15-3988

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ADVANCED SERVICES, INC.,	)
Petitioner,	)
v.	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent.	)

FILED
DEC 3 1 2015
U.S. Court of Appeals
Eighth Circuit-St. Paul, MN

PETITION FOR REVIEW

Pursuant to Federal Rule of Appellate Procedure 15(a), Advanced Services, Inc. hereby petitions the Court for review of the Decision and Order of the National Labor Relations Board ("NLRB") entered on December 22, 2015 in NLRB Case Nos. 26-CA-063184 and 26-CA-071805. A copy of this Decision and Order, reported at 363 NLRB No. 71, is attached.

This Court has jurisdiction because the NLRB's decision is a final order within the meaning of 29 U.S.C. § 160(f) of the National Labor Relations Act, and the Petitioner is an aggrieved party. Venue properly lies in this Court under 29 U.S.C. § 160(f) because Petitioner has physical operations and transacts business within the geographical boundaries of this circuit.

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Eighth Circuit-St. Paul, MN

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Respectfully submitted,

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December 31, 2015

Counsel for Petitioner
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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, a true and correct date-stamped copy of the foregoing Petition for Review, with attachment, was served by electronic mail and overnight mail on the following:

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I hereby certify that on December 31, 2015, a true and correct date-stamped copy of the foregoing Petition for Review, with attachment, was served by electronic mail and overnight mail on the following:

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Advanced Services, Inc. *and* Tabita Sheppard Howard *and* Princess Ballard. Cases 26–CA–063184 and 26–CA–071805

December 22, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On July 2, 2012, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief to the General Counsel's cross-exceptions. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[2] and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.[3] As explained below, we agree with the judge that the Respondent violated Section 8(a)(1) by maintaining the class and collective action waiver in its mandatory alternative dispute resolution policy.[4] Contrary to the judge, we find that the Respondent also violated Section 8(a)(1) by instructing employees to keep confidential any discussion regarding the Respondent's investigation into an employee complaint.

1. Class and collective action waiver

The Respondent, Advanced Services, Inc., is headquartered in Memphis, Tennessee. The Respondent is a wholly owned affiliate of General Electric and provides call center services for consumer appliances and electronics.

In 2004, the Respondent implemented an alternative dispute resolution (ADR) program for employees hired from 2004 forward. In 2011, the Respondent made a number of changes to its ADR program, which it renamed "ASI Solutions" (Solutions or policy). The terms of the policy are set forth in a 27-page document, which contains the following waiver:

> Covered Employees and the Company waive their right to bring any Covered Claims as, or against, a representative or member of a class or collective action (whether opt-in or opt-out) or a private attorney general capacity, unless all parties agree to do so in writing. All covered claims must be brought on an individual basis only in Solutions. Without waiving the Company's right to enforce this Procedure's provisions regarding class and collective action waivers, nothing in this Procedure prohibits employees from acting concertedly to challenge the terms of Solutions by pursing class or collective actions and they will not be subject to discipline or retaliation by the Company for doing so.

"Covered claims" are defined to "include all claims that arise out of or are related to an employee's employment or cessation of employment . . . where a court in the jurisdiction in question would otherwise have the authority to hear and resolve the claim under any federal, state, or local . . . statute, regulation or common law."

The Solutions policy includes four levels. At levels I and II, an employee and management team meet in an attempt to address the employee's concern. If the employee is not satisfied with the resolution, the employee may submit the claim to level III, where an external mediator tries to facilitate a resolution with the employee and the Respondent. If there is no resolution at level III, then the employee submits the claim to level IV where an external arbitrator issues a binding decision.

Certain claims are expressly excluded from levels III and IV of Solutions, including "[c]laims under the National Labor Relations Act." In addition, ASI Solutions provides:

> Nothing in this procedure is intended to discourage or interfere with the parties becoming familiar with and or taking advantage of their rights to file administrative

[1] Member Miscimarra is recused and took no part in the consideration of this case.

[2] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform to the violations found and the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[4] In addition, we agree with the judge, for the reasons stated in her decision, that the Respondent violated Sec. 8(a)(1) by instructing employees not to discuss performance improvement plans with other employees. We also adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by terminating employee Tabita Howard. In doing so, we assume arguendo that the General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), but we find, consistent with the judge's analysis, that the Respondent met its rebuttal burden.

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claims or charges with government agencies or authorities, such as the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), the National Labor Relations Board (www.nlrb.gov), the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp), and law enforcement authorities. Either party may request that an administrative agency or authority with which the other party has filed a claim or charge defer processing that claim or charge pending exhaustion of the Solutions process.

On January 22, 2011, the Respondent sent an email to employees announcing the new Solutions policy. All current employees and new hires were required to sign an acknowledgement form titled the "Solutions Policy Agreement" agreeing to be bound by the policy. In response to employee inquiries, the Respondent sent a second email to employees explaining that they would not be fired for failing to sign the Solutions Policy Agreement, but if they elected to continue their employment, they would be bound by the terms and conditions of the Solution policy regardless of whether they signed the agreement. All employees, even those who refused to sign the agreement, were required to attend a training session and sign an acknowledgement that they had received training and that they understood they were bound by the agreement.

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by maintaining the provision of the Solutions policy that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied ___ F.3d ___ (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. Based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's finding that the class and collective action waiver is unlawful.

The Respondent argues that ASI Solutions includes an exemption allowing employees to file charges with administrative agencies, including with the Board, and thus does not, as in *D. R. Horton* and *Murphy Oil*, unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. In support of its argument, the Respondent cites *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013), in which the court stated, in dicta, that the arbitration agreement there did not bar all concerted employee activity in pursuit of employment claims because the agreement permitted employees to file charges with administrative agencies that could file suit on behalf of a class of employees. We reject the Respondent's argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by maintaining an alternative dispute resolution policy that required employees, as a condition of employment, to waive their Section 7 right to pursue class or collective actions in a judicial or arbitral forum.[5]

2. Prohibiting employees from discussing investigation

During an investigation into alleged supervisor misconduct, the Respondent ordered employees to keep any discussion of the investigation confidential. The General Counsel alleged that the Respondent's instruction was an unlawful promulgation of an overly broad rule because it prohibits discussion among employees about their terms and conditions of employment. Citing *Caesar's Palace*,[6] the judge dismissed the allegation and found that the Respondent demonstrated a legitimate and substantial business justification that outweighed employees' Section 7 rights. We reverse.

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably chills employees in the exercise of their Section 7 rights. Employees have a Section 7 right to discuss discipline or disciplinary investigations involving their fellow employees. An employer may prohibit employees' discussion during an investigation only if it demonstrates that it had a legitimate and substantial business justification that outweighs employees' Section 7 rights. *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 2–3 (2015); *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at

[5] We also adopt the judge's finding that the confidentiality provision in the Solutions Policy Agreement independently violates Sec. 8(a)(1). See *Professional Janitorial Services of Houston*, 363 NLRB No. 35, slip op. at 1 fn. 3 (2015); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert denied 546 U.S. 1170 (2006). We agree with the judge that the Respondent failed to show a legitimate and substantial business justification that outweighs the employees' Sec. 7 rights.

With respect to the confidentiality provision contained in ASI Solutions itself (as opposed to the provision in the Solutions Policy Agreement), we find that provision, which pertains to level I discussions, was not before the judge because it was not alleged in the complaint to be unlawful. Although that issue is closely connected to the allegation in the complaint, we cannot consider it because the confidentiality provision in the agreement was not fully litigated. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

[6] 336 NLRB 271, 272 fn. 6 (2001).

15 (2011), enfd. in relevant part ___ F.3d ___(D.C. Cir. 2015); *Caesar's Palace,* 336 NLRB at 272 fn. 6.

The Respondent's witnesses admitted that managers and human resources supervisors routinely instruct employees involved in investigations not to talk with other employees about those investigations. Such instructions are given in connection with every investigation involving an "integrity" violation (which includes all complaints about supervisors or other employees), without any individual review to determine whether such confidentiality is necessary.

In *Banner Estrella*, the Board stated:

> [I]t is the employer's burden to justify a prohibition on employees discussing a particular ongoing investigation . . . First, the employer must proceed on a case-by-case basis. The employer cannot reflexively impose confidentiality requirements in all cases or in all cases of a particular type. Second, a determination that confidentiality *is* necessary in a particular case must be based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality.

[Slip op. at 3.]

There is no evidence that the Respondent conducted any such preliminary analysis here. To the contrary, the Respondent "reflexively impose[d]" its confidentiality requirements without demonstrating a legitimate and substantial justification. Thus, we find that the Respondent's instruction violated Section 8(a)(1) of the Act. See also *Hyundai America Shipping Agency v. NLRB*, supra ("confidentiality rule was so broad and undifferentiated that . . . . Board reasonably concluded that Hyundai did not present a legitimate business justification.")

ORDER

The Respondent, Advanced Services, Inc., Memphis, Tennessee, is officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a provision in the Solutions Policy Agreement that requires employees to keep confidential all proceedings that arise under ASI Solutions.

(b) Maintaining a mandatory arbitration agreement that requires employees, as a condition of employment, to waive their right to maintain joint, class, or collective actions in all forums, whether arbitral or judicial.

(c) Interfering with, restraining, and coercing employees in the exercise of their Section 7 rights by prohibiting them from discussing performance improvement plans.

(d) Promulgating or maintaining an oral rule prohibiting employees from discussing any misconduct under investigation.

(e) 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) Rescind the Solutions Policy Agreement in all of its forms, or revise it in all of its forms to make clear to employees that it does not require employees to maintain the confidentiality of all proceedings arising under the ASI Solutions policy.

(b) Notify all current and former employees who were required to sign the Solutions Policy Agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Rescind the ASI Solutions in all of its forms or revise it in all of its forms to make it clear to employees that the policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(d) Notify all current and former employees who were required to sign or otherwise become bound to ASI Solutions that the policy has been rescinded or revised and, if revised, provide them a copy of the revised agreement and/or acknowledgement form.

(e) Within 14 days after service by the Region, post at its Memphis, Tennessee facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 15, 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 are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees

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

and former employees employed by the Respondent at any time since July 1, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 15 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.

Dated, Washington, D.C. December 22, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule in the Solutions Policy Agreement that requires employees to keep confidential all proceedings that arise under our ASI Solutions policy.

WE WILL NOT maintain a mandatory arbitration agreement that requires employees as a condition of employment to waive their right to maintain joint, class, or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT interfere with, restrain, and coerce employees in the exercise of their Section 7 rights by prohibiting them from discussing performance improvement plans.

WE WILL NOT promulgate or maintain an oral rule prohibiting employees from discussing any misconduct under investigation.

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 or revise the language in the Solutions Policy Agreement that requires employees to maintain the confidentiality of all proceedings arising under the Solutions policy, and notify employees in writing that this has been done and that the rule is no longer in force.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the Solutions Policy Agreement that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement and/or acknowledgement form.

WE WILL rescind ASI Solutions in all of its forms, or revise it in all of its forms to make it clear to employees that the agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to ASI Solutions that the policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

ADVANCED SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/26–CA–063184 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Susan B. Greenberg, Esq., for the Acting General Counsel.
Bobby C. Simpson, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Memphis, Tennessee, on March 26, 27, and 28, 2012. Tabita Sheppard Howard (Howard) filed a charge on August 18, 2011. Howard also filed a first amended

charge on October 27, 2011, a second amended charge on February 10, 2012, and a third amended charge on March 14, 2012. Princess Ballard (Ballard) filed a charge on December 28, 2011, and a first amended charge on January 19, 2012. On March 9, 2012, the Acting General Counsel issued an order consolidating cases, consolidated complaint, and notice of hearing.

Generally, the consolidated complaint alleges that about July 2011, Advanced Services, Inc. (Respondent) orally promulgated, and since has maintained, a rule prohibiting discussions among employees about their terms and conditions of employment, including their performance improvement plans. The consolidated complaint also alleges that about August 10, 2011, Respondent orally promulgated, and since then has maintained, a rule prohibiting discussions among employees about their terms and conditions of employment, including discipline issued to Respondent's employees. Furthermore, the consolidated complaint alleges that since about April 1, 2011, Respondent has maintained a confidentiality provision and a class claim provision in a mandatory arbitration procedure that interferes with employees' rights under Section 7 of the National Labor Relations Act (the Act). Finally, the consolidated complaint alleges that Respondent terminated Howard on August 11, 2011, because she engaged in concerted activities with other employees for the purposes of mutual aid and protection by discussing a disciplinary warning with other employees on August 11, 2011.

On the entire record, including my observations of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

Respondent, a corporation with an office and place of business in Memphis, Tennessee, operates as a call center for General Electric appliance parts. During the 12-month period ending October 31, 2011, Respondent, in conducting its business operations, caused goods valued in excess of $50,000 to be sold or shipped to points located outside the State of Tennessee through transactions placed and processed at its facility. During the same time period, Respondent, in conducting its business operations, purchased and received at its Memphis, Tennessee facility goods valued in excess of $50,000 directly from points located outside the State of Tennessee. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(1), (6), and (7) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

A. Issues

Counsel for the Acting General Counsel (General Counsel) asserts that the Respondent not only imposed mandatory arbitration procedures that required confidentiality and prohibited class claims, but that Respondent promulgated confidentiality rules that prohibited Ballard from discussing disciplinary warnings or Howard from discussing internal investigations. General Counsel contends that although the Respondent may assert that it is privileged to maintain confidentiality with respect to investigations and arbitration procedures, such an assertion of confidentiality is overly broad, is not tied to the specific circumstances at issue, and lacks a legitimate and substantial business justification. Counsel for the General Counsel further asserts that the arbitration procedure implemented in April 2011 only permits individual claims pursuant to the procedure, and therefore prevents employees from engaging in activity protected by Section 7 of the Act. Additionally, the General Counsel contends that Respondent terminated Howard because Respondent thought that she discussed employee discipline and because she breached the confidentially of an internal investigation.

B. Background

1. Respondent's operation

The Respondent is headquartered and incorporated in Memphis, Tennessee, and is a wholly owned affiliate of General Electric (GE). As a call center for General Electric (GE), Respondent receives telephone calls from GE appliance customers who need replacement parts for their GE product or customers who need a service technician to repair their GE appliance. Respondent's Memphis, Tennessee facility employs approximately 400 employees and has 5 main work groups. These include parts appliance sales, home delivery, customer care, customer and consumer relations, and factory service. All of the employees at the call center work on an open call center floor. Individual employee workstations are located in cubicles that are immediately adjacent to one another. Employee workstations are organized into specific work areas that correspond to the particular call center department within which the employee is assigned. The employees working on the parts appliance sales team receive telephone calls from GE customers who want to order replacement parts. The circumstances of this case involve employees working in this work group.

The success of the employees working in parts appliance sales are measured by the number of calls made by the employees, the quality of how the employees handle the calls with the consumers, and the number of sales that they generate.

2. Respondent's managers

As Respondent's senior vice president and center manager, Jill Sullivan (Sullivan) is ultimately responsible for the call center's operations. She has been with Respondent for 22 years. Since the call center opened in 1990, Sullivan has worked in various capacities. Gertrude Dunlap (Dunlap) reports directly to Sullivan and serves as the operational director for the parts, sales, and home delivery departments. Like Sullivan, Dunlap has held a number of different positions during her 16 years of employment with Respondent. Debora Ulrich (Ulrich) became Respondent's human resources (HR) director on April 18, 2011. Her predecessor, Ora Ford (Ford) had held the position of HR director for only a matter of months before leaving the job in February 2011.

For the relevant time period, Respondent employed four supervisors in the parts sales department. These supervisors included Andrea Slaughter, Rhonda Johnson, Sharon Marshall, and Russ Clack, who was hired in March 2011. Clack supervised approximately 16 employees.

C. Respondent's Alternative Dispute Resolution Procedure

When Respondent began its operation in 1990, Respondent did not have an alternative dispute resolution (ADR) program for its employees. In 2004, Respondent implemented an ADR program for newly hired employees. Employees who had been hired from 1990 to 2003 were not covered by the program. In January 2011, Respondent initiated an ADR program identified as "Solutions Policy Agreement, Agreement to Resolve Employment Claims Under Advanced Services Incorporated's Solution Policy" (Solutions). The Solutions program covered all employees, including those who had been hired during the period from 1990 to 2003. Sullivan testified that in January 2011 Respondent also made a number of updates to its existing policy, including making the program binding on both the Company and the employees, as well as adding a class action waiver clause which contained a provision that permits a collective action if all parties agreed to such. Counsel for Respondent asserts that the program exempts from its jurisdiction any claims that are brought under the National Labor Relations Act (Act). Counsel for the General Counsel would no doubt assert that this is only partially correct.

On January 22, 2011, HR Director Ora Ford sent an email to employees informing them of the new ADR program. Ford explained that employees who continued their employment after April 1, 2011, would be deemed covered by the revised procedure. Ford added that when training was provided on the new program employees would be asked to sign an acknowledgment indicating their understanding of the procedure and the fact that they were bound by its terms if they elected to continue employment after April 1, 2011.

Sullivan testified that following this email announcement she received four or five emails from employees expressing concern and confusion. She said that the employees expressed concern that they were going to be fired if they did not understand or acknowledge the Solutions program. In response, Sullivan sent a February 18, 2011 email to all employees concerning the program and emphasizing that no one would be discharged for electing not to sign the Solutions Agreement form. She clarified, however, that if an employee decided to continue his or her employment after the 60-day period the employee would be deemed bound by the terms and conditions of the program.

Following Sullivan's email, Respondent provided a series of training sessions about the program. Employees who elected not to sign the Solutions Agreement were nevertheless required to attend a Solutions training session and they were asked to sign an acknowledgment of receiving the training, indicating that they understood that they were bound as a result of their continued employment. After she assumed her job in April 2011, Ulrich created another acknowledgment form for employees who were still uncomfortable signing the original Solutions acknowledgment form. By signing the form, the employees acknowledged that they had received training and that they understood that the program was a condition of their employment.

1. The Solutions language limiting class claims

Counsel for the General Counsel asserts that the Solutions procedures precludes all collective or class claims, based on the following language:

> Covered Employees and the Company waive their right to bring any Covered Claims as, or against a representative or member of a class or collective action (whether opt-in or opt-out) or a private attorney general capacity, unless all parties agree to do so in writing. All covered claims must be brought on an individual basis only in Solutions. Without waiving the Company's right to enforce this Procedure's provisions regarding class and collective action waivers, nothing in this Procedure prohibits employees from acting concertedly to challenge the terms of Solutions by pursing class or collective actions and they will not be subject to discipline or retaliation by the Company for doing so.

Counsel for the General Counsel argues that any employment-related claim must be filed on an individual basis. Collective or class claims are prohibited in both judicial and arbitral forums. Counsel maintains that under Solutions employees waive their right to a judicial forum unless Respondent agrees. Counsel also argues that there are no documents to explain what circumstances would cause Respondent to waive its right to arbitrate a claim. Counsel for the General Counsel further asserts that Solutions provides that either party to the mandatory arbitration procedure can ask the NLRB to defer processing a charge until it is resolved through mandatory arbitration. The claims that allege a violation of the Act, however, must be filed and processed through the first two steps of Solutions.

2. Whether Respondent's limitation on class claims violates the Act

The General Counsel submits that the Solutions procedure requires all employees who file a claim to do so on an individual basis and, thus, such a rule violates Section 8(a)(1) of the Act as it precludes filing class claims. Counsel for the General Counsel and counsel for Respondent both cite the Board's decision in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), 203 F.3d 52 (D.C. Cir. 1999), as authority for determining whether a work rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." Citing *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374–380 (D.C. Cir. 2007), Respondent also acknowledges that the Board may conclude that the maintenance of such a rule may be an unfair labor practice even in the absence of enforcement.

Respondent contends that the class-action waiver clause of Solutions is not violative of the Act and further argues that agreements between employers and employees to arbitrate employment disputes are clearly enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. Relying on the Supreme Court's decision in *AT&T Mobility LLC v. Conception*, 131 S.Ct. 1740, 1749 (2011), Respondent maintains that the overriding goal of the FAA is to "ensure judicial enforcement of privately made agreements to arbitrate." In January 2012, however, the Board found an arbitration agreement to violate the Act despite the FAA's pro-arbitration policy or the Court's ruling in *AT&T Mobility v. Conception*. In its decision in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), the Board held that a mandatory arbitration procedure unlawfully restricts employ-

ees' Section 7 right to engage in concerted activity if it precludes filing employment-related collective or class claims against their employer in both arbitral and judicial forums. Specifically, the Board explained that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial. Id., slip op. at 1.

Citing *J. I. Case Co. v. NLRB*, 321 U.S. 350 (1940), the Board *in D. R. Horton* noted that the Supreme Court has made clear that wherever private contracts conflict with the functions of the Act, "they obviously must yield or the Act would be reduced to a futility." The Board further explained that finding a class-action waiver to be unlawful does not conflict with the FAA because the waiver interferes with substantive rights under the Act, and the intent of the FAA was to leave substantive rights undisturbed. Respondent argues that the Board wrongly decided *D. R. Horton* "by establishing, for the first time ever, that the Act creates a substantive right to class action litigation which cannot be voluntarily waived by employees as part of a valid arbitration agreement." Respondent's argument, however, is without merit. In its January 2012 decision, the Board did not newly establish class-action litigation as a substantive right. As the Board points out, "Section 7 of the NLRA vests employees with a substantive right to engage in specified forms of associational activity." The Board went on to explain that the Act gives employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and noted that the Supreme Court has long held that "mutual aid or protection" includes employees' efforts to "improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationships." *D. R. Horton,* above, slip op. at 1, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978). Furthermore, the Court specifically stated in *Eastex* that Section 7 "protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums." Id. at 565–566. The Board in *D. R. Horton* found this protection to be equally true of employees' resort to arbitration. *D. R. Horton,* above, slip op. at 1. As the Board went on to point out, arbitration is but one form of collective efforts to redress workplace wrongs or to improve workplace conditions that are at the core of what Congress intended to protect by adopting the broad language of Section 7. Such conduct is not peripheral but central to the Act's purpose. *D. R. Horton*, above, slip op. at 4. Thus, the assertion that class action or collective action is merely procedural and waivable negates the very purpose of the Act.

Respondent also contends that the Board's decision in *D. R. Horton* is not applicable in this circumstance because the arbitration agreement language herein is sufficiently dissimilar to that scrutinized by the Board in *D. R. Horton*. Specifically, Respondent argues that the Solutions language permits collective challenges to the Solutions agreement itself. The addition of such language, however, does not eliminate the requirement for employees to bring their claims individually rather than collectively. Respondent also asserts that the class-waiver clause may be waived if Respondent and the employee agree to do so. The agreement does not clarify the circumstances in which Respondent would enter into such an agreement. Without these written assurances, the language is hollow. Employees may reasonably conclude that there are few, if any, circumstances in which the Respondent would agree to relinquish the class-waiver clause.

The overall record reflects that the Solutions language in issue is likely to have a chilling effect on employees' Section 7 rights and violates Section 8(a)(1), even in the absence of enforcement. *Lafayette Park Hotel*, 326 NLRB, above at 825. Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act as alleged in paragraphs 8(b) and 10 of the consolidated complaint.

3. Confidentiality language in Solutions

Respondent does not deny that as of April 2, 2011, the following confidentiality language was binding on Respondent's employees:

> I understand and agree that all proceedings under this Agreement and Solutions, including the arbitration hearing and record, all documents exchanged in discovery or otherwise used, and all communications in connection with the resolution or arbitration of my covered claims shall be confidential and not disclosed to the pubic, except (a) to the extent that the Company and I agree in writing otherwise; (b) as may be appropriate in subsequent proceedings to enforce or invalidate the arbitrator's decision under this Agreement; or (c) as may be appropriate in response to a government agency or legal process.

The confidentiality is reiterated in another portion of the Solutions program that discusses level I of the progressive steps. The section is termed "Confidentiality and inadmissibility of discussions" and includes the following language:

> Statements made in the meeting are understood to be solely for the purpose of reaching a resolution of the employee's claim and shall be kept confidential by the employee except as provided below, and conveyed on a need-to-know basis by the Company. However, either party may gather information in support of the effort to resolve the claim as long as it is not one in violation of Company policy or law.

In order to determine whether an existing confidentiality rule is unlawful, the Board has set out a framework for evaluating employer confidentiality rules. The rule must first be examined to determine whether it explicitly restricts Section 7 activity. If it does not, the circumstances must be evaluated to determine whether (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activities; or (3) the rule has been applied to restrict the exercise of Section 7 rights. If any of these circumstances are shown to apply, the rule infringes on employee rights under the Act. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Accordingly, an employer's confidentiality rule that is shown to infringe on Section 7 rights may be found to be unlawful unless the employer articulates and establishes a legitimate and substantial business justification for the rule that outweighs the infringement on employee

rights. See, e.g., Caesar's *Palace,* 336 NLRB 271 (2001); and *Phoenix Transit System*, 337 NLRB 510 (2002).

Respondent argues that the confidentiality provision in issue serves a legitimate purpose and that is to foster trust between Respondent and the employee in the resolution of workplace disputes. Respondent asserts that the confidentiality provision provides the employee security in knowing that any sensitive, personal information or situation that is bound up in the workplace dispute will not be broadly disseminated to other employees or the public. Respondent contends that an employee bound by Solutions and the confidentiality language can still freely exercise his or her rights under the Act. Counsel for the General Counsel asserts, however, that the procedure's confidentiality requirements are imposed at a time when it is most critical, and precludes employee discussion to determine the existence of common issues. Essentially, employees would be unable to disclose to other employees information about their employment dispute with Respondent, thus creating an unlawful barrier to group action. Additionally, counsel for the General Counsel argues that limitations on employee discussions are not limited to time or place in Solutions. The procedure requires that all communications must remain confidential even after a resolution.

Thus, the total record evidence reflects that the confidentiality language in issue would reasonably bar employees from discussing the issues or circumstances related to the arbitration process in which they are involved. Inasmuch as this prohibition would reasonably be construed by employees to bar them from discussing matters concerning their conditions of employment, employees are thus prohibited from engaging in activity that is protected by Section 7 of the Act. Although Respondent contends that the confidentiality rule serves to foster trust between the Respondent and its employees, Respondent has demonstrated no legitimate and/or substantial business justification that would outweigh the Section 7 interests of employees that is restricted by this rule. Accordingly, I find that the confidentiality provision contained in the Solutions policy agreement violates Section 8(a)(1) of the Act as alleged in paragraphs 8(b) and 10 of the consolidated complaint.

D. The Termination of Tabita Sheppard Howard

1. Background

On August 10, 2011, at 8:56 a.m., Parts Department Operations Manager Dunlap sent an email to parts sales employees and the subject line of the email included "Newspaper at desk." Dunlap told employees that she had just conducted a "walk through" of the department and she observed "a lot of newspaper out on the desk." She reminded the employees that this item is not allowed for viewing during work hours. She also told the employees that a supervisor would meet with any employee who was in violation of the policy. At 9:03 a.m., Sullivan sent an email to both Dunlap and Ulrich[1] with the message: "Corrective action for 'failing to follow proper procedures' is warranted."

After the issuance of Dunlap's and Sullivan's emails, Supervisor Russ Clack observed reading materials on the desk of Katina Powell (Powell.) He testified that fellow Supervisor Andrea Slaughter had been a supervisor for a number of years and had also assisted him in transition into his new job. As a new supervisor, Clack asked for Slaughter's advice about issuing discipline. He recalled that while he voiced his displeasure to Slaughter for having to discipline Powell, he nevertheless asked Slaughter what he needed to do. He spoke with Slaughter at her desk in the open work area. Tabita Howard (Howard) works in the section of the parts service department that is supervised by Slaughter. Howard testified that she observed Clack speaking with Slaughter around 9 a.m. She denied that she overheard any of their conversation.

After conferring with Slaughter, Clack then issued a written corrective action to Powell on August 10, 2011, sometime between 9 and 10 a.m. Powell testified that at that time she did not tell any of her fellow workers about receiving the discipline.

Later that same morning, Howard took her 15-minute break and took a walk around the building. When she returned to the building, she entered the door at the back of the parts department. A video from the work area showed Howard walking down an aisle where employees Ballard and Powell were seated. Powell estimated that Howard was approximately 5-1/2 feet away from her. Powell testified that when Howard walked down the aisle she made the statement that Clack was "down there bragging about someone he wrote up on his team." Powell testified that there was no doubt in her mind that this is what Howard said.

At 12:19 p.m., and approximately 15 or 20 minutes after hearing Howard's statement, Powell sent an email to Dunlap voicing her concerns about Clack's behavior. In the email, Powell placed the following in capital letters:

> THIS IS MY CONCERN: TABITA HOWARD CAME DOWN HERE SAYING RUSS [sic] HAS BEEN BRAGGING ABOUT WRITING SOME ONE UP ON his team.

Powell added:

> I didn't tell anyone on our team I had been written up this morning but he's down there bragging and [sic] think this is not professional on his behalf.

Powell stated that if this occurred again, she would complain to Sullivan or higher management because she did not feel that such conduct was professional. She also included that everyone on her aisle was trying to determine who had been disciplined and she opined that even though she had not told anyone Clack might tell the other employees.

At 12:43 p.m., Dunlap replied to Powell with the following email:

> I will look into matter and attempt validation of this accusation. However, I will not be able to discuss the outcome with you. Please know that it is never professional for a member of management to discuss agent performance or disciplinary matters with agents.
>
> If you feel the need to speak with someone else, we do have

[1] The email identified as GC Exh. 6 reflects that only management received copies of Sullivan's email.

an open door policy. Let's stay with facts if this needs to go any further.

Powell replied simply: "I understand. . . . . But please address him."

2. Respondent begins an investigation based on Powell's complaint

After sending a copy of Powell's email to HR, Dunlap sent an email to Howard and asked her to come to Dunlap's office. Dunlap testified that at that time she had worked with Howard for approximately 10 years. For 2 years, she had been Howard's frontline supervisor before serving as operations director for 6 or 7 years. Dunlap testified that she did not have Howard sit at the table where Dunlap customarily issues discipline or administers performance coaching to employees. Dunlap told Howard that a complaint had been lodged against one of the supervisors and that Howard had been identified as having overheard the supervisor bragging on the center floor about disciplining an employee. Dunlap testified that she did not mention either Powell's name or Clack's name as the employee and supervisor named in the complaint. Dunlap maintained that she simply asked Howard if she knew anything about the situation. Howard testified that Dunlap told her that an anonymous email had stated that Howard had been overheard saying that a supervisor was bragging about writing up other employees. When Howard was asked on cross-examination if she had thought that she was in trouble during the meeting with Dunlap, Howard responded, "No, not at all."

Howard responded by telling Dunlap that her immediate supervisor had not made any comments and would not do so. Continuing the conversation, Howard denied that she knew about comments from any of the supervisors. Howard testified that she asked Dunlap who had sent the email to her and Dunlap told her that she couldn't tell Howard. Dunlap recalled that Howard became nervous and seemed uncomfortable. Howard told Dunlap that other agents were out to get her or to complain about her and wanted to see her fired. Howard also told Dunlap that the sales records for the day would show that she had a great day. Howard testified that she had told Dunlap that if she checked the sales track and the phone connection she would see that she had been at her desk working. Howard also suggested that Dunlap view footage from the surveillance cameras, which would show that she was not away from her desk for any length of time. Dunlap recalled that at some point in the conversation she told Howard that even though she had the email indicating that Howard knew something about the incident she would take Howard's word for it that she knew nothing about the incident.

After meeting with Howard, Dunlap sent an email to HR Generalist Angie Settles (Settles), giving her a description of her meeting with Howard. Dunlap described the meeting with Howard as very interesting. She told Settles that not only had Howard denied hearing any supervisor mention disciplinary warnings that morning, but she had also asserted that she had not left her work area except for breaks and restroom visits. Dunlap told Settles that she planned to speak with Clack and see if he could help solve the mystery.

After Dunlap's interview with Howard, Dunlap and Settles then met with Powell. Dunlap testified that in order to give Powell more privacy the meeting was held in a coaching and conference room rather than in her office. Powell recalled telling Dunlap and Settles that she was upset because she didn't think that Clack could discuss with anyone that he had disciplined her and that she thought that he had acted completely unprofessional. She told Dunlap that Clack's conduct was wrong and that he should be disciplined. Dunlap described Powell as visibly upset. Powell asked Dunlap to get all the facts and she suggested that employee Pam Moore could corroborate what occurred. Dunlap did not tell Powell during the meeting that she had already spoken with Howard or that Howard had not corroborated Powell's description of what occurred.

When Settles and Dunlap spoke with Moore about the incident, Moore recalled that Howard had walked down her row and Moore had heard the comment "bragging" about discipline. After speaking with both Slaughter and Clack, Dunlap learned that they had met on the floor to discuss discipline concerning the reading materials. Slaughter confirmed to Settles and Dunlap that Clack had talked with her that morning. He told her that one of his employees had reading material on her desk and he asked what kind of discipline to give. Slaughter confirmed that Clack had not identified the employee's name. Dunlap and Settles then met with Ulrich and briefed her on what they had learned during the various interviews. Because Howard had mentioned the video tapes during her meeting with Dunlap, Ulrich suggested that they view the video of the work area during the time of the alleged statement. When they did so, they saw Howard walking down the row where Powell and Moore were seated.

3. Howard's contact with Powell

Shortly after Powell returned to her desk from meeting with Dunlap and Settles, she received a text message from Howard, asking Powell to telephone her. Powell went into the breakroom and telephoned Howard. During the conversation, Howard told Powell about being called into Dunlap's office and being questioned about a complaint concerning a supervisor's discussion of discipline. Realizing that the complaint had been hers, Powell explained that she had been the one who had complained to Dunlap about Clack's statement. Powell also spoke with Howard again when Powell returned to her car at the end of the workday. Powell testified that during the course of these conversations, Howard told her that her earlier statement was only meant to convey that Clack "looked" as though he was writing up someone. Powell recalled that Howard had said it was like a "metaphor." In her testimony, Powell added that Howard had explained to her in their telephone conversation that Clack had merely looked as though he had written up someone. Powell told Howard that she would contact Dunlap the next day and stop the investigation.

The next morning after her conversation with Howard, Powell sent Dunlap an email stating that she and Howard had spoken the previous day about Howard's statement, and that Howard had explained to her that she made the statement in a metaphor form. Powell told Dunlap that she first should have asked Howard whether Howard was serious or playing when Howard mentioned that Clack was bragging about issuing discipline.

Powell asked Dunlap to cancel the investigation.

4. Respondent's meeting with Powell

Ulrich testified that she was shocked when Dunlap forwarded Powell's August 11, 2011 email to her. Ulrich and Dunlap met with Powell and asked her to explain the email. Powell told them that she had taken Howard's words out of context and that Howard had only used a metaphor. She told them that she wanted them to stop the investigation. Ulrich reminded Powell that this was a formal investigation and that they had her documented statement from the previous day, as well as others involved in the investigation. Ulrich told Powell to think hard and to tell them which version that she wanted to give them. Powell then told them that she wanted to tell the truth and that the truth was what she had told the previous day. She reiterated that Howard had said that Clack had bragged about writing up an employee. Dunlap told Powell that she would be disciplined for attempting to impede an investigation. Dunlap testified that it was important that Powell understand the importance of what had happened and the seriousness of the investigation. On August 12, 2011, Powell was given a final warning. Ulrich testified that Powell received a warning rather than a discharge because she had ultimately elected to tell the truth.

5. Howard's termination

On August 11, 2001, Dunlap and Ulrich presented their findings on the investigation to Sullivan. Based on the investigation and a determination that Howard was dishonest during the investigation, Respondent decided to discharge Howard. During Howard's termination interview, Howard asked Dunlap if she had viewed the surveillance film as Howard had suggested during the investigation. Dunlap confirmed that she had. Howard then asked if the camera had audio. When Dunlap replied that it did not, Howard responded, "So you have nothing with me saying these words that I am accused of saying?"

6. Conclusions concerning Howard's discharge

a. Howard's statement to employees

Citing *Rinke Pontiac Co.*, 216 NLRB 239, 241–242 (1975), counsel for the General Counsel points out that an employer violates Section 8(a)(1) when it discharges an employer for engaging in protected concerted activity. Additionally, as counsel for the General Counsel submits, employees are engaged in concerted activities for mutual aid or protection when they join together to improve working conditions.[2] Counsel asserts that in this case, Respondent perceived Howard as engaging in the protected concerted activity of telling her coworkers that their supervisor had issued a disciplinary warning. Counsel further contends that Howard's actual protected activity consisted of warning her coworkers that Clack "looked like he might issue a warning."

For a number of reasons, I do not find that Respondent terminated Howard because she was either perceived to have engaged in protected concerted activity or because she actually engaged in protected concerted activity. This finding is based on the total record evidence and the absence of credible testimony to support a finding of Respondent's unlawful motive. Howard testified that Dunlap told her that she had received a report that Howard had stated that a supervisor had talked openly about his having disciplined employees and that the person giving the report was adamant that Dunlap take care of the situation. Ulrich testified, without contradiction, that management level employees are not permitted to share information such as disciplinary actions, salary, performance, improvement actions concerning nonmanagement employees with other nonmanagement employees. Neither Howard nor any other employee disputed the fact that supervisors were not permitted to discuss or disclose discipline that they issue to employees. As noted above, Howard testified that she did not feel that she was in any trouble when she went to Dunlap's office on August 10, 2011. Admittedly, Dunlap was sharing with Howard that Respondent had reason to believe that a supervisor may have violated this rule and Dunlap was seeking Howard's assistance in investigating the claim. Howard's response was to disclaim any knowledge of such a situation and to deny any wrongdoing by supervisors or her. Howard suggested that Respondent look at the surveillance tape to verify that she had only briefly walked through the area where the comment was alleged to have been made.

Overall, I find Howard's testimony less credible than other witnesses whose testimony was at odds with Howard's. Howard does not deny that she observed Clack and Slaughter talking with each other and near to the time of Sullivan's email concerning discipline for employees. She denies, however, that she overheard anything that they were discussing. Howard also acknowledges that when she returned from her break later in the morning, she passed by the desk where Powell was seated and that she made a statement as she did so. She contends that she told employees:

> "Hey you all, you all might want to put up you all's reading materials, magazines, and coupons because they going to be bragging about writing us up again."

Howard denies that she overheard Clack and Slaughter discussing discipline for employees having reading materials at their desk and she told Dunlap that she knew nothing about any supervisors discussing the possibility of discipline. She does not contend that she knew about Sullivan's email to Dunlap and Ulrich with the instructions that corrective action was warranted for employees' failing to follow the proper procedures. Based on Howard's testimony, the only information that she received from management on the issue of reading material in the work area was the original email from Dunlap reminding employees of the rule restricting reading materials and Dunlap's statement that the employee's supervisor would meet with them if they were not following the policy.

Howard thus asserts that even though she had no knowledge that anyone was going to be disciplined or had been disciplined, she nevertheless took this opportunity 3 hours after Dunlap's email to give employees a comprehensive warning about the various reading materials that were prohibited and to give them her prediction that supervisors would not only issue discipline, but would in fact brag about doing so. Howard's assertion that she used these exact words is not only implausible, but the testimony seems unnatural. This alleged warning to employees

[2] Citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

appears as a rather cumbersome means of reconciling a reference to supervisors' "bragging" with Powell's specific recall of what Howard said and Moore's limited recall of Howard's statement. Overall, Howard's testimony about her alleged statement is not supported by the other employees and generally lacks credibility.

There is no dispute that Howard did not answer Dunlap's questions truthfully. While the Board has certainly found that an employee's dishonesty about his or her protected concerted activity cannot constitute a lawful reason for discharge, the circumstances of this case are distinguishable from such circumstances. *United Services Automobile Assn.*, 340 NLRB 784 (2003). There is no evidence that Howard's dishonesty occurred during an unlawful interrogation by Dunlap or any other manager. Dunlap had a valid basis for asking Howard if she knew anything about the circumstances alleged in Powell's complaint. Any questioning of Howard occurred in an attempt to verify Powell's complaint and in the course of a legitimate investigation to determine if a supervisor had violated the confidence of an employee. See *Bridgestone Firestone South Carolina*, 350 NLRB 526, 530 (2007). Howard was not under investigation for any wrongdoing or perceived wrongdoing at the time that she spoke with Dunlap. She testified, without hesitation, that she did not feel that she was in trouble when she spoke with Dunlap.

As counsel for the General Counsel points out in brief, the Board uses a specific analysis to determine whether an employee has been adversely affected for engaging in protected concerted activity. The analysis requires the General Counsel to meet an initial burden of showing that (1) the employee was engaged in protected activity; (2) the employer had knowledge of the protected activity; and (3) the employer had animus toward the employee's protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In applying this analysis to the evidence in the instant case, I do not find that Respondent terminated Howard for engaging in protected activity.

As discussed above, the overall record testimony does not support a finding that Howard engaged in protected activity. Her contention that she warned employees on August 10, 2011, that they would be disciplined if they had reading materials on their desk and that such discipline would then result in a supervisor bragging about issuing the discipline is unsupported by other witnesses. Although Powell attempted to change her statement to Dunlap after talking with Howard, Powell ultimately recanted and contradicted Howard's testimony in not only her final statement to Dunlap but in her testimony as well. No employee corroborated Howard's testimony that she warned employees that they would be disciplined as she alleges. Thus, there is no credible evidence that Howard engaged in the protected activity as alleged.

Counsel for the General Counsel submits that Howard was also terminated because Respondent "perceived" that Howard had engaged in protected activity by telling her fellow employees that their supervisor had issued a disciplinary warning. The difficulty with this hypothesis, however, is the fact that Howard's testimony conflicts with this proposition. There is no dispute that Howard told Dunlap that she did not know anything about any discipline. It was only when Howard testified in this hearing that she asserted that she warned employees that they could be disciplined and she has continued to deny that she made any mention of employees having been disciplined. Thus, the argument that Respondent perceived or knew that Howard was engaged in the protected activity of informing employees that a supervisor had issued discipline is undercut by the fact that Howard denied to Dunlap that she knew anything about discipline being given or that she told employees that discipline had been issued. Furthermore, Howard testified that when an employee is disciplined, it is the practice for the other employees to not only talk about the disciple and ask questions of each other, but to have what she described as "full-blown discussions about the whole thing." Thus, based on Howard's testimony, even if Respondent knew that Howard had discussed Clack's discipline to an employee, the employees had a practice of doing so and there was not anything unusual or unique about her having done so.

Consequently, there is not only insufficient evidence that Howard engaged in protected activity by telling employees that a supervisor had issued discipline, but also a lack of evidence that demonstrates Respondent's animus in knowing or perceiving that she did so.

b. The alleged breach of confidentiality

Counsel for the General Counsel submits that Howard was also terminated because she breached the confidentiality of the Integrity investigation that was launched by Powell's initial complaint. In Howard's termination letter, Dunlap recaps the events that led to Howard's termination. Although Dunlap mentioned in the letter that she told Howard that she should keep their conversation confidential because of the ongoing investigation, Dunlap did not state that Howard was terminated for breaching that confidentiality. Dunlap addressed Respondent's findings that Howard's actions and statement to Dunlap were at odds.

When Ulrich replied to the Tennessee Department of Labor and Workforce Development after Howard's discharge, Ulrich included that Howard was terminated because she gave false information during a formal investigation and by breaching the confidentiality of that investigation. Although Howard's breach of confidentiality is referenced in Respondent's reference to the State of Tennessee, I do not find that Howard was unlawfully terminated because of such breach.

The lawfulness of Howard's termination cannot be analyzed without also addressing the allegations included in paragraph 7 of the consolidated complaint. Paragraph 7 alleges that about August 10, 2011, Respondent, by Gertrude Dunlap, at Respondent's Memphis facility, orally promulgated, and since then has maintained, a rule prohibiting discussions among employees about their terms and conditions of employment, including discipline issued to Respondent's.

The Board has held that an employer's restriction on employee communication is overbroad when that restriction is not limited by time or place. *SNE Enterprises*, 347 NLRB 472, 492-493 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007). Furthermore, an employer's restriction on employees' discuss-

ing confidential information interferes with employees' Section 7 rights unless the employer can demonstrate a legitimate and substantial business justification that outweighs the employee's Section 7 interests. *Caesar's Palace*, 336 NLRB 271, 272 fn. 6 (2001).

Respondent asserts that its business is such that it processes and handles sensitive and confidential personal consumer information. Respondent's assertion is certainly supported by the fact that employees are under the scrutiny of surveillance cameras on the work floor. Sullivan and Dunlap testified that there are occasions when Respondent conducts investigations that are termed "Integrity investigations" involving such matters as employee wrongdoing relative to the sharing of confidential proprietary business information, violence in the workplace, or instances where a member of management is implicated in broadly sharing employee discipline. Respondent acknowledges that during an Integrity investigation, the employees who possess relevant information pertaining to the events under inquiry are admonished not to speak with other employees about the information shared during the investigation, while the investigation is ongoing. Respondent does not deny that Powell and Howard were admonished not to discuss with other employees the information shared during the investigation. In support of its right to impose this restriction on employees, Respondent cites the Board's decision in *Caesar's Palace*, 336 NLRB, above at 272, wherein the Board found that the employer established a substantial and legitimate business justification in imposing a confidentiality rule during an investigation of alleged illegal drug activity in the workplace. Although the circumstances of the instant case are somewhat different from those before the Board in *Caesar's Palace*, there is a commonality in the respective purposes for the confidentiality restriction. In *Caesar's Palace*, the employer imposed the confidentiality rule during an investigation involving allegations of a management coverup and possible management retaliation. The employer put the rule in place not only to ensure the safety of witnesses, but also to make sure that evidence was not destroyed or that the testimony was not fabricated. Respondent contends that in this case, the admonitions by Dunlap reflect the same substantial and legitimate business justifications articulated by the employer and endorsed by the Board in *Caesar's Palace*. Although the instant case does not involve alleged illegal activity, the investigation involved alleged misconduct by a supervisor that was considered serious by both management and employees. Prior to meeting with Howard, Dunlap had reason to believe that Howard was a witness to a supervisor's misconduct and as such it was reasonable that her identity should be protected in a confidential investigation. Dunlap's admonishment to Howard did not relate to Howard's discipline or even to another employee's discipline. These circumstances are distinguishable from those before the Board in *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999), where the employer's instruction not to discuss an employee's suspension with anyone violated the Act, particularly when the prohibition restricted employees "from possibly obtaining information from their coworkers which might be used in their defense."

Thus, I do not find that Dunlap's instructions to Howard on August 10, 2011, constituted the promulgation or maintenance of a rule that prohibits discussions among employees about their terms and conditions of employment, including discipline issued to Respondent's employees as alleged in paragraph 7 of the consolidated complaint. Furthermore, I do not find that Respondent terminated Howard because she breached the confidentiality of such an unlawful rule. Counsel for the General Counsel points out that Howard testified that she did not recall talking with Powell on August 10, 2011. According to Howard, she received a text message from Powell stating that Powell was not trying to get Howard into trouble, but only that she had tried to get Clack into trouble. Howard claims that she texted a response stating "I guess that you had to do what you had to do." Thus, if Howard's version of her contact with Powell is credited, Howard did nothing to breach the confidentiality of the investigation by talking with Powell other than responding to the text that she claims to have received from Powell. Interestingly, in her testimony, Howard only recalls speaking with Princess Ballard on the evening of August 10 about her meeting with Dunlap. Howard testified that when she spoke with Ballard on August 10 she gave a brief description of what happened to her that day. Howard testified that Ballard replied, "Well, sweetie, you didn't do that." When Ballard testified, however, she only recalled that she had seen Howard walk through her work area during her break. Ballard testified that she was on the telephone at the time and she had no knowledge of what was said when Howard walked through her work area. While I realize that the issue is a matter of whether Respondent believed that Howard breached the confidentiality of the investigation rather than whether she did so, this specific contradiction of testimony is indicative of the overall contradiction in record testimony.

Accordingly, the overall evidence does not support a finding that Respondent terminated Howard because she breached an unlawful confidentiality rule.

c. Howard's discharge in the absence of protected activity

As discussed above, I do not find sufficient evidence that Howard's conduct constituted protected concerted activity. Even assuming, however, that Howard engaged in protected activity, I find that Respondent would have terminated her despite any protected activity. Even when the General Counsel has met the burden of showing that an employer took an adverse action against an employee because of that employee's protected activity; the employer may nevertheless demonstrate that it took the adverse action for a legitimate nondiscriminatory business reason. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). If the General Counsel has established a link, or nexus, between the employee's protected activity and the adverse employment action, there is a presumption that the adverse employment action violated the Act. To rebut that presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

The total record evidence supports a finding that Respondent terminated Howard because Respondent determined that she had not been truthful during the Integrity investigation. Having

found Powell's testimony to be credible, it is also likely that Howard may have played a role in persuading Powell to change her statement to Dunlap. Although Powell initially tried to change her statement to match Howard's assertions, Powell ultimately recanted. In doing so, Powell removed any doubt that Respondent may have had about Howard's truthfulness with Dunlap. Thus, while I do not find that Howard was terminated because of any protected activity or perceived protected activity, I also find that Respondent has established that it would have terminated Howard even in the absence of any protected activity. Accordingly, I recommend dismissal of the allegation that Howard was unlawfully terminated.

I cannot leave the discussion of this allegation without adding a brief comment about the unfortunate nature of how the events in this case unfolded. At the time that Howard was terminated, she had been Respondent's employee for 15 years. The events of August 10, 2011, should not have been any different for Howard than any other morning at Respondent's facility. Howard took her break at the usual time and reentered the building from her break within the prescribed period. There is no contention that she lingered at any employee' desk as she returned from her break to the work area. When she was later called to Dunlap's office, she was not accused of any misconduct. Dunlap shared the information that she had received from an undisclosed source and asked Howard if she had information about the incident in issue. There is no evidence that Dunlap accused Howard of misconduct or even implied that Howard had done anything wrong. Howard testified that she did not feel that she was in any trouble when she spoke with Dunlap. Howard also testified that employees talk freely with each other when another employee is disciplined. She explained that they ask questions of each other and have "full-blown" discussions about the discipline in issue. Thus, based on Howard's testimony, there was no logical reason for her to have been untruthful with Dunlap. And yet, in this one apparent impulsive action, Howard set in motion the events that ultimately led to her discharge. When Powell and Howard spoke later that evening, it obviously became apparent to both of them that they had given conflicting statements. Powell attempted to remedy the situation by trying to change her statement the next day. Her attempt to do so, however, only triggered more scrutiny. When Powell ultimately admitted that Howard made the statement about Clack as Powell had originally reported on August 10, Howard's lack of truthfulness during the investigation became apparent to Respondent and became a basis for termination. Based on the total record, I am convinced that it was not the subject of Howard's deception, but the actual act of deception that triggered her termination.

E. Complaint Paragraph 6

Complaint paragraph 6 of the consolidated complaint alleges that on or about July 2011, a more exact date being unknown to the Acting General Counsel, Respondent, by Russ Clack, at Respondent's Memphis facility, orally promulgated, and since then has maintained, a rule prohibiting discussions among employees about their terms and conditions of employment, including their performance improvement plans. The Acting General Counsel alleges that in Clack's doing so, Respondent violated Section 8(a)(1) of the Act.

Evidence Presented in Support of the Complaint Allegation

The Acting General Counsel presented two witnesses in support of complaint paragraph 6. Former employee Nicole Nathan testified that during her employment with Respondent, Clack disciplined her on three occasions by issuing performance improvement plans (PIPs). Clack issued the PIP's at his desk without anyone else present. Nathan testified that during the course of giving her one of the PIP's, Clack told her that she was not to share with other agents that she had received a PIP. Nathan testified that Clack stated that the discipline was just between the two of them and confidential. Nathan testified that despite Clack's comments, she told others that she had been disciplined.

Former employee Princess Ballard testified that she attended a roundtable meeting with other employees as well as with Sullivan and Ulrich. During the course of the discussions, Ballard brought up the subject of employee PIPs as related to the employees' ability to meet their sales goals. Clack had not been present during the discussion. Ballard recalled that the following day, Clack asked her why she had brought up PIPs at the meeting when she was not under a PIP at that time. During their discussion, he also told Ballard that other employees do not know if an employee is on a PIP and that being on a PIP is really only for the employee, the supervisor, and HR to know as it is confidential. Ballard confirmed that although Clack issued her three PIPs before her termination, Clack did not tell her again that she could not discuss her discipline after giving her the first PIP.

Employee Shirley Bowles testified that when she received discipline from Clack, he did not prohibit her from telling other employees about her discipline. Clack also denied that he had ever told an employee that they could not share information with other employees about their discipline.

As discussed above, the Board's decision in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), provides the framework for determining whether the maintenance of certain work rules violates Section 8(a)(1) of the Act. The Board found that "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." In this case, the Acting General Counsel alleges that Clack's comments to both Ballard and Nathan unlawfully restricts the ability of employees to engage in the protected activity of discussing discipline and is thus violative of Section 8(a)(1) of the Act. In determining whether a rule unlawfully prohibits employee discussion of discipline or disciplinary investigations, the Board looks to whether the employer's asserted business justifications for the prohibition outweighs the employees' Section 7 rights to discuss such terms and conditions of employment. *Caesar's Palace,* 336 NLRB 271, 272 (2001).

Respondent argues that the testimony of Nathan and Ballard is less credible because both employees were terminated from their employment with Respondent for failing to meet Respondent's sales per hour matrix. Respondent's counsel further contends that both individuals insinuated that Clack was to blame for their failure to reach their goals. Respondent contends that this sentiment toward Clack as well as their recent

terminations may color their recollections of what Clack said to them concerning confidentiality and discipline. Although I agree that these individuals may view Clack as the reason for their separation from Respondent, I do not find a basis to discredit their testimony in this regard. Neither individual appeared to embellish their testimony. Nathan testified that although she received three PIPs from Clack, he instructed her only once not to tell other employees that she had been disciplined. She also testified that regardless of his statement, she had nevertheless told others about the discipline. Ballard also testified that although Clack gave her three PIPs, he did not tell her again that she could not discuss her discipline with other employees after giving her the first discipline. Had their testimony been motivated by their bias against Clack, it is reasonable that Ballard and Nathan may have been more likely to embellish their testimony with more detailed and damaging accounts.

Although Clack gave a blanket denial that he ever told any employee not to share information concerning salary, commissions, performance, improvement, or discipline, he did not address the specific conversations alleged by Ballard and Nathan. Based on the overall evidence, it is likely that Clack made the alleged comments in those brief and isolated instances. I note, however, that the evidence shows that although Clack gave both Ballard and Nathan multiple disciplines; there is no evidence that he repeatedly instructed them not to discuss their respective discipline. Based on the testimony of Bowles, Clack did not consistently instruct employees under his supervision that they could not discuss their discipline.

Although I do not find that Respondent, acting through Clack, has maintained a rule that prohibits employees from discussing their discipline with other employees, there is credible evidence to support a finding that during these brief conversations with Ballard and Nathan, Clack cautioned employees not to discuss their discipline with other employees. Furthermore, Respondent does not assert that there was a business justification for Clack having made these statements. *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). Respondent simply contends that Clack never told employees that they could not share information about various terms and conditions of employment, including discipline.

Subject to applicable time and location limitations, employees have a right protected by Section 7 of the Act to talk about discipline that they have received inasmuch as such discussions may form the basis for collective action by employees. *Verizon Wireless*, 349 NLRB 640, 658 (2007). Accordingly, I find that in the brief and isolated instances discussed above, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Advanced Services, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by requiring its employees to file individual claims and by prohibiting employees from filing class action or group claims pursuant to its Solutions procedures.

3. Respondent violated Section 8(a)(1) of the Act by requiring employees to maintain the confidentiality of all proceedings arising out of the Solutions procedure.

4. Respondent violated Section 8(a)(1) by promulgating a rule in July 2011 that prohibited discussions among employees about their terms and conditions of employment, including discipline issued to Respondent's employees.

5. Respondent did not in any other manner violate the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Advanced Services, Inc., Memphis, Tennessee, is officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining an overly broad confidentiality rule for all proceedings arising out of its Solutions procedure.

(b) Promulgating and maintaining a rule that requires employees to file individual claims and that prohibits their filing class action or group claims pursuant to the Solutions procedure.

(c) Promulgating a rule that prohibits employees from discussing discipline that they have received.

(d) 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) Rescind the language in the Solutions procedure that requires employees to file individual claims and that prohibits their filing class action or group claims pursuant to the Solutions procedure, and notify employees in writing that this has been done and that the rule is no longer in force.

(b) Rescind the language in the Solutions procedure that requires employees to maintain the confidentiality of all proceedings arising out of the Solutions procedure, and notify employees in writing that this has been done and that the rule is no longer in force.

(c) Within 14 days after service by the Region, post at its Memphis, Tennessee facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a Unites 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."

the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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 July 1, 2011.

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

Dated, Washington, D.C., July 2, 2012.

APPENDIX

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

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

FEDERAL LAW GIES 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 require you to maintain the confidentiality of all proceedings arising out of our Solutions procedure, and WE WILL rescind the language that requires you to maintain the confidentiality of all proceedings arising out of our Solutions procedure.

WE WILL NOT insist that you file individual claims and prohibit your filing class action or group claims pursuant to our Solutions procedure and WE WILL rescind the language that prohibits the filing of class action or group claims pursuant to our Solutions procedure.

WE WILL NOT prohibit your discussing wages, hours, and working conditions with other employees including discussions concerning discipline that you have received.

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

ADVANCED SERVICES, INC.