed the question what was Bob thinking to do such a . . . thing to the company. (One posting was regarding the accident at Land Rover when an LR4 was driven into the lake and the second was surrounding our new 5 Series BMW Ride and Drive Event.)

Taylor testified that at the June 16 meeting he handed Becker the postings and asked why he would do that and Becker said that it was his Facebook and he could do what he wanted. He ended the meeting by telling Becker to go home and that they would review this issue and get back to him. Taylor testified that he saw both postings, but:

> I will tell you that the thing that upset me more than anything else was the Land Rover issues. The BMW issue, to me, was somewhat comical, if you will . . . if it had been that, that would have been it. But, no, it was the Land Rover issue.

Becker testified that he received a telephone call on June 22 from Taylor saying, "We all took a vote and nobody wants you back . . . and the only thing that we ask is that you never set foot on the premises." Becker said that he understood, and that was the end of the conversation. Giannini testified that on June 21 he attended a meeting with Taylor, Graziano, Ceraulo, Bill Knauz, and William Madden, Respondent's president. They discussed Becker's ". . . posting a dangerous situation that occurred on our premises on his Facebook and, it being damaging to the company, as well as the individuals involved, personally and . . . of making light of it." They also discussed the fact that Becker had shown no remorse about what he did, and they decided, unanimously, that he should be terminated. I asked Giannini if there was any discussion at the June 21 meeting of Becker's Facebook postings and pictures of the June 9 Ultimate Driving Event and the hot dog cart and he responded: "Only in a comical way . . . that really had no bearing whatever." He testified that they all saw the pictures of the Event and the hot dog cart and "we all concluded that . . . it was just somebody's personal feelings."

Ceraulo testified that during this meeting there was discussion about the June 9 Event and the hot dog cart, and the Land Rover accident, but: "The basis of the decision to terminate was the posting of the accident at the Rover store." Taylor testified that those present at the June 21 meeting decided unanimously that Becker should be terminated because of his posting about the Land Rover accident: "it was . . . making light of an extremely serious situation . . . somebody was injured and . . . doing that would just not be accepted." He called Becker to inform him of his termination. Taylor testified that the discussions at that meeting "centered" on the Land Rover postings:

> and that was, if you will, 90 percent of the discussion. Yes, the other one was mentioned because, we had that. But, again, it was nothing more than, you know hey this is part of Knauz is the hotdog cart . . . mean we laughed about it. Unfortunately . . . that's not why we made a decision to terminate Bobby Becker.

Counsel for the General Counsel introduced into evidence a number of documents subpoenaed from the Respondent that relate to Becker's termination. A memorandum to Becker's personnel file, dated June 22, from Taylor states, inter alia:

> I told Bob [of the June 21 meeting] . . . that it was a unanimous decision to terminate his employment because he had made negative comments about the company in a public forum and had made light on the internet of a very serious incident (Land Rover had jumped the curbing and ended up in a pond) that embarrassed the company. I told him that we could not accept his behavior and he was not to return to work.

In a response to questions from the Board's Regional Office about how the Respondent learned of the Facebook postings, counsel for the Respondent stated that the manager of the Land Rover dealership received calls from two other Land Rover dealerships telling him of the postings. Counsel also attached notes written by Ceraulo and Graziano about the meeting prior to the June 9 Event. Ceraulo wrote that at the June 6 sales meeting to discuss the June 9 Event: "A couple of very brief, light hearted remarks were made by some of the sales staff at the meeting regarding the snacks being served during the event." In regards to the Land Rover incident, Ceraulo stated:

> Mr. Becker had satirized a very serious car accident that occurred at our Land Rover facility on his Facebook page by posting pictures of the accident accompanied by rude and sar-

> castic remarks about the incident. His posting prompted a meeting on June 16th with Mr. Becker, Barry Taylor, Peter Giannini and myself to discuss his actions. The food comments were brought up in the meeting because he had coupled them with the Land Rover accident on his Facebook page. It was explained to Mr. Becker that the food comments albeit insulting to the company, were not the reason for his termination from the company. It was the postings of the Land Rover accident were unforgivable [sic] and justification for termination. When Mr. Becker was confronted with how serious his actions were regarding the Land Rover incident and asked how he could make fun of an accident that could have caused serious harm to life and limb, not to mention harming the company's reputation, he simply shrugged his shoulders in a cavalier manner and said, "OK."

Graziano's notes regarding the Saturday meeting preceding the June 9 Event states that at the meeting "A few client advisers jokingly make comments hoping we would not be using the hot dog cart." Giannini's letter regarding the June 16 meeting states that Taylor asked Becker ". . . what he was thinking by placing negative and discouraging comments regarding our company on the internet, specifically surrounding the incident which occurred at Land Rover involving an LR4 being driven into our lake."

B. The Employee Handbook

The complaint, which issued on May 20, 2011, alleged only that Becker's termination violated Section 8(a)(1) of the Act. On July 11, 2011, counsel for the General Counsel filed a notice of intent to amend complaint which, in addition to adding supervisors and agents to paragraph II of the complaint, alleged that certain portions of the Respondent's employee handbook, which were in effect from August 28, 2003, until July 18, 2011, violated Section 8(a)(1) of the Act. The alleged unlawful provisions are, as follows:

> (a) Bad Attitude: Employees should display a positive attitude toward their job. A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers.
>
> (b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.
>
> (c) Unauthorized Interviews: As a means of protecting yourself and the Dealership, no unauthorized interviews are permitted to be conducted by individuals representing themselves as attorneys, peace officers, investigators, reporters, or someone who wants to "ask a few questions." If you are asked questions about the Dealership or its current or former employees, you are to refer that individual(s) to your supervisor. A decision will then be made as to whether that individual may conduct any interview and they will be introduced to you by your supervisor with a reason for the questioning. Similarly, if you are aware that an unauthorized interview is occurring at the Dealership, immediately notify the General Manager or the President.
>
> (d) Outside Inquiries Concerning Employees: All inquiries concerning employees from outside sources should be directed to the Human Resource Department. No information should be given regarding any employee by any other employee or manager to an outside source.

On July 19, 2011, Madden and Taylor sent a memorandum to all employees stating, inter alia:

> Because our employee handbook has not been updated since 2003, we have been in the process of updating and amending the KNAUZ employee manual for several months. We expect to have the finalized draft to you within the month. However, in the meantime, please be aware of the following areas in which significant changes are being made. If you have issues relating to these areas prior to the issuance of the new handbook, please see Julie Clement or Barry Taylor.
>
> - Bad Attitude-this policy is being rescinded effective immediately.
> - Courtesy-this policy is being rescinded effective immediately.
> - Unauthorized Interviews-this policy is being rescinded effective immediately.
> - Outside Inquiries Concerning Employees-this policy is being rescinded effective immediately.
>
> While there may be some additional changes and/or additions, the foregoing lets you know, in general terms, where the changes will be. Again, please let me know if you have any questions or concerns.

III. ANALYSIS

Admittedly, Becker was terminated on June 22 for his Facebook posting(s) on June 14. The two crucial issues are, was he fired because of both postings, the hot dog cart incident of the Event and the Land Rover accident, or only for the postings of the Land Rover accident, and were these postings protected concerted activities.

The evidence establishes that at the pre-Event sales meeting both Becker and Larsen commented about what they considered to be the inadequacy of the food being served at the Event. Larsen commented that he hoped that they weren't going to use the hot dog cart and that they should cater the Event, and Becker told Ceraulo, "I can't believe we're not doing more for this event." Ceraulo's answer was that it was not a food event. On June 14, Becker posted his pictures and comments of the Event on his Facebook page.

Concerted activities does not require that two or more individuals act in unison to protest, or protect, their working conditions. In *Meyers II*, 281 NLRB 882, 887 (1986), the Board stated that concerted activities included individual activity where, "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." In *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969), the court stated that the "activity of a single employee in enlisting the support of his fellow employees for their

mutual aid and protection is as much 'concerted activity' as is ordinary group activity." In *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995), the court stated: "The fact that there was no express discussion of a group protest or 'common cause' is not dispositive . . . their individual actions were concerted to the extent they involved a 'logical outgrowth' of prior concerted activity. The lone act of a single employee is concerted if it 'stems from' or 'logically grew' out of prior concerted activity." As both Larsen and Becker spoke up at the meeting commenting on what they considered to be the inadequacies of the food being offered at the event, and the subject was further discussed by the salespersons after the meeting, even though only Becker complained further about it on his Facebook pages without any further input from any other salesperson, other than the Facebook pictures of Holland and Charnidski, I find that it was concerted activities, and find that it was protected concerted activities as it could have had an effect upon his compensation. While it is not as obvious a situation as if he had objected to the Respondent reducing their wages or other benefits, there may have been some customers who were turned off by the food offerings at the event and either did not purchase a car because of it, or gave the salesperson a lowering rating in the customer satisfaction rating because of it; not likely, but possible.

Counsel for the Respondent, in his brief, argues that it was not protected concerted activities because neither Becker nor any other employee made Respondent aware that their complaints about the food being served was really about their commissions. However, this is not a requirement of protected concerted activities.

The final issue is whether the tone of the Facebook account of the Event rose "to the level of disparagement necessary to deprive otherwise protected activities of the protection of the Act." *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980). I find that it did not. Although Becker's Facebook account of the Event clearly had a mocking and sarcastic tone that, in itself, does not deprive the activity of the protection of the Act. In *Pontiac Osteopathic Hospital*, 284 NLRB 442, 452 (1987), the discriminatee, along with other employees, authored a fake newsletter employing satire and irony to mock the employer and its administrators. The administrative law judge, as affirmed by the Board, stated: "the fact that the authors used the literary techniques of satire and irony to make their point, as opposed to a more neutral factual recitation of their dissatisfaction, does not deprive the communication that they produced of any protection under Section 7 of the Act to which it might otherwise be entitled." Similarly, in *New River Industries, Inc.*, 299 NLRB 773 (1990), an employer announced that, to celebrate a partnership with another company, refreshments (ice cream) would be provided to the employees. A number of employees wrote sarcastic comments about this "reward," and two were fired for the "demeaning and degrading" comments. The administrative law judge, as affirmed by the Board, citing *Pontiac Osteopathic Hospital*, supra, found that the sarcasm employed by the employees did not exceed permissible bounds, and found the terminations unlawful. The court, however, at 945 F.2d 1290, 1295 (4th Cir. 1991), refused enforcement finding that the matters being publicized were not related to the employees' mutual aid or protection, and was therefore not protected concerted activities. In *Timekeeping Systems, Inc.*, 323 NLRB 244, 249 (1997), the administrative law judge stated: "Unpleasantries uttered in the course of otherwise protected concerted activity does not strip away the Act's protection." Further, referring to supervisors as "a-holes" in *Postal Service*, 241 NLRB 389 (1979), and calling the company's chief executive officer a "cheap son of a bitch" in *Groves Truck & Trailer*, 281 NLRB 1194, 1195 (1986), did not lose the Act's protection, and neither did Becker in his Facebook comments on the Event.

On the other hand, I find that Becker's posting of the Land Rover accident on his Facebook account was neither protected nor concerted activities, and counsel for the General Counsel does not appear to argue otherwise. It was posted solely by Becker, apparently as a lark, without any discussion with any other employee of the Respondent, and had no connection to any of the employees' terms and conditions of employment. It is so obviously unprotected that it is unnecessary to discuss whether the mocking tone of the posting further affects the nature of the posting. It is therefore necessary to determine whether Becker was terminated because of the Event posting, the Land Rover posting, or for both.

Becker testified that at the June 16 meeting Taylor told him that his posting embarrassed his coworkers and everybody working at BMW, and that Giannini said, "The photos at Land Rover are one thing, but the photos at BMW, that's a whole different ball game." On the other hand, according to the testimony and notes prepared by Taylor, Giannini, and Ceraulo, while the hot dog cart and the Event were discussed on June 16, they felt that it was "comical," and that they laughed about it, but that Becker was fired solely for his Land Rover Facebook posting. While I found Becker to be a generally credible witness, I also found the Respondent's witnesses to be more credible and can find no reason to discredit their testimony about the June 16 and 21 meeting. Further, considering the nature of the June 16 meeting, I do not credit Becker's testimony that Giannini downgraded the serious nature of the Land Rover posting while stressing the seriousness of the posting of the Event. The evidence establishes, and reason dictates, that both incidents were discussed on June 16 and 21, but that doesn't necessarily establish that both incidents caused his discharge. Rather, I find that Becker was fired on June 22 because of his Facebook posting of the Land Rover accident, and as a result, I find that counsel for the General Counsel has not sustained his initial burden under *Wright Line*, 251 NLRB 1083 (1980).[4]

The final issue relates to paragraphs (a) through (d) of the Respondent's employee handbook that was in effect from about August 28, 2003, until these paragraphs were rescinded on July 19, 2011. The issues are whether these provisions violate the Act and, if they did, since they were rescinded prior to the hearing, whether these violations need to be remedied. The alleged-

[4] Counsel for the General Counsel, in his brief, argues the disparate treatment of Becker as compared to the Land Rover salesperson whose negligence cause the accident at the dealership, supports his case. I find no similarity between the two and find it not unreasonable that they resulted in different penalties.

ly unlawful provision of paragraphs (a) and (b) state: "A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers" and "No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." Paragraphs (c) and (d) prohibit employees from participating in interviews with, or answering inquiries concerning employees from, practically anybody.

The Board has gone to great lengths in attempting to find the right balance between the exercise of employees' rights guaranteed them by Section 7 of the Act and an employer's right to operate his business without unnecessary restrictions. In *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), the Board stated: "The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice even absent evidence of enforcement." In *Lutheran Heritage Village- Livonia*, 343 NLRB 646 (2004), the Board stated:

> Our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

In *Crowne Plaza Hotel*, 352 NLRB 382 (2008), the issue before the Board was the legality of a number of provisions contained in the employer's employee handbook, including one entitled Press Release and News Media, somewhat similar to (c) Unauthorized Interviews and (d) Outside Inquiries Concerning Employees. The provision provided that for any incident generating significant public interest or press inquiries, the release of information will be handled by the employer's general manager: "Under no circumstances will statements or information be supplied by any other employee." In finding this rule unlawful, the Board stated that the term "significant public interest" is broad enough to encompass a labor dispute, such as a strike, and "A rule that prohibits employees from exercising their Section 7 right to communicate with the media regarding a labor dispute is unlawful." The Board further found that the sentence quoted above, "would reasonably be construed as prohibiting all employee communications with the media regarding a labor dispute," and that this restriction violated Section 8(a)(1) of the Act. In the *NLS Group*, 352 NLRB 744, 745 (2008), the employer had the discriminatee sign an employment agreement containing the following confidentiality language:

> Employee also understands that the terms of this employment, including compensation, are confidential to employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.

The Board found this provision unlawful as it reasonably could be construed to prohibit activity protected by Section 7: "Employees would reasonably understand that language as prohibiting discussions of their compensation with union representatives."

Paragraphs (c) and (d) clearly would be understood to restrict and limit employees in the exercise of their Section 7 rights, and Respondent does not appear to argue otherwise. If employees complied with the dictates of these restrictions, they would not be able to discuss their working conditions with union representatives, lawyers, or Board agents. I therefore find that the restrictions contained in these paragraphs violate Section 8(a)(1) of the Act. The restrictions contained in Paragraphs (a) and (b) are not as obvious. As they do not explicitly restrict Section 7 rights, their legality is determined by the three criteria set forth in *Lutheran Heritage Village*, supra. As parts (2) and (3) have not been established, the test is whether employees would reasonably construe Paragraphs (a) and (b) to prohibit their exercise of Section 7 rights. In *Albertson's, Inc.*, 351 NLRB 254, 259 (2007), the Board stated: "In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of Section 7 rights, the Board will give the work rule a reasonable reading and refrain from reading particular phrases in isolation." In dismissing the allegations regarding certain work rules, the Board stated that they did not believe that the cited rules could reasonably be read as encompassing Section 7 activity. Citing *Lafayette Park Hotel*, supra, the Board stated: "To ascribe such a meaning to these words is, quite simply farfetched. Employees reasonably would believe that these rules were intended to reach serious misconduct, not conduct protected by the Act."

Based upon the above cited cases, I recommend that the allegation regarding paragraph (a) be dismissed. I believe that the one sentence prohibition would reasonably be read to protect the relationship between the Respondent dealer and its customers, rather than to restrict the employees' Section 7 rights. As was frequently mentioned during the hearing, BMW is a top of the line automobile with, I imagine, an appropriate sticker cost. A dealer in that situation, I believe, has the right to demand that its employees not display a bad attitude toward its customers. On the other hand, I find that paragraph (b) violates Section 8(a)(1) of the Act in that employees could reasonably interpret it as curtailing their Section 7 rights. In *University Medical Center*, 335 NLRB 1318, 1321 (2001), the allegedly offending rule prohibited "insubordination . . . or other disrespectful conduct towards service integrators and coordinators and other individuals." The Board found that this rule violated the Act as employees could reasonably believe that their protected rights were prohibited by this rule. In its finding, the Board stated that a problem with this rule was the word disrespectful: "Defining due respect, in the context of union activity, seems inherently subjective."

Although I have found that paragraphs (b), (c), and (d) violate the Act, counsel for the Respondent alleges that as the Respondent rescinded these provisions prior to the hearing, there should be no finding of a violation and that there is no need for a remedy. While, at first glance, one would assume that the Respondent's rescission effectively withdrew the unlawful

provisions negating the violation, certain requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), were not met. In that case, the Board stated that to relieve itself of liability for unlawful conduct by repudiating the conduct, "such repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from proscribed illegal conduct." The Board further stated: "Such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights."[5] While the Respondent notified all of its employees of the rescission and did not commit any other unfair labor practices, the Respondent merely told the employees that the offending provisions were rescinded, without a further explanation and without telling the employees that in the future it would not interfere with their Section 7 rights. I therefore find that Paragraphs (b), (c), and (d), although subsequently rescinded, violate Section 8(a)(1) of the Act.

[5] It should be noted that in *Claremont Resort, Inc.*, 344 NLRB 832 (2005), the Board while finding that a rule about "negative conversations" violated the Act, stated: "We do not necessarily endorse all the elements of *Passavant."*

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and 7 of the Act.

2. The provisions contained in Paragraphs (b), (c), and (d) of its employees' handbook from about August 23, 2003, to July 19, 2011, violate Section 8(a)(1) of the Act.

3. The Respondent did not further violate the Act as alleged in the amended complaint.

THE REMEDY

Having found that Respondent's rescission of the offending paragraphs does not satisfy the Board's requirements for rescission, I recommend that it be required to post the attached notice, and to notify the salespersons electronically, that it has rescinded these provisions of its employee handbook and that it will not interfere with the employees' Section 7 rights. However, as all the unit employees were informed of the July 19, 2011 rescission, it is unnecessary to specifically order the Respondent to, again, rescind these provisions.

[Recommended Order omitted from publication.]