

DirecTV U.S. DirecTV Holdings, LLC and International Association of Machinists and Aerospace Workers, District Lodge 947, AFL-CIO. Case 21-CA-039546

January 25, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On December 13, 2011, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief. The Acting General Counsel filed limited exceptions and a supporting brief and the Charging Party filed cross-exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations 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.

In this case, we address allegations that the Respondent maintained five unlawful work rules. We agree with the judge that four of the rules are unlawful, and we further agree that the Respondent did not repudiate them. We discuss each of the rules below, along with the appropriate remedy.² In addition, we address the judge's finding, with which we agree, that the Respondent unlawfully discharged employee Gregory Edmonds because of his union activity.

A. Work Rules

The judge found that the four rules at issue—two provisions set forth in the Respondent's employee handbook and two corporate policies maintained by the Respondent on its intranet system—were unlawful because employees would reasonably construe them as prohibiting Section 7 activity. See *Hyundai America Shipping Agency*,

¹ The Respondent 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We agree with the judge that the work rule entitled, "Use of Company Systems, Equipment, and Resources," is lawful under the Board's decision in *Register-Guard*, 351 NLRB 1110 (2007), enf'd. in part sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). The Acting General Counsel, joined by the Charging Party, asks the Board to revisit its decision in *Register-Guard*. Chairman Pearce and Member Griffin question whether *Register-Guard* was correctly decided, but they decline to address the issue in this case.

357 NLRB 860, 861 (2011); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).³ The policies posted on the Respondent's intranet system are applicable to all its employees nationwide, while the handbook provisions at issue here are applicable to the Respondent's home services employees (installers) who work at more than 110 locations nationwide. Although the Respondent excepts to the judge's findings that the rules were unlawful, it has presented no alternative construction or interpretation of the rules, focusing instead on its purported repudiation of them. As explained below, we agree with the judge that the rules were unlawful and that the Respondent failed to repudiate them.

1. Restrictions on employee communication with the media

The Respondent's handbook provision section 3.4, entitled, "Communications and Representing DIRECTV," expressly instructs employees, "Do not contact the media."⁴ It is settled that Section 7 of the Act encompasses employee communications about labor disputes with newspaper reporters. See *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enf'd. sub nom. *Nevada Service Employees, Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009); *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995). Employees would reasonably construe the unequivocal language in the Respondent's rule as prohibiting any and all such protected communications to the media regarding a labor dispute. In accord with precedent, we regard it as significant that the rule makes no attempt to distinguish unprotected communications, such as statements that are maliciously false, from those that are protected.⁵ See *Valley Hospital Medical Center*, 351 NLRB at 1252-1253; accord: *Cintas Corp. v. NLRB*, 482 F.3d 463, 469 (D.C. Cir.

³ The Board does not read particular phrases in a rule in isolation from the overall rule language. See *Lutheran Heritage Village-Livonia*, supra at 646. We have considered the overall language of the rules at issue.

⁴ The rule provides, in pertinent part: "Communications and Representing DIRECTV. To ensure the company presents a united, consistent voice to a variety of audiences, these are some of your responsibilities related to communications Do not contact the media, and direct all media inquiries to the Home Services Communications department. . . . If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments." The full text of the rule is set forth in Appendix D to this decision.

⁵ For example, the rule addresses permissible employee engagement in "political activities" but lacks any such clarification or reference to employee engagement in Sec. 7 activity. Nor is clarification offered to employees by the rule as a whole. It broadly addresses communications but remains silent on whether an employee is impermissibly representing DIRECTV under the rule when engaged in Sec. 7 activity.

2007) (finding policy unlawful where “the Company has made no effort in its rule to distinguish [S]ection 7 protected behavior from violations of company policy”). The Board has consistently found similar rules barring employee media communications to be overbroad and unlawful. E.g., *HTH Corp.*, 356 NLRB 1397, 1398, 1421 (2011), *enfd.* 693 F.3d 1051 (9th Cir. 2012); *Trump Marina Casino Resort*, 355 NLRB 585 (2010) (incorporating by reference 354 NLRB 1027 (2009)), *enfd.* 435 Fed. Appx. 1 (D.C. Cir. 2011); *Leather Center, Inc.*, 312 NLRB 521, 525, 528 (1993). Accordingly, we agree with the judge that this part of the Respondent’s handbook provision 3.4 is unlawful.

For similar reasons, we find that the Respondent’s corporate policy entitled, “Public Relations” is unlawful. The policy states, in relevant part “Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.”⁶ As the Board explained in *Brunswick Corp.*, “any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee’s free time and in non-work areas is unlawful.” *Id.*, 282 NLRB 794, 795 (1987) (citing *Enterprise Products Co.*, 265 NLRB 544, 554 (1982)); accord: *Trump Marina Casino*, 355 NLRB at 585 (incorporating by reference 354 NLRB at 1029 fn. 3); *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001). As explained above, Section 7 protects employee communications with the media concerning labor disputes. The Respondent’s preapproval requirement expressly covers any contact with the media, and thus would reasonably lead employees to conclude that it applies to protected communications concerning labor disputes. Indeed, the policy’s statement that its purpose is to ensure a “consistent message” would reasonably be construed as barring expression to the media of any employee disagreement with the Respondent over wages, hours, and other terms and conditions of employment.⁷

2. Restriction on employee communication with NLRB agents

As noted above at footnote 4, the Respondent’s handbook provision section 3.4 provides, “If law enforcement wants to interview or obtain information regarding a

⁶ The policy provides in full: “Public Relations: Employees must direct all media inquiries to a member of the Public Relations team, without exception. Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations. These rules are in place to ensure that the company communicat[e]s a consistent message and to ensure that proprietary information is not released.”

⁷ The broad language of the rule precludes any reasonable inference by employees that the preauthorization requirement is limited to proprietary information.

DIRECTV employee, whether in person or by telephone/email, the employee should contact the security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.” We agree with the judge that this aspect of the Respondent’s handbook rule violates Section 8(a)(1).

Section 8(a)(4) of the NLRA protects employees who file unfair labor practice charges or who provide information to the Board in the course of a Board investigation. See *NLRB v. Scrivener*, 405 U.S. 117, 122–124 (1972). The Respondent’s broadly written rule, however, would lead reasonable employees to conclude that they would be required to contact the Respondent’s security department before cooperating with a Board investigation. The Respondent’s employees would reasonably construe Board agents as “law enforcement” with respect to the labor matter under investigation; indeed, that is essentially the role of the NLRB. Further, we find that the rule is unlawfully broad insofar as it affects employee contacts with other law enforcement officials about wages, hours, and working conditions.⁸

In so finding, we acknowledge that an employer may, in some circumstances, have a legitimate interest in knowing about law enforcement agents’ attempts to interview employees. For example, an employer may wish to ensure that the employees have the opportunity to be represented by counsel during such interviews. The Respondent’s rule, however, is ambiguous: it fails to distinguish those situations from protected employee contacts with Board agents or other law enforcement officials.

Even if the Respondent here did not intend the rule to extend to protected communications, that intent was not sufficiently communicated to the employees. It is settled that ambiguity in a rule must be construed against the respondent-employer as the promulgator of the rule. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) (even if rule not intended to reach protected conduct, its lawful intent must be “clearly communicated to the employees”), *enfd. mem.* 203 F.3d 52 (D.C. Cir. 1999).

3. Confidentiality rules

The Respondent’s handbook provision section 4.3.1, entitled, “Confidentiality,” instructs employees to “[n]ever discuss details about your job, company business or work projects with anyone outside the company” and to “[n]ever give out information about customers or

⁸ See, e.g., *T & W Fashions*, 291 NLRB 137, 137 fn. 2 (1988) (Sec. 7 protects employees’ participation in investigative meetings with the U.S. Department of Labor); *Squier Distributing Co.*, 276 NLRB 1195, 1195 fn. 1 (1985) (Sec. 7 protects employees’ concerted cooperation with the local sheriff in connection with their suspicion that a manager was embezzling company funds), *enfd.* 801 F.2d 238 (6th Cir. 1986).

DIRECTV employees.”⁹ Further, the rule expressly includes “employee records” as one of the categories of “company information” that must be held confidential.¹⁰ The explicit prohibition on releasing information concerning the “job” or fellow “DIRECTV employees” as well as “employee records” would reasonably be understood by employees to restrict discussion of their wages and other terms and conditions of employment. See, e.g., *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1131 (2012) (unlawful confidentiality rule prohibited revealing information “related to . . . personnel information and documents”). See also *Cintas Corp. v. NLRB*, 482 F.3d at 468–469 (explaining that confidentiality rules that by their terms forbid disclosure of “information concerning employees” are unlawful).¹¹ In those circumstances, the fact that the “Confidentiality” provision also covers “information about customers,” “company business,” and other listed items cannot save it from condemnation.¹² Finally, because the rule does not exempt protected communications with third parties such as union representatives, Board agents, or other governmental agencies concerned with workplace matters, employees would reasonably interpret the rule as prohibiting such communications, making the rule unlawful for that reason as well. See *Trinity Protection Services*, 357 NLRB 1382,

⁹ The rule provides, in pertinent part: “Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs, and chat rooms. Never give out information about customers or DIRECTV employees. In particular, customer information must never be transmitted through regular unencrypted email, even internally within DIRECTV. If you have additional questions regarding data transmission guidelines, check with the IT department.” The full text of the rule is set forth in Appendix D to this decision.

¹⁰ The rule states, in pertinent part: “Company information is fundamental to our success. Company information can consist of information such as contract terms, marketing plans, financial information, details about our technology, employee records and customer account information.”

¹¹ See *Double Eagle Hotel & Casino*, 341 NLRB 112, 114–115 (2004) (collecting cases), *enfd.* 414 F.3d 1249 (10th Cir. 2005), *cert. denied* 546 U.S. 1170 (2006); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3 (1999) (unlawful confidentiality rule prohibited revealing information about customers, hotel business, or “fellow employees”). In contrast, more narrowly drafted confidentiality rules that do not specifically reference and restrict information concerning “employees” and their “job[s]” have been found lawful. See *Super K-Mart*, 330 NLRB 263, 263–264 (1999) (prohibition against disclosing “company business and documents” did not by its terms include employee wages or working conditions and made no reference to employee information).

¹² See *IRIS, U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1018 (2001) (rule prohibiting disclosure of information concerning employees, customers, and the employer was unlawful); *Flamingo Hilton-Laughlin*, above, 330 NLRB at 288 fn. 3.

1383 (2011); accord: *Hyundai American Shipping Agency*, 357 NLRB 860, 872 (collecting cases). Accordingly, we agree with the judge that the Respondent’s confidentiality rule violates Section 8(a)(1).

4. Intranet policy on “Company Information”

On its intranet, the Respondent maintains a corporate policy entitled, “Employees.” It states: “Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.” Although this policy itself references only unspecified “company information,” the Respondent promulgated *two* overlapping sets of rules governing employee conduct—its intranet policies and its handbook—and effectively directed employees to read them as one.¹³ As explained, the handbook contains a confidentiality rule that defines “company information” as including “employee records.” The Respondent’s intranet policy does not further explain, limit, or otherwise address the term.¹⁴ Employees who read the two policies in tandem would understand the intranet policy to prohibit disclosure of “employee records,” which would include information concerning their own or fellow employees’ wages, discipline, and performance ratings. See *Hyundai America Shipping Agency*, 357 NLRB 860, 871 (prohibition on unauthorized disclosure of information from an “employee’s personnel file” could reasonably be read to bar discussion of wages, disciplinary actions, and performance evaluations). At the very least, the scope of “company information” in the intranet policy is ambiguous in light of the handbook provision, and the Board has recognized that “employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition.” *Id.* For these reasons, we find the Respondent’s maintenance of this policy to be unlawful.¹⁵

¹³ The Respondent’s intranet, called the DEN, instructed employees to “[r]efer to the version of the handbook for your business unit,” and to “[r]efer to the DEN and other resources for the most up-to-date content.” The handbook, in turn, stated that “policies and practices are periodically reviewed and are subject to change. Should their [sic] be any conflict, the full policy documents available on the DEN . . . will govern.” See *Longs Drug Stores California*, 347 NLRB 500, 501 (2006) (reading general and particular confidentiality provisions together).

¹⁴ The Respondent does not contend that the lack of a specific reference to “employee records” in the intranet policy has replaced or negated that reference in the handbook policy.

¹⁵ The Charging Party contends that the rules should also be found unlawful because employees would understand them to prohibit disclosure of the Respondent’s business information even in furtherance of lawful boycotting, picketing, or strike activity. It is unnecessary to pass on this contention because the rules have already been found unlawful, and must be rescinded, for the reasons set forth.

B. Respondent's Attempted Repudiation of the Unlawful Rules

We agree with the judge that the Respondent's efforts to clarify its rules did not amount to a repudiation of its unlawful conduct. In order for a repudiation to serve as a defense to an unfair labor practice finding, it must be timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). There must be adequate publication of the repudiation to the employees involved, and the repudiation must assure employees that, going forward, the employer will not interfere with the exercise of their Section 7 rights. See, e.g., *Rivers Casino*, 356 NLRB 1151, 1152 (2011). Finally, the employer must admit wrongdoing. *Id.*; *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003).

Here, the Respondent's purported repudiation was not timely. In *Passavant*, the Board found that an attempted repudiation occurring 7 weeks after an unlawful threat of discharge was untimely. The Board additionally observed, "Nor can we ignore the fact that Respondent delayed until very nearly the eve of the issuance of complaint before publishing its disavowal." 237 NLRB at 138. In the present case, the Respondent did not post its disclaimers until nearly a full year after it promulgated the rules at issue, and even then waited until after the complaint had issued.¹⁶ Compare *Gaines Electric Co.*, 309 NLRB 1077, 1081 (1992) (repudiation timely where it occurred 1 month after the unlawful threat) with *Fresh & Easy Neighborhood Market v. NLRB*, 468 Fed. Appx. 1 (D.C. Cir. 2012) (upholding the Board's conclusion that attempted repudiation made after complaint issued was untimely because it "follows logically" from the holding in *Passavant*), enfg. 356 NLRB 546, 561 (2011) (no effective repudiation where unlawful rule was in effect for at least 10 months).

In addition to acting in an untimely manner, the Respondent did not effectively repudiate its misconduct because it did not admit wrongdoing. In its bulletin-board posting at the Riverside, California facility where this case arose, the Respondent couched its disclaimer in terms of "clarify[ing]" its "intent" in "enforcing the policies." See *Branch International Services*, 310 NLRB 1092, 1105 (1993) ("Respondent's attempt to 'clarify' the 'misunderstanding'" does not meet the *Passavant* test), enfd. mem.12 F.3d 213 (6th Cir. 1993); accord:

¹⁶ The handbook rules were issued on May 22, 2010, and the corporate policy rules were posted on the Respondent's intranet on July 1, 2010. The disclaimers were posted on May 9, 2011, on the Respondent's intranet, as well as on a bulletin board at the Riverside, California facility where the instant dispute arose.

Rivers Casino, 356 NLRB 1151, 1152, and cases cited therein. The Respondent's intranet disclaimer similarly failed to acknowledge its unlawful conduct.

We accordingly find that the Respondent did not effectively repudiate its unlawful rules under *Passavant*.

C. Discharge of Gregory Edmonds

The judge found, and we agree, that the Respondent unlawfully discharged employee Gregory Edmonds, an installer employed at the Respondent's Riverside location.¹⁷ The judge correctly found that the Acting General Counsel met his initial burden under *Wright Line*¹⁸ to show that Edmonds' union activity was a motivating factor in the discharge. In particular, after Edmonds spoke up forcefully in favor of unions at a mandatory employee meeting, Riverside Operations Manager Freddy Zambrano warned Edmonds that his installation jobs would be "QC'd" (referring to the quality control inspections that supervisors performed of installers' work). Although this threat of retaliation is sufficient on its own to establish animus, the record contains the following additional evidence: (1) according to credited testimony, Adrian Dimech, a vice president of the Respondent, told employees at the mandatory meeting that the Union "was bad for us and DIRECTV wouldn't allow it"; (2) former Riverside employee Matthew Webster, who attended the mandatory meeting, testified that Dimech spoke about union activity with installers at the Respondent's Rancho Dominguez, California location, and that Dimech was "basically there to tell us that nothing was coming of it, that, you know, 'We're going to shut it down,' that 'it ain't gonna happen'"; and (3) the judge credited the testimony of employee Gallegos, a former employee at the Rancho Dominguez location, that Dimech interrogated him regarding the identity of union supporters.¹⁹

We further find, for the reasons stated by the judge, that the Respondent failed to prove it would have discharged Edmonds even in the absence of his union ac-

¹⁷ The Acting General Counsel and Charging Party except to the judge's finding that the Respondent lawfully suspended Edmonds prior to his discharge. We find it unnecessary to pass on those exceptions because the complaint does not allege the suspension to be unlawful.

¹⁸ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes a showing of discriminatory motivation by proving the employee's prounion activity, employer knowledge of the prounion activity, and animus against the employee's protected conduct, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. See, e.g., *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

¹⁹ In finding that the Acting General Counsel carried his burden, we do not rely on the Respondent's suspension of Edmonds.

tivity. Accordingly, we affirm the judge's conclusion that Edmonds' discharge violated Section 8(a)(3) and (1).

AMENDED REMEDY

The standard remedy for an unlawful work rule is immediate rescission of the rule; this remedy ensures that employees may engage in protected activity without fear of being subjected to the unlawful rule. See, e.g., *2 Sisters Food Group*, 357 NLRB 1816, 1823 (2011); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), *enfd.* in *rel. part* 475 F.3d 369 (D.C. Cir. 2007). In this case, the judge reasoned that rescission would be inappropriate, citing the Respondent's "good faith" in seeking to resolve this matter, and instead recommended that the Respondent and the Union "explore modifications" of the unlawful rules during the compliance stage.

Unlike the judge, we discern no compelling reason for deviating from the usual remedial relief. The Respondent did not seek to disclaim the rules until after the complaint issued, and nothing in the record suggests that the Respondent sought to include the Union or employees in any discussions concerning modification of the rules. More importantly, the employees at the Riverside location are not represented and, accordingly, the Union cannot engage in bargaining or enter into an agreement on their behalf. The focus of our remedial relief in this type of case is to ameliorate the chilling effect of the maintenance of unlawful rules on the employees' exercise of protected rights, and the immediate rescission of the rules effectuates that goal.²⁰

²⁰ Pursuant to *Guardsmark, LLC*, the Respondent may comply with our order of rescission by rescinding the unlawful provisions and republishing its employee handbook applicable to home service employees without them. We recognize, however, that republishing the handbook could be costly. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing that will correct or cover the unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Any copies of the handbook that include the unlawful rules must include the inserts before being distributed to employees. *Id.*, 344 NLRB at 812 fn. 8. Rescission of the Respondent's unlawful policies posted on its intranet system, in contrast, imposes little if any burden on the Respondent.

Further, the unlawful rules were in effect at the Respondent's facilities nationwide. The corporate policies posted on the intranet apply to all of the Respondent's facilities, and the handbook at issue here applies at more than 110 locations where the Respondent employs home services employees.²¹ "[W]e have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *Guardsmark, LLC*, 344 NLRB at 812. As the D.C. Circuit observed in enforcing a nationwide notice-posting in *Guardsmark*, "only a company-wide remedy extending as far as the company-wide violation can remedy the damage." 475 F.3d at 381; accord: *Mastec Advanced Technologies*, 357 NLRB 103, 109 (2011).²² We accordingly amend the remedy and the judge's recommended Order to be consistent with our discussion here.²³

²¹ The Acting General Counsel does not allege as unlawful any provision of the Respondent's other two handbooks, which are applicable to customer care center employees and enterprise employees.

²² An employer may avoid imposition of a companywide remedy by showing that special circumstances justify a narrower remedy. See *Guardsmark, LLC*, 344 NLRB at 812 fn. 9. The Respondent asserts that such special circumstances are present here, citing its disclaimer and the lack of evidence that the rules were enforced. We have found the disclaimer to be insufficient, however, and it is settled that the maintenance of a rule likely to chill Sec. 7 activity, whether explicitly or through reasonable interpretation, constitutes an unfair labor practice even absent evidence of enforcement. *Lafayette Park Hotel*, *supra*, 326 NLRB at 825. We accordingly find no special circumstances here justifying narrowing the scope of notice posting.

²³ The Charging Party has requested that the Board impose additional remedies of an expanded 6-month notice posting period and distribution of the notice to the Respondent's customers. The Charging Party also asks the Board to delete the reference in the notice to employees' right to refrain from Sec. 7 activity. We do not find it appropriate to impose these remedies in this case.

ORDER²⁴

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, DirecTV U.S. DirecTV Holdings, LLC, Riverside, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they supported the Union or engaged in other protected concerted activities.

(b) Promulgating and maintaining a provision in its home services employee handbook entitled, “Communications and Representing DirecTV” that contains the following language: “Do not contact the media” and “If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.”

(c) Promulgating and maintaining a provision in its home services employee handbook entitled, “Confidentiality” that contains the following language: “Never discuss details about your job, company business or work projects with anyone outside the company. . . never give

out information about . . . DIRECTV employees [and] employee records.”

(d) Promulgating and maintaining a corporate policy on its intranet system entitled, “Public Relations” that contains the following language: “Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.”

(e) Promulgating and maintaining a corporate policy on its intranet system entitled, “Employees” that contains the following language: “Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.”

(f) 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.

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

(a) Within 14 days from the date of this Order, offer Gregory Edmonds full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Gregory Edmonds whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge’s decision.

(c) Reimburse Edmonds an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Edmonds, it will be allocated to the appropriate periods

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Gregory Edmonds, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days of the Board’s Order, rescind the provision in its home services employee handbook entitled, “Communications and Representing DirecTV” that

²⁴ We have modified the judge’s recommended Order to provide for electronic notice posting pursuant to *J. Picini Flooring*, 356 NLRB 11 (2010), and to conform to the Board’s standard remedial language. In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), we shall order the Respondent to reimburse discriminatee Edmonds an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him. Further, we shall order the Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Edmonds, it will be allocated to the appropriate periods.

We have substituted new notices to conform to our modifications. First, the Respondent shall be required to post the attached notice marked “Appendix A” at its Riverside, California location, where the discharge of Edmonds occurred and where the handbook rules applicable to home service employees and the nationwide DEN intranet corporate policies at issue are in effect. The Respondent shall be required to post the attached notice marked “Appendix B” at all its other facilities nationwide where its employee handbook applicable to home services employees, along with the nationwide DEN intranet corporate policies, are in effect. Finally, recognizing that the Respondent has many locations where the home services employee handbook is not applicable, but where the nationwide DEN intranet corporate policies are maintained, the Respondent shall be required to post the attached notice marked “Appendix C” at all its facilities nationwide where its DEN intranet corporate policies are in effect but where its home services employees handbook rules we have found unlawful today are not in effect. (Appendix C does not encompass the Respondent’s DEN policy entitled, “Employees” because we are finding that policy unlawful only when read in tandem with provisions of the home services employee handbook.)

contains the following language: “Do not contact the media” and “If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.”

(h) Within 14 days of the Board’s Order, rescind the provision in its home services employee handbook entitled, “Confidentiality” that contains the following language: “Never discuss details about your job, company business or work projects with anyone outside the company. . . never give out information about . . . DIRECTV employees [and] employee records.”

(i) Within 14 days of the Board’s Order, rescind the corporate policy on its intranet system entitled, “Public Relations” that contains the following language: “Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.”

(j) Within 14 days of the Board’s Order, rescind the corporate policy on its intranet system entitled, “Employees” that contains the following language: “Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.

(k) As more fully set out in the Amended Remedy, furnish all current home services employees with (1) inserts for the current home services employee handbook that advise that the unlawful rules have been rescinded, or (2) the language of lawful rules on adhesive backing that will cover or correct the unlawful rules; or (3) publish and distribute revised handbooks that do not contain the unlawful rules.

(l) Within 14 days after service by the Region, post at its Riverside, California, facility copies of the attached notice marked “Appendix A,” within that same time period post at all its facilities nationwide where its employee handbook applicable to home services employees is in effect copies of the attached notice marked “Appendix B;” and within that same time period post at all its facilities nationwide where its DEN intranet corporate policies are in effect and where its home service employees handbook is not in effect copies of the attached notice marked “Appendix C.”²⁵ Copies of the notices, on forms

provided by the Regional Director for Region 21, 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 members 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 May 22, 2010.

(m) Within 21 days after service by the Region, file with the Regional Director for Region 21 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.

APPENDIX A

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 discharge or otherwise discriminate against any of you for supporting International Association of Machinists and Aerospace Workers, District Lodge 947, AFL–CIO, or engaging in other protected concerted activities.

WE WILL NOT promulgate and maintain a provision in our home services employee handbook entitled, “Communications and Representing DirecTV” that contains the following language: “Do not contact the media” and “If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in per-

²⁵ 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.”

son or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.”

WE WILL NOT promulgate and maintain a provision in our home services employee handbook entitled, “Confidentiality” that contains the following language: “Never discuss details about your job, company business or work projects with anyone outside the company. . . never give out information about . . . DIRECTV employees [and] employee records.”

WE WILL NOT promulgate and maintain a corporate policy on our intranet system entitled, “Public Relations” that contains the following language: “Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.”

WE WILL NOT promulgate and maintain a corporate policy on our intranet system entitled, “Employees” that contains the following language: “Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.”

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board’s Order, offer Gregory Edmonds full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Gregory Edmonds whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL reimburse Gregory Edmonds an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Gregory Edmonds, it will be allocated to the appropriate periods.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharge of Gregory Edmonds, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind the provision in our home services employee handbook entitled, “Communications and Representing DirecTV” that contains the following language: “Do not contact the media” and “If law enforcement wants to interview or obtain information regarding a

DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, California, who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.”

WE WILL rescind the provision in our home services employee handbook entitled, “Confidentiality” that contains the following language: “Never discuss details about your job, company business or work projects with anyone outside the company . . . never give out information about . . . DIRECTV employees [and] employee records.”

WE WILL rescind the corporate policy on our intranet system entitled, “Public Relations” that contains the following language: “Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.”

WE WILL rescind the corporate policy on our intranet system entitled, “Employees” that contains the following language: “Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.”

WE WILL furnish all of you with (1) inserts for the current edition of the home services employee handbook that advise you that the unlawful provisions above have been rescinded; or (2) the language of lawful provisions on adhesive backing that will cover or correct the unlawful rules; or (3) WE WILL publish and distribute to all of you a revised employee handbook that does not contain the unlawful provisions.

DIRECTV U.S. DIRECTV HOLDINGS, LLC

APPENDIX B

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 promulgate and maintain a provision in our home services employee handbook entitled, “Com-

munications and Representing DirecTV” that contains the following language: “Do not contact the media” and “If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.”

WE WILL NOT promulgate and maintain a provision in our home services employee handbook entitled, “Confidentiality” that contains the following language: “Never discuss details about your job, company business or work projects with anyone outside the company . . . never give out information about . . . DIRECTV employees [and] employee records.”

WE WILL NOT promulgate and maintain a corporate policy on our intranet system entitled, “Public Relations” that contains the following language: “Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.”

WE WILL NOT promulgate and maintain a corporate policy on our intranet system entitled, “Employees” that contains the following language: “Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.”

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the provision in our home services employee handbook entitled, “Communications and Representing DirecTV” that contains the following language: “Do not contact the media” and “If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.”

WE WILL rescind the provision in our home services employee handbook entitled, “Confidentiality” that contains the following language: “Never discuss details about your job, company business or work projects with anyone outside the company. . . never give out information about . . . DIRECTV employees [and] employee records.”

WE WILL rescind the corporate policy on our intranet system entitled, “Public Relations” that contains the following language: “Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.”

WE WILL rescind the corporate policy on our intranet system entitled, “Employees” that contains the following language: “Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.”

WE WILL furnish all of you with (1) inserts for the current edition of the home services employee handbook that advise you that the unlawful provisions above have been rescinded; or (2) the language of lawful provisions on adhesive backing that will cover or correct the unlawful rules; or (3) WE WILL publish and distribute a revised employee handbook that does not contain the unlawful provisions.

DIRECTV U.S. DIRECTV HOLDINGS, LLC

APPENDIX C

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 promulgate and maintain a corporate policy on our intranet system entitled, “Public Relations” that contains the following language: “Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.”

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the corporate policy on our intranet system entitled, “Public Relations” that contains the following language: “Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.”

DIRECTV U.S. DIRECTV HOLDINGS, LLC

APPENDIX D

3.4 Communications and Representing DIRECTV

To shape and communicate the company's image and reputation, the company makes timely and accurate information available to a variety of audiences. This information is released in a professional, coordinated manner following the appropriate reviews and approvals. The management members responsible for authorizing the release of company information are identified in the Communications policy (located on the DEN and in the policy binder at your work location). To ensure the company presents a united, consistent voice to a variety of audiences, these are some of your responsibilities related to communications:

- In accordance with the policy on the Use of Company Resources, you are not allowed to blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record. See the policies on Social Media and on Protecting Company Information & Customer Privacy (located on the DEN and in the policy binder at your work location) for more details.
- DIRECTV-branded social media properties, such as DIRECTV accounts on Facebook, Twitter, YouTube, etc., are monitored by the Social Media Team. Unless you have been granted special permission from the DIRECTV Social Media Team, you should not respond to fan posts and/or post comments that are related to DIRECTV's business (e.g., customer complaints, troubleshooting, pricing questions, etc.).
- If you participate in a discussion about DIRECTV on a social media platform, you should disclose that you are a DIRECTV employee. But you may not act as a spokesperson for the company or as a subject matter expert on DIRECTV's products or services. Any questions from customers or other members of public forums should be routed to Public Relations or Customer Care, depending on the nature of the question.
- Do not contact the media, and direct all media inquiries to the Home Services Communications department.
- Upon determining the need for releasing information to the public, each employee, in collaboration with the appropriate Communications function, is responsible for the timeliness, accuracy and appropriateness of information made public, as well as for receiving the proper authorization for release.
- If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employees should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.
- Direct all company-related speaking invitations to the Home Services Communications department.
- If you plan to present on behalf of DIRECTV at a conference, seminar or other event, you must obtain the necessary approvals in advance. These may include your management, the Public Relations department, the Legal department and other related individuals and departments.
- If you engage in political activities, you do so as a private citizen on your own personal time.
- You must consult and coordinate with the Home Services Communications department for internal and external meetings and events with a budget exceeding \$5,000 and/or involving company executives.

See your immediate supervisor or HR representative, who can escalate your communications concern up through their management and, if necessary, involve the Public Relations, Communications or Security departments at headquarters in El Segundo, Calif., in order to determine a proper course of action.

4.3.1 Confidentiality

Company information is fundamental to our success. Company information can consist of information such as contract terms, marketing plans, financial information, details about our technology, employee records and customer account information. Information that can be used to identify specific employees and customers, or that is considered private (such as our customers' bank and credit card information), is particularly sensitive. Remember that unless expressly approved for external release, all company information is for internal use only and must be carefully stored, transmitted and (when necessary) destroyed.

Be aware that federal and state laws and standards imposed by credit card issuers and the payment card industry require us to take special precautions when sharing personally identifiable information (PII) of employees and customers—even internally within DIRECTV. A breach in the confidentiality or security of this information could subject DIRECTV to significant legal and financial penalties and brand damage.

Personally identifiable information includes:

- Names, addresses and phone numbers
- Social Security numbers, identification numbers and driver's license numbers
- Credit and debit card numbers
- Credit applications, scores and reports
- Background checks
- Bank account numbers

Your obligation to protect the confidentiality of company information applies both inside and outside of the office, and continues even after you leave your employment with DIRECTV. Please ensure that you always follow these guidelines:

- Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs and chat rooms.
- Do not use the company's name, logo or trademarks within any public profiles you may have (i.e. pictures, screen names and handles), and do not use your DIRECTV email address when registering on social media platforms.
- Never give out information about customers or DIRECTV employees. In particular, customer information must never be transmitted through regular unencrypted email, even internally within DIRECTV. If you have additional questions regarding data transmission guidelines, check with the IT department.
- Never allow still and video cameras, other than those used as part of your daily job function (i.e., quality control), to be brought onto DIRECTV premises without prior approval from your site manager. Although cell phones with camera features are not specifically prohibited, do not use the camera feature to record any company-sensitive or potentially sensitive information or interiors of facilities. In addition, remember these five simple principles to help you protect sensitive information:

1. Take stock. Assess what information you have and determine who has access to it.

2. Scale down—If you don't have a legitimate business need, don't collect it. Keep it only as long as necessary.

3. Lock it—Limit access to sensitive information. Don't use faxes, email or voice mail to send messages containing sensitive information.

4. Pitch it—Follow our record retention policy. Use shredders or secure bins.

5. Plan ahead—If a computer is compromised, disconnect it from the internet and notify IT immediately.

Sometimes confidential or proprietary company information must be shared with third parties in order to conduct business. To ensure its protection, DIRECTV requires that a nondisclosure or confidentiality agreement (often called an "NDA") be put in place before this occurs and that information be exchanged via certain secure systems or processes. All NDAs must be approved by the DIRECTV Legal department.

Jean C. Libby, Esq., for the General Counsel.

Gregory D. Wolflick, Esq. (Wolflick & Simpson), of Glendale, California, for the Respondent.

Adam J. Luetto, Esq. (Weinberg, Roger & Rosenfeld), of Los Angeles, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to a notice of hearing in this matter was held before me in Los Angeles, California, on July 19 and 20, 2011. The charge was filed by International Association of Machinists and Aerospace Workers, District Lodge 947, AFL-CIO (the Union) on October 18, 2010, and an amended charge was filed by the Union on April 20, 2011. Thereafter, on April 21, 2011, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by DirecTV U.S. DirecTV Holdings, LLC (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), counsel for the Respondent and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California State corporation, maintains an office and place of business in Riverside, California, where it is

engaged in the business of providing digital television entertainment services. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$100,000, and annually purchases and receives at its Riverside, California facility goods, products and materials valued in excess of \$50,000 directly from points outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material here has been, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act by suspending and discharging employee Gregory Edmonds, and whether the Respondent has violated and is violating Section 8(a)(1) of the Act by promulgating and maintaining in effect various handbook provisions and other rules or policies which prohibit lawful Section 7 union or protected concerted activity.

B. *Edmonds' Suspension and Discharge*

1. Facts

The Respondent, a nationwide company with facilities throughout the United States, including the Riverside, California facility involved herein, installs TV satellite dishes for consumers.

Gregory Edmonds was employed by the Respondent as an installer, also referred to as an installation technician, from November 2007, until his discharge on July 28, 2010.¹ Edmonds was one of approximately 50 installers working out of the Riverside facility.

Installers are primarily paid on a piecework basis; that is, according to how many installations they complete during the workday. The more installations, the more money they earn. However, if their piecework pay during the pay period is less than a guaranteed minimum base pay, they receive the guaranteed minimum amount in lieu of their piecework earnings. There were three tiers of base pay for the installers, according to their expertise with certain types of installations, and Edmonds had attained the highest level approximately 2 weeks prior to his termination. Edmonds was also one of five or six installers who would be assigned service tech work, that is, troubleshooting previously installed equipment pursuant to customer inquiries or complaints.

During times material here the installers have complained about certain inequities with this pay system as well as related matters resulting from the daily routine of having to wait in line

at the Respondent's facility each morning to obtain the requisite equipment to be installed at the customers' premises. Thus, in addition to the frustration of simply having to wait in line, the wait time also impacted their earnings.

Another matter about which certain employees complained was the lengthy commute time it would take for certain Riverside installers to drive from Riverside to customers' locations in the San Diego area. This, too, impacted their earnings.

Edmonds, who, according to the Respondent, was discharged for using profanity toward Riverside Operations Manager Freddy Zambrano, testified that from the time he was hired he regularly used profanity, which he termed "construction talk," including the "f-word," on a daily basis, to punctuate his conversation with his coworkers, with his supervisor, Lamar Wilson, as well as with Manager Zambrano.

Other employees also testified about the use of profanity by employees, supervisors, and managers alike at the Respondent's facility. Former employee Matthew Webster testified that at supervisory team meetings conducted by Supervisor Lamar Wilson, who was also Edmonds' supervisor, installers would complain about work-related matters, characterizing certain new changes or requirements as "f-cking bullsh-t," as the additional requirements impacted the number of installations that could be completed and thereby effected the installers' compensation. Such or similar language was not unusual. At no time were employees told by Supervisor Wilson to watch their language; and sometimes Wilson also used such language.

Webster testified the average time for waiting in line each morning was about 45 minutes, and employees would complain about the wait in the presence of supervisors or managers, including Zambrano. They would make such statements such as, "This is a f-cking waste of my time." Webster recalled one occasion when Zambrano asked him how things were going. Webster answered, "This f-cking sucks," and Zambrano replied, "Well, you've got to f-cking deal with it." At one weekly meeting, conducted by Zambrano and attended by all the employees, Zambrano said, according to Webster, "Why aren't these f-cking vans clean?" On another occasion, when Regional Manager Scott Thomas was conducting a meeting at the facility, Thomas told the assembled employees, "We got to do our f-cking jobs. These vans should be cleaned. You know, this is how we represent our company."²

Brandon Ojeda, a current employee, reluctantly agreed with the statement in his Board affidavit that on one occasion Zambrano called him in to the office to be admonished for a work-related matter, and asked Ojeda, in the presence of Supervisor Wilson, "Is this the f-cking type of work you do?" Ojeda answered, "This ain't the f-cking type of work I do." Ojeda, during the course of his testimony, however, claims that although his affidavit is correct as far as it goes, he, rather than Zambrano, was the first to utter profanity. Thus, he claims that

² Neither Supervisor Wilson nor Regional Manager Thomas testified in this proceeding, and Zambrano did not contradict this specific testimony of Webster. I credit Webster.

¹ All dates or time periods herein are within 2010, unless otherwise specified.

when he entered the room he jokingly said, “Another F’ing promotion.” This does not appear in his affidavit, however.³

Edmonds testified that about a month prior to his discharge he met with union representatives at the home of coworker Brandon Ojeda. Another employee, Matthew Webster, was also present. The three employees, according to Edmonds, were told by the union representative to just try to get a feel for who might be interested in union representation. After this meeting Edmonds spoke to about four coworkers in a general manner about whether they might be interested.

About a week after the aforementioned union meeting at Ojeda’s home, according to Edmonds, the Respondent conducted a Saturday morning meeting at the Riverside facility. Saturdays are the only day of the week when all installers are required to work, apparently because this is the day when most installation customers will be at home. Saturday meetings were held on a regular basis to discuss any work-related issues or problems that employees may have encountered during the week. Manager Zambrano customarily conducted the Saturday meetings, but on occasion Area Manager Scott Thomas would conduct the meetings. However, unlike other Saturday meetings, an announcement was posted at the facility that this particular meeting⁴ was a mandatory meeting that all employees were required to attend. Some 60 to 80 employees, supervisors, and managers, attended this meeting.

Zambrano began the meeting by introducing Adrian Dimech, vice president of operations for Southern California, and said that Dimech had some union matters to discuss. This is the first time the subject of union representation had come up at a company meeting. According to Edmonds, Dimech “just began his meeting by telling us that there was another office in Rancho Dominguez that had voted to have a union come in and that the union won the election and that he was there to talk to us about trying to keep that from spreading to other sites.”⁵ “Mainly,” according to Edmonds, “he was asking us if there were issues that he could address so that that wouldn’t become a necessity. If everything was taken care of on that level, then there really wouldn’t be a need for a union in his mind.”⁶

³ I do not credit Ojeda’s testimony in this latter regard. As amply demonstrated throughout his testimony, he was clearly fearful of having to testify against his employer in this proceeding.

⁴ The date of this meeting is in contention, *infra*.

⁵ Respondent’s installers at a nearby facility in Rancho Dominguez, California, had voted in an NLRB election, held on April 16 (Case 21–RC–021191), to be represented by the Union involved in this proceeding. During the preelection campaign at that facility the Respondent had advised the installers it opposed union representation. The Respondent filed election objections premised, *inter alia*, on the contention that one or more of its supervisors tainted the election process by engaging in prepetition prounion solicitation of union authorization cards, activity that undermined the employees’ free choice in the election. A hearing on election objections was held on June 8 and 9. The hearing officer determined in his report, dated July 7, that in fact supervisory involvement tainted the election process, and recommended that the election results be set aside. At the time of the hearing, this matter was pending before the Board.

⁶ Dimech was involved in the Respondent’s Rancho Dominguez preelection campaign. Noe Gallegos, a former field supervisor at the Rancho Dominguez facility who was terminated from that facility on

This invitation by Dimech for the employees to present their concerns prompted a few employees to speak up with complaints or suggestions. Edmonds spoke up. He had several issues. Edmonds, who was one of the installers sometimes assigned San Diego duty, complained that he and other installers were not being sufficiently paid for the time—some 2 hours—that it took them to drive from Riverside to San Diego; and moreover, once they arrived, they were sometimes unable to complete the installation because of some problem at the site. He complained that this was a big waste of time, for which the installers were not receiving travel time over and above their minimum hourly rate, thus affecting their compensation. In response to this complaint, Dimech, according to Edmonds, said he would see what he could do to change that. Edmonds also complained about the Respondent’s practice of adding time-consuming tasks to the job assignments of installers at the site, which would reduce the number of installations per day and also affect their compensation. Edmonds said he thought this was unfair.

Further, Edmonds said that it would be more advantageous or fair if the installers were paid only an hourly rate, at an increased hourly amount, rather than the then-current hourly/piecework rate, so that they could make more money. Regarding this particular request, Dimech replied that such a proposed change was not his decision to make, that decisions of that nature were “far over his head,” and that all he could do was present this suggestion to the company. To this remark, Edmonds replied, “Okay. So you just said as an individual that you can’t do anything for us. But [what] I’m wondering is if we were a collective body if maybe the company might hear us.” Some employees, according to Edmonds, were saying they didn’t want a union and others said they did. Employee Brandon Ojeda backed up Edmonds, and said “they might hear us better if we were a collective body than just a bunch of individuals.”⁷

about May 18, and who has a current charge pending with the Board over his discharge, testified in the instant proceeding. Gallegos testified that Dimech, who participated in two meetings with supervisors and, although Gallegos’ testimony is unclear on this point, conducted perhaps some or all of eight meetings with the entire employee complement, asked Gallegos to identify employees and supervisors who were supporting the union. He told Gallegos that he was authorized to grant him “immunity”—Gallegos understood that it was immunity from discharge—in exchange for his assistance. Gallegos said he did not know who was prounion or procompany. Dimech told him, “If the union was to come in, that the site could possibly be closed, that the work could be handed out to contractors.” I credit Gallegos’ testimony.

⁷ As noted above, Brandon Ojeda, a current employee, was a very reluctant witness. He was upset that he had been subpoenaed to testify. He seemed fearful of testifying against his employer, and accused the General Counsel of “throwing me under the bus completely. . . .” Ojeda testified as follows regarding Dimech’s remarks at the meeting: “I mean, there’s no beating around the bush. He [Dimech] was trying to talk guys out of not liking the union. And that’s what it was.” Ojeda’s affidavit states: “The gist of what Dimech said was that the union was bad for us and DirecTV wouldn’t allow it.” During his testimony Ojeda confirmed that this was the understanding he took away from Dimech’s remarks. I credit Ojeda’s testimony.

According to Edmonds, Dimech “just kind of turned red and didn’t really have much of a response at all.” According to former employee Matthew Webster, who also spoke up at the meeting, Edmonds’ remarks caused Dimech some consternation: Dimech “seemed a little dumbfounded. He wasn’t prepared for the conversation that he was having that day.”⁸

The meeting lasted approximately an hour. Some of the employees complemented Edmonds for speaking up, and one coworker said he was his hero.⁹ Then Edmonds gathered his supplies and proceeded to his van in preparation to make his installation calls for the day. Dimech followed Edmonds to his van. He asked Edmonds what he, Dimech, could do about the issues that were raised. After some discussion, Dimech said he would address the issues and see if he could get them taken care of. Edmonds replied, “that would be great,” adding, “it probably wouldn’t be necessary for a union to come in if DirecTV would take care of this stuff.” Edmonds further said, “But I told him that they weren’t taking care of it. And that I knew that the only reason that he was here for this meeting was to discourage the union from coming in.” Dimech replied that they had “things that were in the works . . . that they were going to be offering us. But that they couldn’t do that right now with all of this pending because . . . it could tie up negotiations or whatever for quite a while depending on the outcome of this whole union being voted in or not.” Dimech said he “couldn’t elaborate on what the Respondent was going to be offering us.” The conversation lasted about 45 minutes. During this conversation Edmonds was apparently cleaning out his truck from the day before, and Dimech asked if he could take Edmonds’ trash back to the office and throw it away for him. He gave Edmonds his business card and said, “[I]f there was anything he could do for me to give him a call.”

Regional Operations Vice President Dimech testified that he oversees 11 facilities employing a total of about 900 employees. Scott Thomas, regional director of operations, Southern California, reports to Dimech, and Riverside Manager Zambrano reports, in turn, to Thomas. Dimech testified that the meeting he held with the Riverside employees was on May 22, and he knows this “because I looked it up on my calendar.” He testified it was not possible that the meeting could have been held during the month of June, as Edmonds had testified, “because we were moving facilities around at that time, and it would have been logistically difficult and cumbersome for us to

⁸ According to Webster, Dimech was portraying the Union as “bad, bad, bad.” Webster testified he did not directly come out in favor of the Union but rather suggested to Dimech that if the Company did not want a union it should not ignore the requests of the employees for the opportunity to earn more money. Dimech said he would look into it. However, Webster testified that Edmonds’ remarks were more forceful. Webster characterized Edmonds’ remarks as follows: “He was basically saying, ‘Don’t listen to him [Dimech].’ You know, the union is a good thing. You know, if we all stand together, it’s not just one voice. It’s all of us. That’s what a union is.” After the meeting some employees thanked Edmonds for saying what they themselves wanted to say.

⁹ Eber Urrutia, a current employee who appeared reluctant to testify on Edmonds’ behalf, testified that after the meeting he “probably” approached Edmonds and told him “not to try to be a hero because that’s going to bite him in the butt.”

have conducted the meetings around that time.” He had conducted other meetings with the Riverside employees, and may have attended meetings prior to May 22, during which employees also raised concerns about having to wait in line to get their equipment.

Dimech testified that he scheduled the meeting merely as a “courtesy” to the Riverside employees to update them on the union situation at the Rancho Dominguez facility, as employees of the two facilities would talk about such matters among themselves. Dimech said that at the time of the meeting or thereafter he was not aware of union activity among the Riverside employees, and that the meeting was not in response to such activity. The meeting lasted about 45 minutes. Dimech spoke about the union election in Rancho Dominguez that had been held on April 16. He told them the Union had won the election by a margin of three votes, but there was a hearing pending to determine whether the election would be invalidated, as there was good reason to suspect that supervisors had been involved in the solicitation of union cards. He explained to the employees the seriousness of signing union cards and cautioned them that cards should be signed only after they were fully educated on the implications of signing a card. He did not tell them not to sign cards. Asked whether he communicated anything else about unions in general he said, “[N]o, I don’t believe so.” Dimech testified that several employees spoke up and “said they were advocates of union representation.”

While Dimech denied that he became flustered during the meeting as a result of employees’ union advocacy, he did not specifically deny or otherwise contradict the accounts of the meeting testified to by Edmonds and other employees, *supra*. Dimech testified that his subsequent conversation at Edmonds’ van lasted approximately 10 minutes, rather than about 45 minutes as Edmonds testified, but he did not otherwise deny or contradict Edmonds’ account of the conversation.

Zambrano testified that he was present during the entire meeting and heard Edmonds’ comments and the comments of others. Zambrano testified that Edmonds’ comments at the meeting that day were not any different than comments he had made during other meetings, except for “the fact that he expressed his experience was—he had been involved—he had been involved with unions before.” Asked whether Dimech’s remarks were to the effect that the Respondent did not want a union, Zambrano answered, “possibly.”

Edmonds testified that on the first or second workday following the Saturday meeting, Zambrano made the statement in front of him, “Well, we’re going to go out and QC all of Greg’s jobs today.” This comment was overheard by another employee, who so testified, adding that Zambrano did not appear to be joking.¹⁰ Apparently there was no further exchange between Edmonds and Zambrano on that occasion. Zambrano, during

¹⁰ Mathew Webster testified he overheard this conversation. He heard Zambrano tell Edmonds “that he would be QC’ing all his jobs from now on.” According to Webster, this statement was tantamount to saying that Edmonds would be kept under surveillance. Zambrano appeared to be serious, and, according to Webster, there would have been no reason to make such a statement in jest. Zambrano, during his testimony, did not specifically contradict Webster’s testimony, but said he didn’t “recall” making such a statement.

the course of his testimony, answered “no” when asked whether he “recalled” making such a statement, but did not specifically deny making such a statement.¹¹

Also, according to Edmonds, on about the same day the office secretary came out to Edmonds’ vehicle, and showed him a document reflecting a call from corporate headquarters. The document stated that Edmonds, and apparently the other Riverside installers who were assigned San Diego installations, were going to be paid for the aforementioned issue that Edmonds had raised at the meeting with Dimech. Later that day Edmonds received a phone call directly from Dimech, who also told him he would be paid “for those issues that I brought up.” Edmonds, who had never before received a call from Dimech, simply thanked him.

Edmonds regularly complained to Zambrano and to Lamar Wilson about the long wait in line each morning, sometimes for as much as an hour and a half, to be issued the satellite dishes and receivers he would need for the day’s scheduled installations. The line was not monitored, and, adding to the frustration was the fact that some installers would let their buddies cut in line. Edmonds’ protestations were to no avail; both Zambrano and Wilson told him they could not do anything about it. Other installers also complained on a daily basis. As the Respondent was preparing to move to a new Riverside facility—the Myers Street location—Zambrano told the employees that the new facility would have lockers for each installer, and that the lockers would be stocked the night before with the components they would need the following day; in this manner the wait in line would be eliminated. However, according to Edmonds, the situation did not change when they moved to the new Myers Street location in early July, even though the lockers were in place.¹² Accordingly, the complaints of Edmonds and other employees continued.

On the morning of July 21, at about 6:30 a.m., Edmonds met with Supervisor Wilson and received the hard copies of his work orders for the day. Then, as was his routine, he began standing among the other installers to get his materials. According to Edmonds, there was no actual “line,” but rather a disorganized gathering or crowd of some 40 to 60 installers. Edmonds testified that after standing there for quite some time, watching other installers letting their friends cut in, he “was getting frustrated because that takes away from my time to get to a job to do what I have to do in a timely fashion without having a customer call in and say where am I or this and that.” At this time Zambrano happened to walk into the warehouse. Edmonds noticed his presence, and, from about 20 or 25 feet away, over the rather noisy chatter of the installers, Edmonds said to Zambrano, “Freddy, can’t you do something about this f-cking line? I stand in this f-cking line ten hours a day.” Zambrano walked over, put his arms out as if to block others

from getting in front of Edmonds, and said, “Oh, Greg. Nobody cut in front of Greg. Okay?” Edmonds said that he “felt kind of stupid and humiliated, and shut up and got his stuff and went to work.” Apparently this incident was over in a matter of seconds.

The following morning, July 22, Edmonds saw on his handheld computer that he had received no assignments. He drove to the facility and spoke with Supervisor Wilson. Wilson told him that Zambrano wanted to have a talk with him. He met with Zambrano and Assistant Manager Roy Cienfuegos. Zambrano handed him an Employee Consultation Form dated July 21, and told him that he was going to be suspended for his outburst the day before. The form states, *inter alia*, as follows:

Insubordination toward a supervisor, manager, security representative or other designated person in authority.

On Wednesday, July 21, 2010 at 7:30 AM, Greg Edmonds started yelling towards Freddy Zambrano (Operations Manager) that he needed to “F-cken do something about this F-cken line”, and that it was “Bullsh-t!” that he had to wait for like 10 hours, while other techs cut in front of him. I told him that I did not think he was waiting in line for 10 hours, and that the lockers should be ready for use by this upcoming Saturday. He then continued to curse in line in front of other technicians, Thus creating an uncomfortable and hostile work environment.

The “Corrective Action” portion of the form notes that Edmonds was being given a “Suspension.” The “Action Plan” portion of the form notes that “Immediate and sustained improvement must be shown or further disciplinary action may be taken up to and including termination,”¹³ and further notes that the suspension was to end on July 28. Edmonds did not dispute the matter, signed the form, left the office, and removed his tools from his van in preparation for being driven home by Manager Cienfuegos. Before leaving the facility he had a conversation with his supervisor¹⁴ and a further conversation with Zambrano.

Edmonds testified that during his subsequent conversation with Zambrano he apologized to Zambrano for “the whole situation,” and suggested, as a resolution of the problem, that poles or standards be set up in the warehouse “so that there would be an orderly line instead of a big crowd.” Zambrano told him it didn’t matter, as the guys would ignore the poles; further, he said that the lockers would be ready soon. Edmonds asked him, “You’re not going to fire me, are you?” Zambrano said, “No. When you get back from your suspension, you’ll go back to work.”

Manager Cienfuegos drove Edmonds home that day. Cienfuegos testified that during the drive home Edmonds apologized and told him “he was sorry for what had happened and that he wished he could take it back.”

¹¹ While supervisors routinely go out on quality control inspections checking the work of the installers they supervise, each supervisor has about 15 installers under his supervision and there is no showing that a supervisor would QC each and every job of a particular installer.

¹² In preparation for the new procedure, the installers were to return to the facility each night and fill out paperwork showing what they would need for the day’s work, so that the items could be placed in their lockers by the following morning.

¹³ This particular language is preprinted on each Employee Consultation form, regardless of the action to be taken.

¹⁴ The record does not note the substance of this conversation.

After the suspension period¹⁵ Edmonds phoned Supervisor Wilson about returning to work. Wilson told him he would be notified. Shortly thereafter he received a phone call from the office secretary, who instructed him to meet with Zambrano that afternoon. He arrived for the meeting. Zambrano told him that “after talking with Scott Thomas and the HR department that my employment with DirecTV . . . was being terminated.” He was given another Employee Consultation Form. The form, dated July 28, contains the identical language as the July 21 form, except the “Corrective Action” portion of the form notes, “Termination of Employment,” and the “Action Plan” portion notes, “Discharge . . . 7/28/2010.”

Operations Manager Frederico Zambrano¹⁶ is the highest-ranking management official at the Riverside facility, and has worked at the Riverside facility in this capacity since August 2008. At the time of the incident there were between 80 to 90 employees at the Riverside facility, including five installer teams. Each team is headed by a field supervisor, and consists of about 15 installers. When initially asked whether employees used profanity in the workplace, Zambrano testified, “Not that I was aware of.” Later during his testimony, however, Zambrano agreed that “employees use profanity in the workplace but they don’t direct it at a supervisor in this fashion.”¹⁷ While Zambrano testified he did not use profanity in talking to employees as he interfaced with them in work areas, he agreed that behind closed doors he more than once has used profanity while talking with individual employees.

Zambrano testified that he liked Edmonds just as well as he liked all of his employees, and understood their frustrations with having to stand in line. Describing the incident, Zambrano testified that Edmonds was “uptight, he was pretty much screaming/yelling out loud.” Asked what it was that caused him to think Edmonds had violated company policy, Zambrano replied, “[H]e had cursed at me in front of other employees.” Zambrano prepared the employee consultation form immediately after the incident. When he suspended Edmonds the following day, Edmonds apologized, saying that “he was sorry and he knew he was wrong,” and that “he knew he could have just came to me and talked behind closed doors and he could have, you know, probably got his point across better.” Zambrano did not deny Edmonds’ testimony that during a subsequent meeting shortly thereafter, before Edmonds left the premises and was driven home, Zambrano specifically told Edmonds he would not be terminated and would be returning to work after his suspension period.

Eber Urrutia, currently an installer and formerly a supervisor, has worked for the Respondent for approximately 8 years. He was called as a witness by the General Counsel. Urrutia testified installers would grumble among themselves on a daily basis and would also complain to supervisors about having to

wait in line each morning to receive their equipment. The complaining diminished after the move to the Myers Street facility,¹⁸ but did not stop.

Urrutia testified that at the time of the July 21 incident there were approximately 50 or 60 employees in line for supplies. They were talking, and the noise level was high. Edmonds was some 10 to 15 feet from Zambrano when he asked him, “What are you going to do about this f—cking line,” and “kept cussing, to be honest with you.” Zambrano didn’t say much, but “his face was in shock.” Urrutia testified he was surprised Edmonds would make such a remark in front of Zambrano. He was not surprised to learn that Edmonds would be disciplined for his conduct, as this was simply not the appropriate way to talk to the manager.

Zambrano testified that although termination decisions were his to make, his boss, Regional Operations Director Scott Thomas, had to be “advised” of termination decisions, and that Human Relations Generalist Marianne Hamada had to be contacted.

As noted above, during the July 22 consultation and suspension interview, Edmonds told Zambrano that “he was sorry and he knew he was wrong.” After that interview and suspension, Zambrano again phoned Hamada and reported what had transpired, telling her that Edmonds had apologized; he also told her that he had reviewed Edmonds’ file and that he was “on a final and had been written up.” Zambrano testified that at this point he had not yet decided whether to terminate Edmonds, and did not make the determination to discharge Edmonds until the following day, July 23.¹⁹ Zambrano also testified that even if there were no other warnings in Edmonds’ file, he “probably” would have still fired Edmonds for this one incident, and that Edmonds’ prior history and “final” warning, *infra*, “definitely” played a role. According to Zambrano, a final warning “basically means that [an employee is] on his final incident and any other incident moving forward can be grounds for termination.”²⁰

Edmonds, who had worked for the Respondent since November 2007, had been issued a number of Employee Consultation or Corrective Action forms during the course of his employment. The warnings or other corrective action incidents prior to July 21 generally involved technical performance-related matters in the field. None of the write-ups involved insubordination toward management, or interaction difficulties with coworkers or customers.

¹⁸ While Urrutia did not so specifically testify, this was apparently because the employees understood that when the new locker system was in place there would be no more waiting.

¹⁹ I do not credit Zambrano, and find, *infra*, that in fact he had decided not to discharge Edmonds over this incident.

²⁰ The record shows that the Respondent’s disciplinary procedure is not “progressive” in the sense that a subsequent discipline must be more stringent than a prior discipline. Neither the Respondent’s procedure nor practice mandated any particular disciplinary action, and the degree of discipline, if any, was entirely within Zambrano’s discretion. Moreover, contrary to Zambrano’s testimony, there is no showing that “final” warnings are followed by terminations; rather, suspensions, verbal warnings, or written warnings seem to follow final warnings.

¹⁵ While not entirely clear, it appears that this constituted a 4- or 5-day suspension, although Edmonds understood it to be a 3-day suspension.

¹⁶ This position is also referred to as site manager.

¹⁷ Zambrano, generally, did not impress me as a credible witness, and frequently gave succinct responses to leading questions in a manner that he believed would be most beneficial to the Respondent’s position, regardless of their accuracy.

Edmonds' writeups are as follows. On March 20, 2008, he was cited for failing to bring a job up to code; the form shows he was given both a "written" and "final" warning although there is no showing that he had ever received a previous warning of any kind for any reason. On February 5, 2009, he was cited for not properly grounding an installation, and given a "written" warning. On March 20, 2009, he was cited for using existing cable on a new install rather than new cable, and given a "final" warning. On September 6, 2009, he was given a "written" warning for failing to replace all unapproved connectors creating a repeat service call. On about November 9, 2009, a person called the facility giving Edmonds' van number, and reported a tailgating incident; Edmonds was given a "verbal warning." On January 6, Edmonds was cited for completing a Satellite installation that did not meet company standards; he was given a "final" warning and the form notes, "You will be suspended for 2 days." On January 21, he was "suspended pending investigation" for failing to precall customers; there is no showing that he was given a warning of any kind.²¹ On March 12, he was cited for failing to completely fill in his timesheet and was given a "verbal" warning. At the time of the foregoing writeups or counseling interviews, Edmonds agreed with or did not dispute some of them, and did dispute others.

Edmonds testified that he would stop by Zambrano's office on a daily basis just to say hi. About 2 weeks prior to his discharge he stopped by Zambrano's office to perhaps get a pat on the back for having a high performance rating as reflected in an "Employee Breakdown Sheet" that had been given to him. He was pleased about having earned a high rating in the category dealing with "hooking up the phone lines of the customer to our equipment." He showed the document to Zambrano, who told him that now that he was certified for "Wild Blue" internet installations he would be given a raise; the raise was to the highest level of pay an installer could earn.²² As noted, in addition to being at the top of his pay scale as an installation technician or installer, Edmonds was one of several individuals who would also be utilized as a service technician. Service technicians earn a higher rate of pay than installers, and, according to Zambrano, the position of service technician is considered to be a "higher" classification than that of an installation technician.

Edmonds testified that in May, Zambrano suggested that he apply for the position of field supervisor, as there was an opening. The application, dated May 27, was signed by Edmonds; however he decided not to submit it as he was told by a former supervisor, currently a technician, that technicians, on an hourly basis, made more money than supervisors given the amount of hours supervisors had to work. Zambrano denied that he told Edmonds he should apply for a job as a field supervisor. He testified that he would not have done so because of Edmonds' prior write-ups, and because he did not think Edmonds would be a good supervisor as he "just wasn't a good performer."²³

²¹ According to Edmonds' testimony he was suspended over this incident after which he returned to work; the number of day(s) of his suspension is not stated.

²² Zambrano did not deny this testimony of Edwards.

²³ I credit Edmonds' testimony and find that in fact Zambrano did suggest that he apply for the supervisory position.

Regarding Edmonds' performance, there is no showing that at the time of the July 21 incident the number or quality of Edmonds' installations was below par. He had not received a further Corrective Action Form reflecting performance issues since January 17, *supra*. Further, documentary evidence shows that he ranked well above average in "customer satisfaction." Customer satisfaction is evaluated each pay period. A report dated March 8, shows Edmonds' customer satisfaction score as 100 percent, and his past 12-month score as 100 percent, whereas the average site score for all the Riverside installers was 89 and 89.22 percent, respectively. A more current report, dated June 29, shows Edmonds' customer satisfaction score as 100 percent for the past 90 days, and 98.67 for the past 12 months, while the average site score for all Riverside installers was 89.56 and 89.56, respectively.

Zambrano testified that during his tenure as operations manager the only other employee who used profanity against a supervisor or manager was also discharged. That employee was John Barrios, who was discharged for insubordination in May 2009. Barrios' Employee Consultation form states that Barrios and other installers were told they would not be issued a gas card for their van unless they were wearing their reflective safety vest. Barrios, who was not wearing his vest, approached his supervisor for his gas card, and was told to return to his van for the vest before he would be issued a gas card. Barrios responded that he did not have to put it on, saying, "this is bullsh-t." He then returned to his van, put on his safety vest, and again approached the supervisor "and continued to be very confrontational and disrespectful, stating 'I don't play around like that, I'm a grown ass man.'" He then "snatched the gas card from [the supervisor's] hand and proceeded to pump gas." The form goes on to state: "This is considered insubordination and it is a violation of DirecTV Home Services personnel policies and procedures." Barrios was suspended pending investigation. After being presented with the Employee Consultation form later that day, which he refused to sign, he was told by his supervisor to move his van to the warehouse so his equipment could be inventoried. Barrios said he would not give up his van without receiving a copy of the Employee Consultation form. He was told that according to company policy he was not entitled to a copy of the form unless he signed it. He refused to give up his keys. According to the memorandum written by a supervisor, "Site Manager Freddy Zambrano then came out to see what the problem was and [Barrios] told [Zambrano] the same thing." Barrios continued to refuse to give up his keys and stated that he, Barrios, would call the police. In fact, Zambrano called the police and Barrios gave up his keys to the van.²⁴

Clearly, the above scenario surrounding the termination of Barrios, who directly defied his supervisor's orders, is unlike and readily distinguishable from the facts in the instant matter.

2. Analysis and conclusions

Both the General Counsel and the Respondent rely on the analytical framework set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), to balance an employee's use of profane and insub-

²⁴ Zambrano testified that he was "pretty sure" Barrios' file reflected previous performance-related incidents, but he did not specify the dates or nature of such incidents.

ordinate comments, uttered during the course of concerted activity, with “an employer’s right to maintain order and respect in the workplace.” *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994). The General Counsel maintains that Edmonds’ activity in protesting working conditions was clearly protected concerted activity, and that his use of profanity, under the circumstances, did not remove his conduct from the protection of the Act. The Respondent maintains that Edmonds’ outburst was not concerted, as he was protesting not on behalf of others but rather on his own behalf; nor was his conduct protected, as his use of profanity toward Zambrano, under the circumstances, exceeded the bounds of permissible conduct.

I find no merit to the Respondent’s contention that Edmonds was not engaged in protected concerted activity. The record clearly shows, and Zambrano acknowledged, that having to wait in line to get materials each morning was a significant matter of concern to all the installers. The daily waiting in line, the absence of an organized line, and the fact that the disorganization necessarily resulted in an even longer wait and added frustration for some employees, are inseparable elements of one overriding, common grievance. The failure or delay of the Respondent to put in place an appropriate system to resolve the underlying problem, whatever parts of the problem individual employees may have found most annoying, was admittedly an ongoing concern to all the installers, and clearly Edmonds was not speaking solely for himself in imploring Zambrano to do something about the situation.

The four factors to be balanced as set forth in *Atlantic Steel*, supra, are as follows: the place of the “discussion”; the subject matter of the discussion; the nature of the employee’s outburst; and whether the outburst was, in any way, provoked by an employer’s unfair labor practice. Moreover, relative weight is to be given to each of the four factors.

The “discussion” took place in a workplace setting in the presence of some 40 or 50 employees, and Edmonds’ comments were likely overheard by many if not all of the employees; while the underlying subject matter of the discussion was clearly a longstanding matter of legitimate concern to all employees, this should be tempered with the fact that the employees had previously been made aware that the problem would likely be resolved in a few days; Edmonds uttered profanities²⁵ in conjunction with his questioning Zambrano about when Zambrano was going to perform his job as manager by doing something about the employees’ complaint, and this, I conclude, would tend to diminish Zambrano’s status and authority in the eyes of the other employees and have a deleterious effect on his “right to maintain order and respect in the workplace”;²⁶

²⁵ The record shows that employees, supervisors, and managers alike used profanity in the workplace. The record does not show, however, any prior instances of employees cussing out supervisors or managers in the workplace, in the presence of other employees, for failing to do the job that employees expected them to do. Accordingly, while there is precedent for the Respondent’s acceptance of profanity in the workplace, there is no precedent for the Respondent’s acceptance of profane outbursts in the workplace toward management.

²⁶ *Piper Realty*, supra; *Verizon Wireless*, 349 NLRB 640, 642 (2007) (profane references would necessarily have drawn attention and had a destructive effect on workplace discipline).

and finally, Edmonds’ outburst was not provoked in any way by Zambrano. Thus, from the foregoing, I conclude that each of the *Atlantic Steel* factors weighs in favor of the Respondent’s contention that Edmonds’ remarks removed him from the protection of the Act.

The complaint also alleges that Edmonds was suspended and discharged because of his union activity. The Respondent’s opposition to unionization is clear from the record evidence and, contrary to Dimech’s testimony, it is clear from the remarks Dimech made during his meeting with the Riverside employees that he was not there simply as a “courtesy” to update them on the union election at the Rancho Dominguez facility. Rather, I find, he was there to keep the Union’s efforts at Rancho Dominguez from spreading to the Riverside facility, or to stop a union campaign that he believed had already begun.²⁷ Edmonds directly challenged Dimech at the meeting, and let Dimech, Zambrano, and everyone else know, in no uncertain terms, that he did not believe any significant concerns of the employees could be resolved absent representation by a union. Then, at Edmonds’ van, when Dimech sought to let Edmonds know that his concerns would be immediately addressed, Edmonds remained unconvinced and continued to profess the need for union representation. Dimech said that other benefits would be forthcoming when the union situation in Rancho Dominguez was resolved, gave Edwards his business card, and told Edmonds to call him if there was anything else he could do for Edmonds.²⁸

A few days later not only was the San Diego matter resolved by giving a raise to the San Diego installers, but also Edmonds was called personally by Dimech to give him the news. At about the same time, on about the first workday after the Dimech meeting, Zambrano told Edmonds that all of his jobs would be QC’d. I find that in fact Zambrano made this statement; and I further find that, absent any other apparent reason or motivation, it was said in direct response to Edmonds’ pro-union remarks at the Dimech meeting. Thus, Zambrano warned Edmonds that his work was to be monitored as a result of his protected concerted and/or union activity.

To summarize, the record abundantly shows the Respondent’s antipathy toward unionization, and the Respondent’s awareness of Edmonds’ forceful defense of unions in general and his proclivity to speak up in front of employees and managers alike as an articulate advocate of his position. Moreover, I have found that as a result of his prouion remarks he received a warning from Zambrano that his work was to be watched. Then, on July 22 he was suspended for his July 21 outburst, and on July 28 he was terminated.

²⁷ There is no clear record evidence that the Respondent was aware of the union activity taking place at the Riverside facility.

²⁸ The Respondent maintains that the Dimech meeting took place on May 22, and the General Counsel places the meeting sometime in June. The date of the meeting is unclear and there is evidence to support either position. I conclude that under the circumstances it is unnecessary to determine whether the Dimech meeting took place in May or June.

Accordingly, all of the elements under *Wright Line*²⁹ have been established to shift the burden of proof to the Respondent to show that Edmonds would have been both suspended and discharged even absent his protected concerted and/or union activity flowing from his comments at the Dimech meeting. Assuming *arguendo* that the Respondent had a legitimate reason for merely suspending Edmonds as a result of his July 21 outburst, I find that the Respondent has not met its burden of establishing that Edmonds was also discharged for his July 21 outburst.

From the date of the Dimech meeting until July 22, Edmonds was never disciplined for work performance or any other reason.³⁰ On July 22, the day he was suspended for his July 21 outburst, Edmonds apologized during one or both of his conversations with Zambrano, and said he knew he had been out of line. And before he left the premises that day he specifically asked Zambrano whether he would be terminated. Zambrano pointedly replied that he would not be terminated, and would be returned to work at the end of his suspension. This comports with the July 21 Employee Evaluation form Zambrano presented to Edmonds. The form does not state that Edmonds was simply suspended, or suspended pending investigation, but rather states that he would be suspended until July 28, a date certain. Accordingly, it is abundantly clear, and I find, that Zambrano had already decided on July 21, shortly after the incident, as he prepared the Employee Evaluation form, that Edmonds would be suspended but would not be discharged for his outburst.

This finding further establishes that at the time Zambrano decided to suspend but not discharge Edmonds, Zambrano was either aware of Edmonds' prior work history, or that Edmonds' prior work history simply did not matter to Zambrano; in either event, Zambrano had determined that Edmonds would not be discharged regardless of his work history.³¹ Thus, when Ed-

²⁹ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982).

³⁰ The Respondent maintains that Zambrano harbored no animus against Edmonds as exhibited by Zambrano's failure to discipline Edmonds for two incidents that occurred between the time of the Dimech meeting and Edmonds' July 22 suspension. One incident occurred in late May and the other in June. One involved a minor auto accident for which it was determined that Edmonds clearly was not at fault, as the other driver admitted fault. The other involved a complaint by a customer. Edmonds was suspended pending investigation of this incident, and Zambrano determined that the customer complaint was unwarranted as clearly demonstrated by records, namely Edmonds' telephone log, which conclusively showed that, contrary to the customer's contentions, he had in fact contacted the customer in a timely manner. As a consequence, Edmonds was absolved of the infraction and reimbursed his wages for the day(s) of his suspension. The fact that Edmonds received no discipline for these incidents does not show that Zambrano was lenient or fair with Edmonds; rather, it is clear that Zambrano simply had no supportable rationale for imposing discipline, as the documents precluded any reliance upon subjective considerations.

³¹ Indeed, not only had Edmonds received no adverse counseling forms for the 5 months or so prior to his suspension, but also he had received 100 percent on current customer satisfaction statistics, well exceeding the average customer satisfaction statistics of the Riverside installers for the preceding year. In May, Zambrano suggested to him that he apply for an open supervisory position. And about 2 weeks prior

Edmonds asked Zambrano whether he was going to be discharged, Zambrano was not noncommittal, and did not reply that he didn't know or that he intended to review Edmonds' file during his suspension. Rather, he unequivocally answered, "no," adding that Edmonds would be returned to work following his suspension. There is no contrary evidence.

It follows, therefore, that someone intervened between July 22 and 28, to cause Zambrano to change his mind and convert the suspension to a termination. I do not credit Zambrano's testimony to the extent it suggests or implies that he did not have his mind made up not to discharge Edmonds when he issued the July 21 counseling form, or that his review of Edmonds' personnel file was the determinative factor in making his decision to discharge Edmonds. During their July 28 conversation Zambrano said nothing to Edmonds about his employment history or that he was on a final warning. Rather, he implicated others by telling Edmonds that after talking with Scott Thomas—Zambrano's boss and Dimech's subordinate—and the HR department, it had been determined that his employment was being terminated. And while Zambrano testified he advised HR that he had reviewed Edmonds' file, he did not testify whether or not he already knew or even cared what was in Edmonds' file before he allegedly reviewed it. To summarize, the Respondent has neither admitted that Zambrano had a change of mind after issuing the July 21 suspension notice, as the evidence shows and I have found; nor has the Respondent affirmatively demonstrated that whatever it was that caused Zambrano to change his mind and convert Edmonds' suspension to a discharge was not motivated by unlawful considerations. Thus, the Respondent has failed to show that Edmonds would have been discharged, rather than merely suspended, as a result of his July 21 outburst.

On the basis of the foregoing, I find that the Respondent has not satisfied its burden under *Wright Line*, supra, to show that Edmonds would have been discharged for the July 21 outburst even absent his protected concerted and/or union activity. Accordingly, I find that Edmonds was discharged in violation of Section 8(a)(1) and (3) of the Act as alleged.

C. Respondent's Handbook; Respondent's DirecTV Policy Communications, Public Relations, and Corporate Events Document

1. Facts

The complaint alleges and the Respondent admits that on or about May 22, 2010, by distributing to employees a handbook, entitled "Home Services Employee Handbook," Respondent promulgated and since then has maintained the following rules:

2.4 Use of Company Systems, Equipment, and Resources

Occasional and reasonable personal use of company property is permitted. Examples of reasonable use include use that is moderate and appropriate in duration and frequency, use that

to his suspension he received a high performance rating for internet installations, and was given a raise by Zambrano, at which point he was elevated to the highest level of pay an installer could earn. Zambrano did not explain what motivated him to ignore or discount these current positive factors, and instead rely upon Edmonds' past discipline, in determining whether Edmonds should be discharged.

does not involve obscene or questionable subject matter, use that does not conflict with the company's Anti-discrimination/Harassment and/or conflict of interest policies, and use that is not in support of any religious, political, or outside organization activity.

3.4 Communications and Representing DIRECTV

To ensure the company presents a united, consistent voice to a variety of audiences, these are some of your responsibilities related to communications:

- Do not contact the media, and direct all media inquiries to the Home Services Communications department.
- If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.

4.3.1 Confidentiality

Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs, and chat rooms. Never give out information about customers or DIRECTV employees. In particular, customer information must never be transmitted through regular unencrypted email, even internally within DIRECTV. If you have additional questions regarding data transmission guidelines, check with the IT department.

The complaint alleges and the Respondent admits that since at least on or about July 1, 2010, Respondent has maintained, in the DirecTV Policy Communications, Public Relations, and Corporate Events document, the following rules:

Employees

Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.

Public Relations

Employees must direct all media inquiries to a member of the Public Relations team, without exception. Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations. These rules are in place to ensure that the company communications [sic] a consistent message and to ensure that proprietary information is not released.

Following the issuance of the complaint the Respondent posted on its bulletin board at the Riverside facility the following Memo, on company letterhead, from Adrian Dimech, dated May 9, 2011, regarding DTVHS employee handbook and company Policies:

The purpose of this memo is to clarify to you the intent of DTVHS in enforcing the policies set forth in the DTVHS em-

ployee handbook and those company policies posted on the DEN.³²

Employee Handbook

The policies contained in the DTVHS Employee Handbook previously distributed to you (including but not limited to confidentiality, using social media) will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions.)

Company Policies

The company policies posted on the DEN (including but not limited to confidentiality, using social media) will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions.)

If there should be any questions regarding this, please see your Human Resource Representative.

The Respondent also posted on the DEN the following announcement:

REFERENCE> Policies and Procedures

Employee Handbooks

Refer to the version of the handbook for your business unit. Refer to the DEN and other resources for the most up-to-date content from the printed copy of the handbook you received during new hire orientation.

The policies contained in the Employee Handbooks set forth below, will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions.)

....

Company Policies

Company policies apply to all DIRECTV employees regardless of in which department or business unit an employee works. For a particular business unit's (Enterprise, Customer Care or Home Services) or department's procedures and rules, see the appropriate section on this page.

The Company policies that follow will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions

³² The "DEN" is the Respondents' intranet network through which all of Respondents' employees, nationwide, are kept current on company matters.

whether with co-workers or third parties about wages, hours or working conditions.)

Anti-discrimination/Harassment
Communications, Public Relations and Corporate Events
Company-paid Business Expenses for visitors
Compliance with Export/Import Laws and Regulations

2. Analysis and Conclusions

There is no contention that the Respondent has promulgated or enforced the foregoing provisions in the employee handbook (handbook), or the DirecTV Policy Communications, Public Relations, and Corporate Events document (Policy document), for the purpose of inhibiting lawful union or protected concerted activity. However, it is alleged, and the General Counsel maintains, that each of the foregoing provisions are unlawful on their face as employees who may desire to engage in union or protected concerted activity, or have contact with the Board or Board agents, would be reluctant to do so if such activity or conduct would reasonably seem to be prohibited by any of the foregoing provisions.

The Respondent maintains the provisions are not unlawful on their face and, moreover, that no violation should be found as the Respondent, since the issuance of the complaint, has adequately advised its employees that the provisions should not be understood to inhibit lawful activity protected by the Act.

I find that handbook provisions 3.4 Communications and Representing DIRECTV, and 4.3.1 Confidentiality, are unlawful on their face, as they would reasonably tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours, and working conditions with employees and others, including union representatives, by precluding employees from contacting or conferring with representatives of the media, and by causing employees to be reluctant to contact the Board or deal with Board agents. See generally *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999); *Lafayette Park Hotel*, 326 NLRB 824 (1998).

I find that Policy document provisions titled "Employees and Public Relations" are unlawful on their face as they would reasonably tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours, and working conditions with employees and others, including union representatives, through the internet and by other means, and by precluding employees from contacting or conferring with representatives of the media. *Ibid*.

I further find, contrary to the Respondent's contention, that the Respondent's disclaimers and corrective action are insufficiently specific and/or would be overlooked by employees reading the particular provisions in the written documents to warrant a dismissal of the pertinent compliant allegations. See, generally *Passavant Memorial Area Hospital*, 237 NLRB 138, 899 (1978). However, under the circumstances, I do not believe that, as contended by the General Counsel and the Union, the provisions found to reasonably contain impermissible restrictions on employees' Section 7 rights should be entirely expunged from the relevant documents. The Respondent is a nationwide employer with several business units and many thousands of employees. To require the Respondent to remove the relevant provisions may unduly interfere with legitimate

employer prerogatives. Further, as noted in the Respondent's brief, it has attempted in good faith to resolve this matter through its various postings. It would appear most appropriate for the parties to explore modifications of the language or other alternatives during the compliance stage of this proceeding. Accordingly, the remedial action to be taken will be relegated to the compliance stage of this proceeding.

Regarding handbook provision 21.4 Use of Company Systems, Equipment and Resources, the General Counsel maintains that even though the Respondent prohibits "use of company property," namely company systems, equipment, and resources, which includes the Respondent's email system, for purposes "of any religious, political, or outside organizational activity," this blanket prohibition should be found impermissible regarding Section 7 activity as it unduly restricts union and protected concerted activities. The General Counsel, citing *Register Guard*, 351 NLRB 1110 (2007), acknowledges that the Board has recently resolved this issue. I agree. I shall dismiss this allegation of the complaint.³³

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 Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) and (3) of the Act as found.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that the Respondent be required to cease and desist from discharging employees in violation of the Act, and from promulgating and maintaining in effect certain employee handbook and other policy provisions that preclude and interfere with the Section 7 rights of employees to engage in union and protected concerted activity. Specifically, to remedy the unlawful discharge of employee Gregory Edmonds, I recommend the Respondent offer him immediate reinstatement to his former position of employment, and make him whole for any loss of earnings, including piecework wages, and other benefits lost as a result of his July 28, 2010 discharge, computed on a quarterly basis from July 28, 2010 to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest on amounts due to Gregory Edmonds shall be compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). I further recommend that the Respondent be required to remove from its files any reference to the July 28, 2010 discharge. I further recommend that the Respondent be required to cease and desist from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Matters pertaining to the employee handbook and other documents

³³ The General Counsel maintains that *Republic Aviation*, 324 U.S. 793, 803 fn. 10 (1945), warrants a different result. This is a policy matter to be addressed to the Board.

shall be relegated to the compliance stage of this proceeding. attached hereto as "Appendix."
Finally, I shall recommend the posting of an appropriate notice, [Recommended order omitted from publication.]