

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

_____)	
T-MOBILE USA, INC.)	
)	
and)	Case 14-CA-106906
)	
COMMUNICATIONS WORKERS OF AMERICA)	
_____)	
T-MOBILE USA, INC.)	
)	
and)	Cases 28-CA-106758
)	28-CA-117479
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 7011, AFL-CIO)	
_____)	
METROPCS COMMUNICATIONS, INC.)	
)	
and)	Case 02-CA-115949
)	
COMMUNICATIONS WORKERS OF AMERICA)	
_____)	
T-MOBILE USA, INC.)	
)	
and)	Cases 28-CA-128653
)	28-CA-129125
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO)	10-CA-128492
_____)	

**RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE
GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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Respondent T-Mobile USA, Inc. (“Respondent,” “T-Mobile” or the “Company”) submits this Brief pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (the “Board”), in support of Administrative Law Judge Christine E. Dibble’s March 18, 2015 Decision¹ in the above-referenced matters recommending the dismissal of allegations that the Respondent’s *Workplace Conduct* and *Recording in the Workplace* policies violate the National Labor Relations Act (the “Act”).

INTRODUCTION

Based upon a stipulated record, on March 18, 2015, ALJ Dibble issued her Decision in the above-referenced matters, holding that Respondent’s *Workplace Conduct* and *Recording in the Workplace* policies are lawful and recommending the dismissal of allegations to the contrary. In making these rulings, ALJ Dibble correctly relied on the long-standing analytical framework for determining whether a work rule violates the Act, which was set forth by the Board in in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and *Lafayette Park Hotel*, 326 NLRB 824 (1998). (ALJD 7:10-28). Under this framework, the ALJ correctly concluded that the Respondent’s *Workplace Conduct* policy – which simply provides that “employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers and management” – does not explicitly restrict Section 7 activity, was not promulgated in response to, or applied to restrict such activity, and would not reasonably be construed to proscribe it. (ALJD 23:40-24:1-17). The ALJ also properly concluded that the Respondent’s *Recording in the Workplace* policy – which, for a litany of legitimate business reasons prohibits employees from recording communications and activities in the workplace – is not facially

¹ Hereafter, the Administrative Law Judge’s Decision will be referred to as “ALJD” or “Decision” and the Administrative Law Judge will be referred to as “ALJ.”

overbroad, as it does not prohibit employees from engaging in conduct in which they have a protected right. (ALJD 19:43-20:1). Further, the ALJ appropriately determined that the Respondent was entitled to promulgate a rule prohibiting recordings in the workplace based on “valid, nondiscriminatory” interests, including, *inter alia*, “safety, maintenance of a harassment free environment, protection of trade secrets” and promotion of “open lines of communication.” (*Id.* 20:28-38).

These conclusions are supported by the record and relevant Board law. The arguments advanced by Counsel for the General Counsel (“General Counsel”) in its exceptions brief are extreme and unrealistic, and would depart from established law and the record in this case. The General Counsel ignores a reasonable reading of the policies, and instead suggests that they are unlawful if there is any way that employees could, in theory, construe any portion of them to prohibit protected conduct. The assertion that the law can be violated based on hypothetical interpretations of isolated policy fragments ignores the applicable analysis, the plain language and lawful purposes of the rules, and, importantly, the realities of the workplace.

In reality, employers and workers alike expect to carry out their daily business in a “professional” environment and, in doing so, to foster “cooperative” and “effective working relationships” with both colleagues and customers – all standards of civility and business decorum promoted by the *Workplace Conduct* policy at issue here. Indeed, it is difficult to imagine how either businesses or employees would achieve their goals in the absence of these basic conditions in the work setting. A rule promoting such conditions, therefore, would be read by any reasonable employee to do just that; no reasonable reading of the Respondent’s *Workplace Conduct* policy would yield an interpretation that it addresses, let alone restricts,

employee efforts to engage in protected conduct. The utterly unreasonable and tortured reading proposed by the General Counsel cannot lead to a conclusion that this policy violates the Act.

The *Recording in the Workplace* policy is equally reasonable and lawful. Both employers and workers have firm expectations and paramount interests in the ability to carry out workplace functions without fear of their communications, data or activities being surreptitiously recorded and later shared. While the General Counsel acknowledges, as he must, that there is no cognizable right in audio or video recording or photographing in the workplace, he nevertheless excepts to ALJ Dibble's findings and urges the Board to create such right, seemingly without limit. Certainly, no limit of any kind is suggested by the General Counsel, who appears to argue that the Respondent's *Recording in the Workplace* policy should be rendered wholly invalid. (Counsel for the General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision, hereafter "General Counsel Exceptions Br." at 9-11). In advocating for the apparent limitless ability to record and photograph in the workplace, the General Counsel points to the ubiquitous presence of devices capable of audio and video recording (such as cellular phones), these devices' superior capability in capturing information, and even the greater ease and speed with which that information may be shared, including on social media sites such as Facebook and Twitter. (*Id.*). These realities do not undermine the legitimacy of the Respondent's *Recording in the Workplace* policy, as the General Counsel contends; in fact, they strengthen it.

Employees reporting to work each day have a right to know that they will not be recorded or photographed at will and that their words and images do not have the perpetual potential of being shared with the public at large in a manner of seconds. As ALJ Dibble properly observed, such activity in the work environment – for which the General Counsel openly advocates – raises

serious concerns of possible harassment and hostility and carries with it the potential of encumbering, not promoting, free and open communications in the workplace. (ALDJ 20:28-38).

Further, while the General Counsel would have the right to record extend to any employee interaction or meeting, employers, including the Respondent, must have confidence that they can candidly share a wide variety of topics – from personnel decisions, to business strategy and results – without this information being electronically captured and, possibly, instantly made public. Such a possibility would greatly hamper, not promote, open dialogue and the ability to share information at work.

Further, as the General Counsel notes, the majority of the Respondent’s employees deal directly with and are entrusted to provide services to the Company’s customers. (General Counsel Exceptions Br. at 10, fn. 5). Contrary to the General Counsel’s impression, there are many substantial reasons for preventing the unfettered recording of these interactions. The Respondent’s customers, like those of many other businesses, entrust the Company with personal identifying and financial data that is routinely accessed by employees. There is a vital interest, and indeed a legal requirement, that the employer safeguard this data from capture and possible use for improper purposes. These same customers anticipate that recordings, if made, will be used only for the Company’s business purposes and will not be made public. Certainly, no business entity can maintain the confidence of its consumers if they have reason to fear that their interactions with the business may be shared outside the company.

ALJ Dibble correctly determined that the Respondent’s *Recording in the Workplace* policy is facially valid, addresses legitimate business concerns, does not discriminate against protected conduct, and does not impinge upon any right recognized by Act. The ALJ’s

conclusion as to the policy's lawfulness is further supported by the existence of state laws that make it illegal to record communications without the explicit consent of all parties; illegal acts are not protected by the Act, and, therefore the maintenance of work rules enforcing local laws may not constitute a violation of the Act.

ALJ Dibble's conclusions that the Respondent's *Workplace Conduct* and *Recording in the Workplace* policies are lawful are amply supported by the record and relevant Board law. The Board should affirm these conclusions and dismiss the pertinent allegations.

STATEMENT OF FACTS

This matter was submitted on a stipulated record, the entirety of which is appended to the STIPULATION OF RECORD CONCERNING POLICY ALLEGATIONS AND SUBMISSION TO ADMINISTRATIVE LAW JUDGE ("Stipulation").² The allegations in this case concerned only whether the maintenance of certain written policies of Respondent violate the Act. There is no evidence in the record that:

- Respondent promulgated any of the policies in response to any alleged union organizing, or that
- Respondent ever applied any of the policies in any manner, let alone to restrict employees' Section 7 rights.

² Hereafter, "Ex. JT 2, Tab___ at p.___" refers to the Appendix to the Stipulation.

ARGUMENT

THE ADMINISTRATIVE LAW JUDGE CORRECTLY CONCLUDED THAT THE RESPONDENT'S WORKPLACE CONDUCT AND RECORDING IN THE WORKPLACE POLICIES ARE LAWFUL

Under the established framework for determining whether an employer's work rule violates Section 8(a)(1) of the Act, the Board looks at "whether the rule explicitly restricts activities protected by Section 7. If it does, [the Board] will find the rule unlawful." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The rules at issue here do not explicitly restrict Section 7 activity. Therefore, the applicable test under the Board's framework is whether "(1) employees *would* reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* (Emphasis supplied). In evaluating a work rule under the first prong, the Board may consider whether the rule "addresses legitimate business concerns" or whether the employer has taken any action that would lead its employees to believe the rule prohibits protected conduct. *Lafayette Park Hotel*, 326 NLRB at 825-826. Further, the Board may weigh the employer's right to address legitimate business concerns in light of employees' right to engage in activity protected by the Act. *Relco Locomotives Inc.*, 358 NLRB No. 32, slip op. at 15 (2012), *enforced*, 734 F.3d 764 (8th Cir. 2013).

The two policies at issue here do not explicitly restrict the exercise of Section 7 rights, and the General Counsel acknowledges as much insofar as the *Workplace Conduct* policy is concerned. (General Counsel Exceptions Br. at 5). Indeed, it is undisputed these are nationwide policies, the promulgation of which had nothing whatsoever to do with alleged union activity. There is no evidence or allegation that the Respondent has ever applied these policies to restrict or interfere with the exercise of such activity. Accordingly, the only question is whether employees would reasonably construe the policies to prohibit their engagement in protected

conduct. The question is not *could* the rule be construed to interfere with such conduct, but the much narrower inquiry of whether a reasonable employee *would* read it as such. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. (“[W]e will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.”) (Emphasis in original).

The Respondent’s policies plainly do not restrict or otherwise chill employees’ ability to engage in conduct in protected activity. Reasonably understood and read as a whole, the Respondent’s *Workplace Conduct* policy sets lawful, legitimate expectations for professional decorum in the workplace; in the absence of any evidence that the Respondent has, through any other action, led employees to believe that the rule encompasses Section 7 activity, the policy should be deemed lawful under relevant Board precedent.

The *Recording in the Workplace* policy governs conduct in which neither the Board nor any other court has recognized a legal right, and advances vital interests of employees and the Respondent alike. The position that the General Counsel urges the Board to adopt would greatly undermine those interests and would significantly encumber every day business dealings.

A. The Administrative Law Judge Correctly Determined that the Respondent’s “Workplace Conduct” Policy Does Not Violate Section 8(a)(1) of the Act

The Respondent’s *Workplace Conduct* policy, found in the Company’s Employee Handbook, provides as follows:

[T-Mobile] expects all employees to behave in a professional manner that promotes efficiency, productivity and cooperation. Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers and management.

(JT Ex. 2, Tab 5 at p. 15).³ As the ALJ concluded, this policy, which sets a simple baseline for professional decorum and civility in communication in the matters of work, would not reasonably be read to pertain to Section 7 activity and, as such, does not violate Section 8(a)(1) of the Act. (ALDJ 23:44-45, 24:15-17).

The General Counsel urges a reversal of this common sense conclusion and would find the policy unlawful because it extends “co-workers and management.” (General Counsel Exceptions Br. at 5). In this context, the General Counsel argues, the terms “positive work environment” and “communicating in a manner that is conducive to effective working relationships” are “vague and ambiguous,” “leav[] ample room to ensnare Section 7 activity,” and “can be used to discriminate against employees engaging in Section 7 activity” (General Counsel Exceptions Br. at 5-8). These contentions are based on pure speculation – there is no evidentiary basis for concluding that the hypothetical interpretation the General Counsel conjures is that likely to be reached by a reasonable employee, and there is, of course, zero evidence the policy has been used for discriminatory purposes. Indeed, it is wholly insufficient, for purposes of finding a violation of the Act, that there is “room” to interpret a policy as restricting protected conduct, that the policy “*may*” be construed as such, that it may be “*misconstrued*,” or that its application “*may* be subjective [or] arbitrary,” as the General Counsel argues here. (*Id.* at 6-8) (Emphasis supplied). In *Lafayette Park Hotel*, the Board specifically observed that employers must not be required to draft policies so as to eliminate any possibility that they might be read to cover protected Section 7 activity. *Lafayette Park Hotel*, 326 NLRB at 826. “Such an approach is neither reflective of the realities of the workplace nor compelled by Section 8(a)(1).” *Id.* Yet, this is exactly the type of approach the General Counsel advocates in

³ Notably, the first sentence of the policy, which is part of the context of the overall policy, is omitted from the General Counsel’s brief. (General Counsel Exceptions Br. at 3).

arguing that the *Workplace Conduct* policy is unlawfully overbroad in the absence of precise definitions for each of its provisions. (See General Counsel Exceptions Br. at 5-8). Employers are not required to go as far specifically defining the terms of each policy where, as here, the intent of the policy is clear.

ALJ Dibble's evaluation of the *Workplace Conduct* policy, on the other hand, is both proper and consistent with Board law. Pursuant to Board decisions that have considered similar rules, the *Workplace Conduct* policy is of the type intended to promote "a civil and decent workplace," which reasonable employees would not infer to prohibit Section 7 activity although such activity may conceivably be covered by the policy under certain interpretations. See *Costco Wholesale Corp.*, 358 NLRB No. 106, slip. op. at 1, 7, 13-14 (Sept. 7, 2012) (a "reasonable employee" would infer that the employer's purpose in promulgating a policy requiring the use of "appropriate business decorum" in communicating with others was to ensure a "civil and decent" workplace and not to restrict Section 7 activity.") (citing *Lutheran Heritage Village*, 343 NLRB at 647-649). That is especially the case here, where Respondent's employees are primarily engaged in servicing customers, making it absolutely necessary for the Company to expect that they "behave in a professional manner" and "maintain a positive work environment." See, e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287, 294-95 (1999) ("[t]here can be no doubt that an employer in a service industry may require that employees maintain a satisfactory attitude.")

At the onset, the *Workplace Conduct* policy makes clear that it concerns business-related objectives of "efficiency, productivity and cooperation." (JT Ex. 2, Tab 5 at p. 15). With these objectives in mind, it goes on to state that "employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships

with internal and external customers, clients, co-workers and management.” *Id.* A reasonable employee would not interpret this basic expectation of civility and decorum to prohibit him from engaging in activities protected by the Act, and the Board has reached similar conclusions with respect to highly comparable policies.

In *Flamingo Hilton-Laughlin*, 330 NLRB at 294-95, the Board upheld as lawful a strikingly similar rule requiring employees to “maintain[,] in management’s sole judgment, satisfactory attitude . . . and/or relationships with other guests, *employees, including supervisors.*” *Id.* at 294-95 (Emphasis supplied). Advancing arguments similar to those presented by the General Counsel here, the charging parties in *Flamingo Hilton-Laughlin* contended that the term “satisfactory attitude” was unlawful because it was undefined and “could reasonably be interpreted as prohibiting permissible union propaganda.” *Id.* The Board disagreed. *Id.* Rejecting the charging parties’ arguments as to ambiguity, the Board concluded that “[t]here [wa]s no basis to presume or speculate that the term satisfactory attitude would be used to discriminate against pro-union employees,” as the General Counsel asks the Board to do here. *Id.*; (General Counsel Exceptions Br. at 8).

The Board reached a similar conclusion regarding analogous language in *Lafayette Park Hotel*, 326 NLRB at 824-827. There, the employer promulgated rules identifying as “unacceptable” “[b]eing uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the [the employer]’s goals and objectives,” as well as engaging in “[u]nlawful or improper conduct . . . which affects the employee’s relationship with the job, fellow employees, supervisors, or the hotel’s reputation or good will in the community.” *Id.* at 824.

The charging parties contended that the prohibition against engaging in conduct that did not support the employer's "goals and objectives" was unlawful, relying, like the General Counsel does here, on the lack of a definition for the term "goals and objectives." *Lafayette Park Hotel*, 326 NLRB at 824-827. Specifically, the charging parties argued that because this term was not defined, employees might believe that the employer viewed it as a "goal" to exclude a union and deemed it unacceptable to actively support union organizing. *Id.* The Board rejected this argument, explaining that "the rule, in providing that it [wa]s unacceptable for employees to engage in conduct that does not support the Respondent's 'goals and objectives,' addresse[d] legitimate business concerns, including, as the rule specifically state[d], being 'uncooperative with supervisors, employees, guests and/or regulatory agencies.'" *Id.* The Board declined to conclude that the lack of definition for the term "goals and objectives" rendered the rule ambiguous and overly broad, found "no ambiguity in th[e] rule as written," and observed that "any arguable ambiguity ar[ose] only through parsing the language of the rule, viewing the phrase 'goals and objectives' in isolation, and attributing to the Respondent an intent to interfere with employee rights." *Id.*

These principles, applied here, support the ALJ's finding T-Mobile's policy is entirely lawful. The *Workplace Conduct* policy's objectives of "promot[ing] efficiency, productivity[], . . . cooperation . . . [and] effective working relationships" are clear and "address[] legitimate business concerns." *Lafayette Park Hotel*, 326 NLRB at 826. Any reasonable employee would understand this policy to focus on the manner in which the employee carries out the employer's business. To the extent the policy is interpreted by the General Counsel to encompass Section 7 activity, that result is reached by improperly reading the challenged language in isolation and outside of its context. *See First Transit, Inc.*, 360 NLRB No. 72, Slip op. at 3 (2014) ("the latter

clause must be interpreted in the context of the introductory language which makes its overarching purpose clear”). That the General Counsel ignores the context is further illustrated by the fact the General Counsel only cites and relies on a portion of the entire policy. (General Counsel Exceptions Br. at 3).

Also instructive is the Board’s recent decision in *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (2014), which ALJ Dibble cites in support of her determination. (ALJD 23:34-38). In that case, the employer maintained a rule prohibiting “[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests, . . . includ[ing] displaying a negative attitude that is disruptive to other staff or has a negative impact on guests.” *Id.*, slip. op. at 1, 3, 11-14. In holding that the rule was lawful, the ALJ, whose decision the Board adopted, explicitly rejected another argument that the General Counsel advances here – that a prohibition on “negativ[ity]” in interactions with both guests or employees or, inversely stated, a requirement that these interactions remain positive – would be reasonably read to bar conversations expressing unfavorable opinions about terms and conditions of employment. *Id.* The *Copper River* decision specifically distinguishes between rules prohibiting “negative conversations” and prohibitions against “negative attitudes,” explaining:

Prohibiting ‘conversation’ cuts to the very essence of activity which the Act protects because all other actions contemplated by the statutory scheme flow out of employees’ discussions about their wages, hours, and other terms and conditions of employment. . . . By comparison, [a] rule, forbidding ‘displaying a negative attitude’ does not limit employees’ rights to have conversations about any subject.

Id. This rationale further supports the conclusion that the *Workplace Conduct* policy, which places no restriction whatsoever on the content of conversations, is lawful. While the General Counsel attempts to distinguish the *Copper River* decision by arguing that the *Workplace*

Conduct policy does not contain similar limiting language, the policy, like the rule at issue in *Copper River*, clearly sets forth legitimate business purposes and, reasonably read, its conduct-related requirements are tailored to those purposes.

Meanwhile, the decisions the General Counsel cites are inapposite. In *Roomstore of Phoenix, LLC*, 357 NLRB No. 143 (2011) the employer directly applied the challenged rule to restrict Section 7 activities. *Id.*, slip op. at 1, fn. 3. There was, therefore, no question as to the employer's intention to prohibit Section 7 activities because it repeatedly applied its rule to do just that. *Id.* By contrast, there is no evidence, let alone allegation, of any kind suggesting that the Respondent ever applied its policy to prohibit employees from engaging in any type of protected activity. The remaining decisions – *Cla-Val Co.*, 312 NLRB 1050 (1993) and *In re Saginaw Control and Engineering, Inc.*, 339 NLRB 541 (2003) – do not deal with the maintenance and promulgation of workplace rules, but allegations of discrimination premised on adverse employment actions. As such, they do not inform the pertinent analysis here.

Relevant Board precedent instructs that T-Mobile's *Workplace Conduct* policy – which simply creates an expectation of civility and professionalism – must be found lawful, and ALJ Dibble's decision and recommended order in that regard should be affirmed.

B. The Administrative Law Judge Correctly Determined that the Respondent's "Recording in the Workplace" Policy Is Lawful

The Respondent's *Recording in the Workplace* policy, also found in the Employee Handbook, provides as follows:

To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information employees are prohibited from recording *people or confidential information* using cameras, camera phones/devices, or recording devices (audio or video) *in the workplace*. Apart from customer calls that are recorded for quality purposes, employees may not tape or otherwise make sound recordings of work-related or workplace discussions. Exceptions may be granted when

participating in an authorized [T-Mobile] activity or with permission from an employee's Manager, HR Business Partner, or the Legal Department. If an exception is granted, employees may not take a picture, audiotape, or videotape others *in the workplace* without the prior notification of all participants.

(JT Ex. 2, Tab 5 at p. 28) (Emphasis supplied).

The policy does not, even indirectly, implicate Section 7 rights. Neither the Board nor any other court has recognized a right under the Act to make audio, video or any other recordings in the workplace. The General Counsel's contention that the policy seeks to reach employees' activities outside of the workplace – such as, for example, “offsite” or in “parking lots” – ignores not only the policy's very title but its repeated references to “workplace” restrictions. (JT Ex. 2, Tab 5 at p. 28; General Counsel Exceptions Br. at 11-12). Furthermore, while the General Counsel takes issue with what he inappropriately characterizes as “blanket” prohibitions on audio and video recordings and photographs, the policy expressly proscribes the recording and photographing of “people and confidential information.” (JT Ex. 2, Tab 5 at p. 28; General Counsel Exceptions Br. at 11, fn. 5). It also makes clear at the onset that it is intended to “maintain individual privacy” and “protect confidential information.” (JT Ex. 2, Tab 5 at p. 28).

1. ALJ Dibble Correctly Found that the Recording in the Workplace Policy Does Not Restrict Section 7 Rights

ALJ Dibble correctly concluded, contrary to the General Counsel's contentions, that the *Recording in the Workplace Policy* does not explicitly restrict Section 7 rights and is not facially invalid. (ALJD 19:43-45). There is, indeed, no authority for the proposition that recording or photographing in the workplace constitutes protected activity under the Act. Even if the activity being recorded is itself protected, (*i.e.*, discussions regarding conditions of employment), there is no protected right under the Act to memorialize that activity by recording it or taking a photograph of it. While acknowledging as much, the General Counsel erroneously relies on

various Board decisions to argue that the Board has recognized a certain “intertwin[ing]” between audio and video recordings in the workplace and an employee’s exercise of Section 7 rights and that, pursuant to this purported recognition, the Respondent’s policy should be found unlawful. (General Counsel Br. at 12).

However, none the decisions upon which the General Counsel relies support the conclusion that the use of recording devices in the workplace should be protected. ALJ Dibble thus correctly concluded that these authorities do not provide support for the argument that the *Recording in the Workplace* policy is facially invalid or can be reasonably construed to prohibit protected activity. (ALJD 19:43-20:20). To the contrary, the cited decisions implicitly recognize the employer’s right to enact similar policies.

Sullivan, Long & Hagerty, 303 NLRB 1007 (1991), for example, does not focus on the right to tape record conversations in the workplace, does not involve an employer policy, and does not state or otherwise indicate that the use of a recording device is a protected Section 7 right. Specifically, in *Sullivan*, the charging party, a former employee, alleged that the union caused the employer to lay him off as a result of an internal union political rivalry, and that the employer violated the Act when it refused to reinstate the employee upon a recall. *Sullivan*, 303 NLRB at 1007. The employer contended that the employee was not recalled because, *inter alia*, he carried a tape recorder on the jobsite. *Id.* at 1013. Importantly, the Administrative Law Judge’s conclusion, affirmed by the Board, that the employee’s carrying of a tape recorder on the jobsite did not present a non-discriminatory reason for the refusal to rehire, was predicated on the fact that “[t]here was no evidence presented by the [employer]” that this activity “violated any of the [employer]’s valid policies. . .” *Id.*

The General Counsel's reliance on *Hawaii Tribune*, 356 NLRB No. 63 (2011), is similarly misplaced. In *Hawaii Tribune*, another case in which the employer did not have a policy in place that prohibited recordings, the employer terminated an employee for secretly recording a meeting with his supervisor. *Id.*, slip op. at 1, 25. The employee's surreptitious recording did not lose protection under the Act specifically because the employer "had no rule barring such recording" and because "it was not unlawful in the State of Hawaii." *Id.* Thus, the Board acknowledged that the conclusion might have been different if the recording was precluded by an existing employer policy or local law.⁴ Insofar as the employer's *subsequently* published rule restricting surreptitious recordings was concerned, that rule was found unlawful because it was promulgated "in direct response to employees' exercise of their [Section 7] rights" and on no other grounds. *Id.* at 19.

Also contrary to the General Counsel's argument, the Board recently adopted, without opinion, a decision finding, *inter alia*, that a policy prohibiting the use and possession of recording devices in the workplace was lawful. *Interbake Foods, LLC*, No. 05-CA-033158 (N.L.R.B. Div. of Judges, Aug. 30, 2013), *adopted* by Order dated Oct. 29, 2013. The policy in *Interbake Foods LLC* provided: "In order to keep the lines of communication open and to ensure the health and safety of all employees, personal cellular telephones, personal radios, televisions, personal tape recorders and players and similar electronic devices are not permitted anywhere in the facility." *Id.*, slip op. at 131. The Administrative Law Judge concluded that the policy was valid on its face, and "express[ed] valid, nondiscriminatory, rationales for its existence." *Id.* The Administrative Law Judge also observed that "[i]t is apparent . . . that the use of concealed recording devices would interfere with the open lines of communication that are deemed

⁴ *White Oak Manor*, 353 NLRB No. 83, slip. op. at 1 (2009) stands for the exact same proposition.

important by the policy's terms" and that "[i]t is entirely reasonable for [an] [e]mployer to have determined that the possibility of concealed recording of conversations would impede free and open discussion among the members of its work force."⁵ *Id.* See also *Flagstaff Medical Center, Inc.*, 357 NLRB No. 65 (2011) ("[i]t does not appear that the policy, on its face, would likely have a chilling effect on employees' Section 7 rights, as the specific right to take photos in the workplace would not reasonably seem to come to mind as an inherent component of the more generalized fundamental rights of employees set forth in Section 7 of the Act.") (Emphasis supplied).

Lastly, there is an additional notable barrier to the concept of recording as a Section 7 right. Several states require two-party consent to lawfully record a conversation, and work rules enforcing local laws may not constitute a violation of the Act. See *Giant Food LLC*, Nos. 05-CA-064793, 05-CA-065187, 05-CA-064798, 2012 WL 8963488, *7 (N.L.R.B.G.C. Mar. 21, 2012) ("rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful"). Illegal acts, or the ability to commit illegal acts, are not protected –

⁵ The Administrative Law Judge also concluded that the employer lawfully discharged an employee who violated the policy. The discharged employee made the recordings "to create a record of supervisory instructions to guard against any claim that she had violated those instructions," which she later gave to her union. *Id.*, slip op. at 123. The General Counsel argued that the discharge was based on her protected concerted activity, support of the union, and in retaliation for testifying at an earlier NLRB proceeding. The ALJ stated:

[S]uch behavior, while clearly unpleasant and sneaky, is not a *per se* offense of the egregious character that would lose the Act's protection. However, the fact the conduct is not *malum in se* does not foreclose an individual employer from making that conduct *malum prohibitum*. The necessary implication of the Board's careful wording is that, if this conduct violates a valid, nondiscriminatory work rule, that would render the behavior outside the Act's protections.

Id., slip op. at 129. In conclusion, the ALJ held that "the Board would not prohibit this [e]mployer from applying its disciplinary process to a violation of its prohibition against possession of recorders in the production area of its plant, particularly when the device had been used to record confidential information at a team meeting which was then disseminated outside the plant." *Id.*, slip op. at 130.

in fact, “conduct that is sufficiently egregious,” including illegal activity, is removed from the protection of the Act even if it would otherwise be considered protected. *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip. op. at 1, *citing and quoting Stanford Hotel*, 344 NLRB 558, 558 (2005); *see generally Atlantic Steel*, 245 NLRB 814 (1979).

Therefore, because the Board has never found recording to be a Section 7 right in and of itself (and has recently found to the contrary) and because non-consensual recording is unlawful in many of the states where the Respondent operates, the Respondent’s rule prohibiting the use of recording devices is a violation of the Act. Accordingly, ALJ Dibble’s findings that the *Recording in the Workplace* policy does not explicitly restrict any Section 7 rights and would not be reasonably read as such is supported by the facts and case law and should be affirmed.

2. ALJ Dibble Correctly Concluded that the Recording in the Workplace Policy Does Not Discriminate Against the Exercise of Section 7 Rights and that the Expressed Rationales for the Policy are Unrelated to Protected Activity

As ALJ Dibble explained, the *Recording in the Workplace* policy “explicitly sets forth valid, nondiscriminatory rationales for its existence” – that is, concerns for safety and privacy, the maintenance of a harassment-free work environment, protection of confidential information and trade secrets, and the promotion of open communication. (ALJD 20:28-32). While the General Counsel attempts to characterize these interests as “speculative and unsupportable,” this merely illustrates the fallacy of the General Counsel’s overall argument. With respect to the *Workplace Conduct* policy, the General Counsel’s asserted problem is that certain words are “vague and ambiguous,” which in turn renders the entire policy unlawful. With respect to the *Recording in the Workplace* policy, the General Counsel attempts to discount the clearly asserted rationale for the policy in the record and the words of the policy themselves by attempting to discount any meaning as mere “rote recitation.” (General Counsel Exceptions Br. at 10). With

all due respect, the record was submitted by stipulation and the General Counsel cannot attack as somehow incredible the only clear intent of the policy, which is plainly obvious and central to the operation of any employer's business. (General Counsel Exceptions Br. at 10).

Among the most important of the interests safeguarded by the policy is the employees' interest in privacy and ability to conduct their work without fear of being surreptitiously recorded. As such, the *Recording in the Workplace* rule precludes the recording or photographing of "people" without prior consent and express notification to those being so captured. (JT Ex. 2, Tab 5 at p. 28). Employees have an expectation and a right to know that their words, images and actions will not be recorded or photographed at will and will not stand to be shared with the public at large, possibly in a manner of seconds. The potential of such activity raises serious concerns of prospective harassment and hostility and carries with it the obvious possibility of encumbering open dialogue in the workplace.⁶

The General Counsel ignores the fact that under both federal and state laws, employers have an affirmative obligation to take firm steps to prevent potential abusive and offensive behavior. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 807-808 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998) (holding that Title VII of the Civil Rights Act of 1964 imposes a duty upon employers to take steps to prevent and promptly correct any instances of harassing conduct and to implement and communicate policies to that effect). That the General Counsel would not consider or blithely ignore these legitimate concerns and obligations while advocating for the ability to upload audio and video recordings

⁶ The General Counsel conjures up an argument that the purpose of the rule is to prevent employees from recording supervisors' "unlawful and coercive statements" and that all such concerns may be alleviated by "not . . . mak[ing] [unlawful] statements and comply[ing] with the Act." (General Counsel Exceptions Br. at 10, fn. 4). This argument is contrived out of thin air and has no support in the record. Moreover, it is inconsistent with the language of the policy, which does not in any way focus on the actions of supervisors.

on social media sites shows how far divorced from the regular workplace its analysis and the position it advocates here truly are. (General Counsel Exceptions Br. at 11, fn. 6).

While the General Counsel notes that certain employees may wish to record videos and take photographs in connection with union campaigns, nothing in the law mandates that such wishes be accorded priority over others' right to not have their words and images so captured and shared. The rule at issue here speaks to exactly this right in providing that, in the event an exception to the prohibition on recording in the workplace is granted, "employees may not take a picture, audiotape, or videotape others . . . without the prior notification of all participants." (JT Ex. 2, Tab 5 at p. 28); (General Counsel Exceptions Br. at 10). Notably, and contrary to the General Counsel's allegations, the policy does not purport to restrict activity, including organizing activity, outside of the workplace. However, to prevent harassment, hostility, fear of loss of privacy and, indeed, encourage open communication, the policy simply requires restraint in doing so in the work setting.

The General Counsel's contention that "there is nothing in the nature of [the Respondent's] business or [its] work setting that would justify . . . [its] blanket prohibition on . . . communications by audio and video recording and photography" is also without merit. (General Counsel Exceptions Br. at 10, fn. 5). The predominant aspects of the Respondent's business actually lead to the exact opposite conclusion. As the General Counsel notes, the majority of the Respondent's employees deal directly with and are entrusted to provide services to customers. (*Id.*). In the provision of such services, significant amounts of business and personal identifying information are exchanged by employees and customers alike. Customers regularly share addresses, social security numbers and financial data, while employees communicate facts pertaining to the Company's products and pricing. Employees also routinely access customers'

personally identifiable and financial information on their computers. Obviously, there is a vital interest in ensuring that such information is not improperly disclosed and used. While the General Counsel observes that data could easily be misappropriated by “committing [it] to memory” or “using a notepad and pencil,” it also spends significant time discussing the superior capability of recording devices when it comes to capturing and sharing this very data. (General Counsel Exceptions Br. at 9, fn. 2, 11). These very features justify and further legitimize the Company’s rationale in prohibiting the recording or photographing of confidential information.

Further, the Respondent’s customers, like those of most other businesses, expect that to the extent their interactions with employees are recorded, they are informed of as much and of the reasons for the recordings. They also anticipate that recordings, if made, will be used only for the Company’s business purposes and will not be made public. If a business cannot guarantee as much it cannot maintain its customers’ confidence.

Moreover, based on the arguments advanced in its Exceptions Brief, the General Counsel would appear to extend the right to make audio and video recordings and to photograph to every aspect of the work setting, including every employee meeting. (In addition, the General Counsel suggests no limitations that, in its view, would render the Respondent’s *Recording in the Workplace* policy lawful). The unfettered right to record any employee interaction or meeting would have significant detrimental effects on communication in the workplace and would greatly impede free and open dialogue among members of the workforce.

By way of example, meetings with employees may cover myriad types of sensitive and confidential topics, including business and product performance and strategy, pricing, personnel decisions, views about colleagues, and personal and medical matters. Plainly, the ability to record these conversations – particularly in this age of cell phones with recording capabilities

and ubiquitous social media postings – would inhibit candid dialogue. As plainly stated on its face, the *Recording in the Workplace* policy aims to eliminate the chilling effect that would result from recording conversations and meetings and to “encourage open communication.” (JT Ex. 2, Tab 5 at p. 28) . Indeed, the Board itself has recognized that the ever present possibility of audio or video recording or photographing would inhibit spontaneity and flexibility and open and honest dialogue. *See, e.g., Pennsylvania Telephone Guild*, 277 NLRB 501 (1985); *Bartlett-Collins Company*, 237 NLRB 770 (1978). Such a possibility would have a negative impact on the “channel[s] of communication to management” and would result in employers’ “inability to discover and correct problem areas.” *Pennsylvania Telephone Guild*, 277 NLRB at 501-02, fn. 3.

Recording and photographing are not activities protected by the Act and the *Recording in the Workplace* policy was enacted for clearly stated, legitimate business purposes and is obviously tailored to those purposes. For these reasons, and because there is no evidence, or even an allegation, that the policy is or has been discriminatorily applied, it cannot be deemed unlawful under the Act.

CONCLUSION

The General Counsel has failed to present any arguments or legal authority that warrant a reversal of ALJ Dibble's Decision regarding the Respondent's *Workplace Conduct* and *Recording in the Workplace* policies. Accordingly, the Respondent respectfully requests that the Board affirm these aspects of the Decision.

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Dated: May 6, 2015

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare that: I am employed in the county of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is 2049 Century Park East, Suite 3200, Los Angeles, California 90067-3206.

On May 6, 2015, I served the following document, described as:

**RESPONDENT'S ANSWERING BRIEF TO COUNSEL
FOR THE GENERAL COUNSEL'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

by placing the original and a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

(By Electronic Filing) By transmitting a true and correct copy thereof via electronic filing through the National Labor Relations Board's website, filed with the Board's Office of Executive Secretary.

(By Email) By transmitting a true and correct copy thereof via electronic transmission to the above/below listed email address.

(By Fax) By transmitting a true and correct copy thereof via facsimile transmission to the addressee.

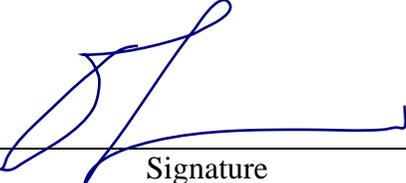
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(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 6, 2015 at Los Angeles, California.

Olia A. Golinder
Type or Print Name


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