

BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 01

MACY'S, INC.

and

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 1445

CASE 01-CA-123640  
JD(NY)-21-15

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF**

Respectfully submitted by:

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## I. STATEMENT OF THE CASE

This case was decided by Administrative Law Judge Joel P. Biblowitz based on a Joint Motion and Stipulation of Facts dated April 2, 2015.<sup>1</sup> On May 12, Administrative Law Judge Biblowitz issued his Decision in the above-captioned case, in which he made certain findings of fact and conclusions of law and recommended that Respondent be ordered to take certain affirmative actions to effectuate the purposes of the Act.

The Administrative Law Judge correctly decided that Respondent violated Section 8(a)(1) of the Act by unlawfully maintaining rules restricting its employees' use of confidential information regarding other employees and customers, the use of Respondent's logo, and employee participation in governmental investigations without prior notice to Respondent's Human Resources Department. The judge recommended that Respondent be ordered to rescind its unlawful rules, to notify its employees on a nationwide basis that it has rescinded them and that they are no longer in effect, and to post a Notice to Employees.

In its Exceptions, Respondent urges that the Administrative Law Judge erred in finding that the rules restricting employees' use of customer information was unlawful. Respondent does not except to any of the Administrative Law Judge's other findings. In response, Counsel for the General Counsel submits this Answering Brief.

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<sup>1</sup> All dates are in 2015 unless otherwise indicated. References to the decision of the Administrative Law Judge will be cited herein as "ALJD."

## II. FACTS

Respondent is a corporation engaged in the operation of retail department stores throughout the United States, including a store located in Saugus, Massachusetts (the Saugus store).

The stipulated record establishes that the charge in this matter was timely filed and served, and that the Complaint and Notice of Hearing was issued on August 28, 2014. In its answer and in the Joint Motion and Stipulation of Facts, Respondent admitted that the Board has jurisdiction over the matter; that Respondent is engaged in commerce within the meaning of Section 2(2), 2(6), and (7) of the Act; that the Union is a labor organization within the meaning of Section 2(5) of the Act; and that Saugus store Human Resources Manager Lori Barroso and Saugus Store Manager Danielle McKay were, at material times, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

### **The Overbroad Rules**

Since September 5, 2013, Respondent has maintained an Employee Handbook entitled "Code of Conduct" (the Handbook) that includes the following policies at issue in this proceeding.<sup>2</sup>

1. The Rule Prohibiting Employees from Disclosing "Confidential Information" About Employees and Customers – Paragraph 7 of the Complaint, found on Page 16 of Respondent's Employee Handbook.

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<sup>2</sup> The rules at issue are summarily set forth here, and are quoted in their entirety below. As stipulated in the parties' Joint Motion, the rules were not promulgated in response to union activity or applied in any manner to restrict Section 7 rights. Respondent does not except to the Administrative Law Judge's findings or conclusions with respect to the third and fourth rules described above, and they will not be further discussed herein.

2. The Rule Prohibiting Employees from Disclosing Personal Data of Employees and Customers – Paragraph 8 of the Complaint, found on Page 18 of respondent’s Employee Handbook.
3. The Rule Prohibiting Employees’ Use of Respondent’s Logo – Paragraph 9 of the Complaint, found on Page 22 of the Employee Handbook.
4. The Rule Prohibiting Employees from Cooperating with Government Investigations Without First Notifying and Obtaining Written Approval from Respondent’s Management – Paragraph 10 of the Complaint, found on Page 14 of Respondent’s Employee Handbook.
5. The Rule Prohibiting Disclosure of “Non-Public” Information Related to Current and Former Employees and Customers – Paragraph 11 of the Complaint, found on Page 31 and 32 of Respondent’s Employee Handbook.

Of the five policies at issue in this case, three contain restrictions on the disclosure of customer information: Confidential Information, Use and Protection of Personal Data, and Confidentiality and Acceptable Use of Company Systems. Together, the three rules, quoted below in their entirety, restrict disclosure of confidential information regarding employees, customers, vendors, business partners, and other third parties.<sup>3</sup> Respondent excepts to the Administrative Law Judge’s findings that the three rules are overbroad insofar as they prohibit

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<sup>3</sup> About April 1, 2014, Respondent notified its employees, through its intranet portal *In-Site* (the method customarily used by Respondent to notify employees of any changes in company policy) that it had revised its Code of Conduct by adding to the introductory page the following:

Nothing in the Code or the policies it incorporates, is intended or will be applied, to prohibit employees from exercising their rights protected under federal labor law, including concerted discussion of wages, hours or other terms and conditions of employment. This Code is intended to comply with all federal, state, and local laws, including but not limited to the Federal Trade Commission, Endorsement Guidelines and the National Labor Relations Act, and will not be applied or enforced in a manner that violates such laws.

Respondent does not except to the ALJ’s finding that this savings clause was too “generic” to be effective.

disclosure of customer information. According to Respondent, its customers have a reasonable expectation that their “identifying personal information will not be disseminated to unions or other entities.” In support of its position, the Employer asserts that “[p]ersonal identifying information of customers/shoppers of a retail department store have no relation to Section 7 rights of employees.”

#### **A. Being Honest Company Assets and Information**

Our Company's assets must be used, purchased or disposed of only for the Company's benefit. We are all obligated to protect the assets of the Company and use them appropriately.

In addition to merchandise, equipment furnishings and other property, our Company's assets include Company information, the personal information of the Company's employees and customers, any work product we may develop in the course of our employment and any business or financial opportunity that the Company could avail itself of.

#### **Confidential Information**

##### **What To Know**

*Confidential information about our Company, its business, associates, customers and business partners should be protected. It can be used only to pursue the Company's business interests or to comply with the Company's legal or other obligations.*

What is confidential information? It could be business or marketing plans, pricing strategies, financial performance before public disclosure, pending negotiations with business partners, *information about employees*, documents that show social security numbers or credit card numbers- *in short, any information, which if known outside the Company could harm the Company or its business partners, customers or employees or allow someone to benefit from having this information before it is publicly known.*

Just as our Company requires that its own confidential information be protected, our Company also requires that the confidential and proprietary information of others be respected.

##### **What To Do**

In performing our duties, we as associates may have access to confidential information relating to our Company, its business, *customers, business partners or our co-workers.*

We are all trusted to maintain the confidentiality of such information and to ensure that the confidential information, whether verbal, written or electronic, is *not disclosed except as specifically authorized.* Additionally, it must be used only for the legitimate business of the Company.

Here are some simple rules to follow.

Confidential information should:

- Be stored in locked file cabinets or drawers and not be left where others can see it,
- Be clearly marked as confidential whenever possible,
- Be shared only with those who need to see it for Company business purposes,
- Not be sent to unattended fax machines or printers,
- Not be discussed where others may hear,
- Be shredded when no longer needed.

Always respect the confidentiality of the information of third parties. *We must not use or disclose any of it except as authorized under a written agreement approved by our Law Department.*

## **B. Use and Protection of Personal Data Policy**

### **What To Know**

The Company has *certain personal data of its present and former associates, customers and vendors.* It respects the privacy of this personal data and is committed to handling this data responsibly and using it only as authorized for legitimate business purposes.

What is considered personal data? *It is information such as names, home and office contact information, social security numbers, driver's license numbers, account numbers and other similar data.*

### **What To Do**

We have a strict obligation to use such personal data in a manner that:

- respects the privacy of our co-workers and our Company's customers and vendors,

- complies with all applicable laws and regulations, and Company policies,
- upholds any confidentiality or privacy obligations of the Company in its contracts.

In addition, we must follow all policies and measures adopted by the Company for the protection of such data from unauthorized use, disclosure or access. If any of us becomes aware of any instance of data being accessed or being used in an unauthorized manner, we must report it immediately to our Divisional Security Administrator or the Law Department.

### **C. Confidentiality and Acceptable Use of Company Systems Policy**

The following standards and procedures apply to your use of, or access to, all Confidential Information.

#### **1. All Non-Public Information is Sensitive**

Any information that is not generally available to the public that relates to the Company or the Company's *customers, employees, vendors, contractors, service providers, Systems, etc.*, that you receive or to which you are given access during your employment or while you are performing services for the Company is classified as "Confidential" or "Internal Use Only" under the Macy's Information Security Policy. As is set forth in the Macy's Information Security Policy, internal access to Confidential Information should only be granted on a "need to know" basis, and such information should not be shared with third parties without prior approval from your Company supervisor and consultation with the Law Department.

#### **3. Use and Protection of Personal Data**

Company maintains certain information regarding its *present and former associates, customers and vendors*. Company respects the privacy of this data where it includes personally-identifiable information ("Personal Data"). *Personal Data includes names, home and office contact information, social security numbers, driver's license numbers, account numbers and other similar data.* Company is committed to handling Personal Data responsibly and using it only as appropriate for legitimate business purposes. This commitment requires that all Company employees, contractors, and third parties who are granted access to Personal Data by Company follow all policies adopted by the Company for

the protection of such data against unauthorized use, disclosure or access. Such policies, including those set forth in the Macy's Information Security Policy, may vary depending on the sensitivity of the Personal Data at issue.

*Personal Data may not be shared with any third party without the written approval of your senior Sales Promotion executive or, for support organizations, your Chief Executive Officer.*

As the Administrative Law Judge noted, each of the above provisions prohibits employees from disclosing information concerning both employees and customers. None of them refers exclusively to customers. Thus, while Respondent addresses only the matter of customer information, each of the three policies found to be unlawfully overbroad addresses the confidentiality of employee information as well as customer information.

### **III. ARGUMENT**

#### **A. Applicable Case Law**

The Board has repeatedly recognized that the mere maintenance of overbroad work rules can violate Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825, 828 (1998); *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979). Indeed, the Board has held that a work rule that prohibits, *inter alia*, unprotected behavior may be unlawful if it also contains prohibitions so broad that they can reasonably be understood as encompassing protected conduct. See, e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 4, 294 (1999) (rule prohibiting "false, vicious, profane, or malicious statements" unlawful because it prohibits statements that are "merely false" and might include union propaganda); *Lafayette Park Hotel*, supra at 828.

In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of their Section 7 rights, the Board applies the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 fn. 5 (2004). Under that framework, the first inquiry is "whether the rule *explicitly* restricts activities protected by Section 7 " (Emphasis in original). If the rule does not explicitly restrict such activity, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activities; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647 The Board further instructs that in determining the legality of the rule, it must be given a reasonable reading; particular phrases should not be read in isolation; and there should not be a presumption of improper interference with employee rights. *Lafayette Park Hotel*, *supra* at 825, 827

The potentially violative phrases must be considered in the proper context. *Compare Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 3 (2012) (rule that prohibited disclosure outside the company of, among other broad categories, "personnel information and documents" could reasonably be construed to prohibit discussion of wages and other terms and conditions of employment with union representatives); *The Roomstore*, 357 NLRB No. 143, slip op. at 1 n.3, 1617 (2011) (finding rule that prohibited "[a]ny type of negative energy or attitudes" was unlawfully overbroad, could reasonably be construed to prohibit concerted discussions); *Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (rule that

prohibited employees from “[a]bandoning job by walking off the shift without permission of your [s]upervisor or [a]dministrator not violative when considered in context that employer was a nursing home and employees would reasonably read the rule as intended to ensure that nursing home patients are not left without adequate care rather than to prohibit strike or similar protected concerted activity). Thus, under *Lafayette Park Hotel*, supra at 825-826, some additional circumstances to consider are: 1) Does the rule address legitimate business concerns?; 2) Is the rule ambiguous as written?; and, 3) Has the Employer exhibited antiunion animus? In addition, the Board considers whether the Employer by other action led employees to believe the rule prohibits Section 7 activity. *Id.* at 826. Notably, rules that are ambiguous as to their application to Section 7 activity and that contain no limiting language or context that would clarify to employees that the rules do not restrict Section 7 rights are unlawful. *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005) (rule proscribing “negative conversations” about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity); *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 399 fn. 8 (1978) (“Where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it”). Board precedent thus holds that mere maintenance of an ambiguous or overly broad rule is unlawful because it tends to



inhibit employees from engaging in otherwise protected activity. *Ingram Book Co.*, 315 NLRB 515, 516 (1994); *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983).

In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful. *Tradesman Intl.*, 338 NLRB 460, 460-462 (2002) (prohibition against “disloyal, disruptive, competitive, or damaging conduct” would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

**B. The Administrative Law Judge correctly concluded that the policies quoted above are overbroad because they restrict disclosure of employee information as well as information related to customers.**

On their face, Respondent's rules preclude employees from disclosing any information deemed confidential, including information about the company, employees, and customers. Respondent's prohibitions are broadly stated and unqualified. As written, employees would reasonably construe them as precluding them from discussing terms and conditions of employment among themselves or with outside parties, including labor organizations or a government investigator, activities that are clearly protected by Section 7 Communications as basic as disclosing one's wage rates or those of other employees, or simple contact information to a union organizer, fall directly within the ambit of the rules. Disclosure of information which could lead to protected appeals to customers and vendors is also proscribed by Respondent's rules.

The Board has consistently found similar confidentiality prohibitions to be unlawful. In *Biggs Foods*, 347 NLRB 425 (2006), the Board found that the Respondent unlawfully maintained an overbroad confidentiality rule, relying on *Cintas Corp.*, 344 NLRB 943 (2005) (confidentiality rule's unqualified prohibition of the release of "any information" regarding its employees would reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment among fellow employees and with the union). The Board has held that rules, which expressly prohibit employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment, restrain and coerce employees in violation of the Section 8(a)(1) of the Act, regardless of whether the rule was unlawfully motivated, or ever enforced. See *Lutheran Heritage Village-Livonia*, supra, 343 NLRB 646; *Flamingo Hilton-Laughlin*, supra, 330 NLRB at 288 fn. 3, 291 (1999) (handbook provision prohibiting employees from disclosing "confidential information regarding fellow employees" a violation). Similarly, the Board found unlawful employer confidentiality rules in *Flamingo Hilton-Laughlin*, supra, and *University Medical Center*, 335 NLRB 1318 (2001). The rule in *Flamingo Hilton-Laughlin*, supra, provided that "[e]mployees will not reveal confidential information regarding our customers, fellow employees, or Hotel Employees." In finding that the rule violated Section 8(a)(1), the Board majority distinguished it from the confidentiality rule found lawful in *Lafayette Park Hotel*, supra, on the basis that, unlike that rule, which made no reference to disclosure of information about employees, the rule in *Flamingo* specifically

prohibited employees from revealing confidential information about “fellow employees.” *Flamingo Hilton-Laughlin*, supra, 330 NLRB at 288 fn. 3. So too did the confidentiality rule in *University Medical Center* (prohibiting “release or disclosure of confidential information concerning patients or employees”), which the Board, relying on *Flamingo Hilton-Laughlin*, 335 NLRB at 1322, found unlawful “because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages, which they might reasonably perceive to be within the scope of the broadly-stated category of ‘confidential information’ about employees.” The same result is warranted here.

Nevertheless, Respondent argues that the policies in question are valid insofar as they prohibit disclosure of confidential, personally identifying customer information. In making this argument, Respondent glosses over the fact that customer information is only one type of disclosure prohibited by the three policies cited above. In addition to information regarding customers, the rules prohibit disclosure of information that relates to employees, contractors, vendors, and others. To parse the rules out as Respondent urges makes no sense in these circumstances, where employees would reasonably infer that employee and customer information are to be treated identically.

Administrative Law Judge Biblowitz correctly noted that, while employers have a “substantial and legitimate interest in maintaining the confidentiality of private information,” *Lafayette Park Hotel*, supra, 326 NLRB at 826, they must “tread carefully and not venture into” employees’ Section 7 rights when formulating

rules regarding confidentiality and privacy. *ALJD at 11*. In finding Respondent's policies overly broad, the Judge distinguished rules found lawful because they were narrowly tailored to protect only information that does not relate to any Section 7 purpose. For example, the lawful rule in *Lafayette Park Hotel*, supra, prohibiting disclosure of "hotel-private information to employees or other individuals or entities that are not authorized to receive that information," could not be reasonably interpreted to prohibit disclosure of employee wage information or other employee information related to Section 7 activity.

Similarly, the rule at issue in *Ark Las Vegas Restaurant Corporation*, 335 NLRB 1284, 1290-1291 (2001), was narrowly tailored to protect information regarding their employer's operations and clients. The rule said nothing about employee information, and could not be reasonably construed to prohibit employees from discussing their wages or other terms and conditions of employment. As Judge Biblowitz noted, the key difference between those rules and Respondent's rules is this: "neither *Lafayette Park* nor *Ark* specifically restrict the flow of employee information," and thus can easily be distinguished from Respondent's policies. *ALJD at 12*.

Respondent's policies are more like the one at issue in *Flamingo Hilton-Laughlin*, supra, which prohibited employees from disclosing "confidential information regarding our customers, fellow employees, or Hotel Employees."<sup>4</sup>

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<sup>4</sup> See also, *Battle's Transportation, Inc.* 362 NLRB No. 17 (2015) (confidentiality agreement prohibiting employees from divulging confidential information such as human resources information and customer contact and medical information was unlawful, as was memo instructing employees not to discuss any company business with clients); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8 (2014) (rule requiring employees to "keep customer and employee information secure, and to use such information "only for the purpose for which it was obtained" was unlawfully overbroad).

Even a hospital may not restrict disclosure of information regarding patients and employees, despite the obvious interest in safeguarding patient privacy, because such a rule “could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages, which they might reasonably perceive to be within the scope of the broadly-stated category of ‘confidential information’ about employees.” *University Medical Center*, supra, 335 NLRB at 1322 (2001). Because they expressly prohibit employees from revealing confidential information regarding other employees, Respondent’s rules are similarly unlawful.

For Respondent to attempt, in its Exceptions, to separate the language in its rules concerning employee information from the language concerning customer information is not only disingenuous, but violates the spirit of *Lafayette Park*, on which this analysis rests. As the Board has repeatedly stated, the ultimate issue is whether employees reading the rules at issue would reasonably read them to restrict their Section 7 rights. Clearly, employees reading Respondent’s rules will reasonably construe them to prohibit disclosure of employee information, which is clearly unlawful, as well as customer information. Reasonable employees will not – and should not be expected to – understand which restrictions are lawful and which are not.

C. **The Administrative Law Judge correctly concluded that the prohibition against disclosure of customer information, by itself, is also unlawfully overbroad.**

It is well established that employees are engaged in protected concerted activity when they contact their employer’s customers regarding matters affecting

their terms and conditions of employment. *Boch Imports*, 362 NLRB No. 83 (April 30, 2015), slip op. at n. 4. See also, *Trinity Protection Services, Inc.*, 357 NLRB No. 117, slip. op. (2011); *Cintas Corporation*, 344 NLRB 943 (2005), enfd. in relevant part 482 F.3d 463 (D.C. Cir.2007); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-1172 (1990), and cases cited therein. Given this principle, an employer rule that prohibits employees from disclosing any non-confidential information about a customer, such as customer names and customer contact information, which Respondent's Use and Protection of Personal Data Policy expressly prohibits, is necessarily overly broad and unlawful. *Boch Imports*, supra. Here, for example, Respondent's employees would have a protected right to concertedly share the name, location and contact information of a customer to a union representative, a governmental agency, or other employees not assigned to the customer location, all in an effort to collectively improve their terms and conditions of employment. See generally, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Employees may seek to share such information in the hope of establishing an organizing drive at the customer location; having a governmental agency investigate matters at that location; or, directing a union representative to speak with the customer on their behalf regarding matters affecting their employment.

In his Recommended Order, Judge Biblowitz included the following cease and desist language:

(a) maintaining overly broad rules in its Employee Handbook that restrict its employees' use of information regarding fellow employees and, but to a lesser extent, the Respondent's customers.

The Administrative Law Judge recognized that the rules were not only unlawful because they included prohibitions against disclosure of employee information, but also because, standing on its own, the prohibition against disclosure of customer information was overly broad and therefore unlawful. It is clear from the language of the proposed Order that the graver error was the former prohibition.

Nevertheless, the Judge correctly concluded that the restrictive language regarding customer information was also improper on its own because employees are permitted to use information regarding customers and vendors "in furtherance of their protected concerted activities." *ALJD at 12.*

As described above, the Board has held that employees may use customer and vendor information to further their Section 7 activities. Although Respondent is correct in stating that the Board has not expressly articulated a right to *disclose* confidential customer information to third parties, it follows that if employees have the right, under Board law, to *communicate* with customers regarding matters affecting their employment, they must be able to share that information as well. Thus, in *Trinity Protection Services*, supra, the Board stated that "employees' concerted communications regarding matters affecting their employment with their employer's customers are protected by Section 7." More recently, in *Boch Imports*, supra, the Board found that policies prohibiting employees from disclosing information about customers or prospective customers were unlawfully overbroad. The prohibitions at issue here are similarly overbroad, as they are not narrowly tailored to protect sensitive customer information such as social security numbers

and account numbers, but instead include customer contact information and other customer data.<sup>5</sup>

Accordingly, because Respondent's Confidential Information and Use and Protection of Personal Data rules prohibit employees from disclosing to other employees and/or third parties employee information and customer contact information that could otherwise be legitimately shared in furtherance of lawful activities protected by Section 7 of the Act, and because these policies fail to state or satisfy any other legitimate employer interest, the ALJ properly found them unlawfully overbroad in violation of Section 8(a)(1) of the Act.

#### **IV. CONCLUSION AND REMEDY**

Counsel for the General Counsel has established, by a preponderance of the evidence, that Respondent has been violating Section 8(a)(5) and (1) of the Act by maintaining the overly broad employee policies described above. Counsel for the General Counsel urges the Board to adopt the Administrative Law Judge's findings of fact and conclusions of law as described herein, and to adopt the recommended order.

Dated: July 7, 2015

  
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<sup>5</sup> Respondent takes the position that its policies further its legitimate interest in "protecting its customer relationship," citing *Pathmark Stores*, 342 NLRB 378, 379 (2004). That case, however, did not involve employee confidentiality policies, but dealt with an inflammatory slogan about the employer's product on pins worn by employees in the workplace.

## CERTIFICATE OF SERVICE

I hereby certify that I served copies of Counsel for the General Counsel's Answering Brief on the parties listed below, by electronic or overnight mail, on this date.

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