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Alternative Entertainment, Inc. ***and*** **James Decommer.** Case 07–CA–144404

February 22, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On July 9, 2015, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

Applying the Board's decisions in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F. 3d 344 (5th Cir. 2013), as reaffirmed in *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F. 3d (5th Cir. 2015), the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining an arbitration policy that employees were required to sign as a condition of employment. We agree with the judge, but note that he failed to set forth the relevant language that rendered the policy unlawful. Specifically, the policy lists a litany of employment claims that must be resolved "exclusively through arbitration," and further provides that such claims "may not be arbitrated as a class action . . . 'collective' action[], and that any claim may not otherwise be consolidated or joined with the claims of others." The policy additionally provides that employees waive "important rights, such as filing or maintaining a lawsuit in a court, joining or participating in a class or representative action, [or] acting as a representative of others . . ." By prohibiting the pursuit of class or collective employment claims in both arbitral and judicial forums, the Respondent's policy expressly restricts protected Section 7 activity, as alleged, and its maintenance violates Section 8(a)(1). Id.[4]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 1.

(1) By (1) prohibiting James DeCommer from discussing his concerns over changes in compensation with coworkers; (2) implementing rules prohibiting unauthorized disclosure of employee compensation and salary information; and (3) compelling employees, as a condi-

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

The Respondent asserts that the judge improperly found that employee James DeCommer was discharged for complaining to his coworkers about the change in pay structure because that theory was not pled in the complaint. We have reviewed the complaint and find no merit in the Respondent's argument. Moreover, the Respondent fully litigated this issue during the hearing.

We find no merit in the Respondent's exception to the judge's finding that it violated Sec. 8(a)(1) merely by maintaining its handbook rule prohibiting the unauthorized disclosure of employee compensation and salary information. See *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 3 (2015).

[2] In adopting the judge's conclusion that the Respondent unlawfully discharged DeCommer in violation of Sec. 8(a)(1), we clarify that DeCommer engaged in two types of protected activity: first, he repeatedly discussed shared concerns about the change in pay structure with his coworkers, and second, he voiced those concerns to management on several occasions. That DeCommer also expressed a personal interest is irrelevant: "Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one." *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). We further agree with the judge that the General Counsel met his burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), and that the Respondent's explanations for the termination were pretextual.

[3] We shall amend the judge's conclusions of law consistent with our findings. We shall also modify the judge's recommended Order in accordance with our decision in *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and to conform to the violations found and the Board's standard remedial language. In addition, we shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[4] Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the Respondent's arbitration policy does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, 6 and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's policy is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the policy unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

tion of employment, to sign arbitration agreements waiving their right to pursue class or collective actions in all forums, arbitral and judicial, the Respondent has violated Section 8(a)(1) of the Act.

2. Substitute the following for Conclusion of Law 2.

(2) By discharging James DeCommer for engaging in protected activity, including discussing his concerns about salary, wages, or compensation structures with his coworkers and bringing complaints about those issues to management, the Respondent has violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Alternative Entertainment, Inc., Byron Center, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a handbook rule that prohibits employees from disclosing employee compensation or salary information and personnel data.

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

(c) Preventing employees from discussing among themselves or otherwise disclosing personnel data or compensation-related information.

(d) Discharging any employee for engaging in protected concerted activities, including discussing concerns about salary, wages, or compensation structures with coworkers and bringing complaints about those issues to management.

(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 handbook rule that prohibits employees from disclosing employee compensation or salary information and personnel data.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute a revised handbook that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

(c) Rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration 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 the mandatory arbitration policy in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised policy.

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

(f) Make James DeCommer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(g) Compensate James DeCommer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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

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

(j) Within 14 days after service by the Region, post at its facilities in Byron Center, Michigan copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such

[5] 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."

means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 2014.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 7 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. February 22, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Open Door Policy and Arbitration Program (Policy) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Policy waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[4] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[5] and (iii)

[1] 361 NLRB No. 72, slip op. at 22-35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). In addition to analysis set forth in my *Murphy Oil* partial dissent, I note that the Respondent's Policy contains language suggesting that an employee may revoke his or her acceptance within seven calendar days after signing. To the extent this language permits employees to opt out from the Policy while remaining employed, this would reinforce the considerations that support a finding that the Policy is lawful. See, e.g., *Nijjar Realty, Inc. d/b/a Pama Management*, 363 NLRB No. 38 (2015). However, I do not reach this issue in the absence of exceptions to the judge's finding that the Policy was mandatory and a condition of employment.

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23-25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4-5 (2015) (Member Miscimarra, dissenting).

[3] *Murphy Oil*, above, slip op. at 30-34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31-32 (Member Miscimarra, dissenting in part).

[4] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[5] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB,* above; *D.R. Horton, Inc. v. NLRB,* above. The overwhelming majority

enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Accordingly, as to the above issue,[7] I respectfully dissent.

Dated, Washington, D.C. February 22, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[6] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[7] I join my colleagues in adopting the judge's finding that the Respondent's discharge of employee James DeCommer violated Sec. 8(a)(1). I concur in my colleagues' finding that the Respondent violated Sec. 8(a)(1) by maintaining a handbook rule that expressly prohibits disclosure of "compensation," "employee salary information," and "personnel data (including salary information)." Discussions and coordination between and among two or more employees regarding compensation and salary information are central aspects of protected concerted activity under the NLRA, and the Respondent has not articulated any important justification for restricting such discussions. In this respect, I believe this case materially differs from *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 4 (2015), cited by my colleagues. The context of the confidentiality rule at issue in that case showed that the rule was intended to prohibit serious acts of misconduct, such as misappropriating confidential personnel files and disclosing an employee's medical records or social security number, rather than discussions of wages and benefits.

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 handbook rule that prohibits employees from disclosing employee compensation or salary information and personnel data.

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

WE WILL NOT prevent employees from discussing among themselves or otherwise disclosing personnel data or compensation-related information.

WE WILL NOT discharge any employee for engaging in protected concerted activities, including discussing concerns about salary, wages, or compensation structures with coworkers and bringing complaints about those issues to management.

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

WE WILL rescind the handbook rule that prohibits employees from disclosing employee compensation or salary information and personnel data.

WE WILL supply all of you with inserts for the current employee handbook that (1) advise you that the unlawful rule prohibiting employees from disclosing employee compensation or salary information and personnel data have been rescinded or (2) provide the language of a lawful rule; or WE WILL publish and distribute a revised handbook that (1) does not contain the unlawful rule or (2) provides the language of a lawful rule.

WE WILL rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear that the arbitration policy 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 the mandatory arbitration policy in all of its forms that the arbitration policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

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

WE WILL make James DeCommer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL compensate James DeCommer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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

ALTERNATIVE ENTERTAINMENT, INC.

The Board's decision can be found at www.nlrb.gov/case/07-CA-144404 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

Colleen J. Carol, Esq., for the General Counsel.
Timothy J. Ryan, Esq. (Jackson & Lewis), of Grand Rapids, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on May 19, 2015. James DeCommer, the charging party, filed the charge and amended charge on January 13 and March 2, 2015, respectively.[1] The General Counsel issued the complaint on March 26, 2015.

The complaint alleges that Alternative Entertainment, Inc. (the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act)[2] by: (1) prohibiting employees, including DeCommer, from discussing with coworkers his concerns over the Company's changes to its compensation policies; (2) discharging DeCommer because he defied company managers and continued speaking with coworkers about those changes; (3) implementing rules prohibiting unauthorized disclosure of employee compensation and salary information; and (4) compelling employees, as a condition of employment, to sign arbitration agreements waving their rights to initiate or maintain group, class, or collective actions in judicial forums.

The Company denies the allegations, attributing DeCommer's discharge to his refusal to satisfactorily perform his job and rejects the claim that DeCommer engaged in concerted activity. The Company maintains that its rules pertaining to confidentiality are lawful because they only prohibit "unauthorized disclosure" and are not unlawful on their face. With respect to its mandatory arbitration rule, the Company asserts that, although the Board is likely to view the collective action waiver as unlawful, such a position has not been supported by any decision from the courts of appeals.

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

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation with an office and place of business in Byron Center, Michigan (Byron Center facility), has been engaged in the retail sale and installation of satellite television service and related products. In conducting its operations at the Byron Center facility, the Company annually derives gross revenues in excess of $500,000, and purchases and receives goods valued in excess of $5000 directly from points outside the State of Michigan. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company Operations

The Company provides satellite television installation and service as DISH Network contractor in Michigan and Wisconsin. Tom Burgess is the Company's president. Neal Maccoux

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[1] All dates are 2014 unless otherwise indicated.

[2] 29 U.S.C. §§ 151–169.

serves as its chief financial officer. Rob Robinson is director of field operations; Vic Humphrey is the general manager of the Company's Byron Center office where DeCommer worked.

Approximately 77 field technicians report to and receive assignments from the Byron Center office. Most field technicians assigned out of that office drive company-owned vehicles to cover their assignments (COV technicians). Approximately eight of those field technicians drive their own vehicles to cover assigned routes (POV technicians). Prior to 2015, POV technicians were compensated an additional $0.82 per unit for personal vehicle costs.

Field technicians are paid on a unit-based compensation system, with portions of their pay and pension accruals based on metrics derived from the number of service calls (units) performed. Metrics are based on a rolling 3-month average of units completed out of the total number of assigned units, and the amount and type of work completed and services provided, including customer satisfaction ratings. In the case of an experienced POV technician like DeCommer, a typical service call accrued 12 units at a rate ranging from $1.90 to $4 per unit.

All field technicians are also expected to promote additional services and products that augment a customer's entertainment system. In recent years, "Smart Home Services" (SHS) were added to the metrics as the basis upon which bonuses were paid. SHS include extra services such as mounting television sets on walls, installing stereo systems and selling wireless headphones. As of August 2014, the Company expected field technicians to average $6 to $8 in extra sales for each regular installation or service visit to meet the metrics. That metric increased to $10 per visit by November of 2014.[3] These averages are used to calculate employees' commissions every other week. The SHS metrics are calculated on a weekly basis and sent to managers. The Company routinely sends emails to field technicians with low SHS sales during the quarter advising that their SHS sales and/or metrics overall are currently on pace to fall below the Company-set goals. In certain cases, company supervisors will "coach" or "ride along" with an employee that has performance issues.[4]

B. The Company's Rules

The Company's operating rules at issue are reflected in its employee handbook, the most recent version of which was distributed to all employees in November 2014.[5] The work rules set forth at pages 27–28 list 22 examples of prohibited behavior. The specific behavior at issue prohibits the "[u]nauthorized disclosure of business secrets or confidential business or customer information, including any compensation or employee salary information."

The Company's conflict resolution or complaint policy is set forth at page six of the handbook. The policy lays out an internal procedure for the informal and formal resolution of employment-related issues. After exhausting all internal channels, employees are directed to the final avenue available:

> 4. If you are dissatisfied with the response to step three and you wish to appeal, such appeal must be made in writing and an arbitration process will take place. Please follow the arbitration process outlined in the Arbitration Agreement.

The most recent version of the mandatory arbitration agreement was distributed to employees on April 18, 2013. DeCommer was required to sign and did sign the agreement setting forth the Company's "Open Door Policy and Arbitration Program."[6] The document states, in pertinent part:

> Specifically, by agreeing to this policy, you agree that in consideration for your employment and in exchange for promises made by [the Company], both you and [the Company] understand and agree either one may elect to resolve the following types of disputes exclusively through binding arbitration.

The types of disputes covered by the Company's binding arbitration provision include claims against the Company or any other employee relating to discrimination, compensation, promotion, demotion, and disciplinary action. The provision further states:

> By signing this agreement, among the other provisions in this document, you and [the Company] agree that if either party to a dispute cho[o]ses to arbitrate a claim involving the types of disputes described above, then the other party may not file or maintain a lawsuit in a court. The only claims not subject to this agreement are those which the law declares "nonarbitrable" or not subject to arbitration. Claims with administrative agencies, such as workers' compensation claims would not be subject to this agreement.

C. DeCommer's Performance

James DeCommer was employed as a field technician at the Byron Center from August 2006 until his discharge in December 2014. While employed by the Company, DeCommer was one of its most productive employees and seldom received coaching or warnings regarding the attainment of his quarterly goals. DeCommer did receive an email in mid-September 2014 from Toby Kendall, his manager at the time, informing him that his SHS sales were not on par to meet the $10-per-work order goal by the end of the month. Several other field technicians also received similar emails around that time. DeCommer was able, however, to accelerate his production for the remainder of that month and ended up exceeding his quarterly goal.

The next month was a different story. In October 2014, DeCommer broke the national record for SHS sales, earning over $80-per-work order that month.[7] After his record-setting month, DeCommer's average SHS sales per work order went down in November, but he still exceeded his goals.[8] In a conversation with Humphrey that month, DeCommer explained that he actually lost money by achieving the record because the time spent on additional SHS sales reduced the total number of

[3] The findings with respect to the Company's compensation practices and expectations derive mainly from DeCommer's credible and undisputed testimony. (Tr. 17–20.)

[4] Although the Company maintains that coaching does not constitute discipline, each coaching encounter is documented. (Tr. 71.)

[5] GC Exh. 2.

[6] GC Exh. 3.

[7] Although not documented, DeCommer's assertion that he broke the national record was not disputed. (Tr. 39.)

[8] GC Exh. 9.

assignments he could complete.

D. DeCommer's Complaints Regarding Compensation

In November, rumors circulated among the POV field technicians that their transportation supplement would be changing from the unit-based rate of 82 cents to a mileage-based rate of 52 cents. After confirming the changes with Humphrey and Robinson, DeCommer discussed them with approximately 10 other technicians over the next several weeks. Thereafter, DeCommer frequently shared with Humphreys and Robinson the concerns of POV field technicians that the new transportation compensation formula would decrease their compensaation.[9] He also documented his concerns in a text message to Robinson on December 5:

> So I just calculated the difference in pay since my last oil change October 9th. At .82 unit I made 3269.34 not counting overtime and that would have placed an additional 327.00 into my 401K. If my POV pay is based on mileage I would have only been compensated 1682.75 assuming about a .53 reimbursement. [That's] a 1600 dollar drop in pay in just under 2 months . . . times that by 6 and [that's] a 9500 dollar reimbursement cut not counting any additional overtime or lost 401K [contribution] . . . so very conservatively [I'm] looking [at least] a 10,000 pay cut next year . . . . [that's] an impossible pill to swallow.
>
> [That's] also looking at [a lot] of those weeks at a 5 day not a 6 day period. So on 6 days [I lose] even more.[10]

Later that day, DeCommer followed up by telephone with Robinson. DeCommer reiterated his concerns over a potential 20-percent cut in pay if the proposed POV reimbursements were implemented. Robinson agreed to consider DeCommer's concerns.

In a conference call with company managers on December 2, Maccoux confirmed the move to a change in the transportation reimbursement of POV technicians from a unit-based formula to a mileage-based formula. On December 3, he followed up with an email to general managers highlighting the plan for review and comment. On December 10, Maccoux sent an email containing October data, and illustrating the differences between the two formulas, and asking general managers to solicit feedback from their POVs about the change.[11]

In accordance with Maccoux's directive, Humphrey spoke with DeCommer and another POV about the changes on December 10. Robinson confirmed to DeCommer that the new system would be implemented and it would be based on the mileage driven by each POV from their first job to their last job. DeConmer disagreed once again, stressing the significant loss in income that POV technicians would experience. Robinson responded that POV technicians unhappy with the change had the choice of driving a company vehicle. Thereafter, DeCommer continued to discuss the issue with coworkers and advocate against the changes with Robinson and Humphrey.[12]

On December 12, DeCommer approached Robinson again. This time, however, Robinson said "let's talk outside." Once outside the presence of other employees, Robinson told DeCommer to discuss this subject only with him or Humphrey, but not with other technicians. After DeCommer reiterated his opposition to the changes, Robinson stated that he would arrange a telephone conference with Maccoux.[13]

Undeterred by Robinson's admonition, DeCommer continued discussing his compensation concerns on a daily basis with Humphrey and with other POV technicians, including Josh Graff, Greg Brewer, Keth Pulling, Bob Myers, and Steve Childs.

DeCommer's efforts were unsuccessful and the Company informed all of the technicians on December 15 that the compensation system for POVs would be changed to a mileage-based system.[14] The next day, Humphrey took DeCommer into a closed room for the promised telephone conference with Maccoux. Maccoux said employees were currently overpaid; DeCommer disagreed, insisting that he would lose between $7000 and $10,000 if the changes went through. He also disagreed with the Company's calculations and mentioned that he spoke with other field technicians and they confirmed that they would also lose money based on the changes. Maccoux responded that it was not the Company's intention to cause its employees to lose money. At the conclusion of the discussion, DeCommer agreed to provide Maccoux and Humphrey with all of his trip data and calculations for his October routes.[15]

After his meeting with Humphrey and Maccoux, DeCommer briefed 5 to 10 POV field technicians about those discussions. He also briefed his colleagues again on December 17.[16] He then sent a long email to Burgess, the Company's president. DeCommer's email, which Burgess forwarded to Gettleman, the Company's human resources director, mixed appreciation for the opportunities that the Company had provided him, along with a detailed explanation of how the changes would drive POV technicians either out of the Company or into the COV technician side. In his case, he asserted that the changes would result in a 20 percent, or nearly $7000, decrease in compensa-

[9] Humphrey, Robinson,and the Company's position statement confirmed DeCommer's credible testimony regarding his discussions with other POV technicians about the transportation supplement rate change. (Tr. 21–23, 115–116, 120; GC Exh. 6 at 2.)

[10] GC Exh. 4.

[11] Although not produced, I find that the "document attached," as referred to in the Company's position statement, was submitted to the Regional Office's field examiner. It is unclear why the General Counsel did not include the position statement's attachments, but Gettleman's chronology of events is generally corroborated by DeCommer's testimony. (GC Exh. 6 at 2.)

[12] DeCommer's credible testimony regarding his conversations with coworkers after that conversation is not disputed. In addition, his interaction with management on December 10 was undisputed and corroborated by the Company's position statement. (Tr. 28–29; GC Exh. 6 at 2.)

[13] I credit DeCommer's credible testimony over Robinson's denial that the latter prohibited him from further discussing the issue with other POV technicians. (Tr. 27–28, 106.)

[14] R. Exh. 8.

[15] DeCommer's testimony regarding this conversation was not disputed by Humphrey and is corroborated by the Company's position statement. (Tr. 30–34; GC Exh. 6 at 3.)

[16] This finding is based on DeCommer's credible and undisputed testimony. (Tr. 35–36.)

tion and possibly cause him to sell his home and move to another state. If that occurred, DeCommer requested that Burgess recommend him for employment with the DISH Network contractor in that state.[17] Burgess never replied to the email. Instead, the Company proceeded to eliminate him as an employee.[18]

E. *DeCommer's Termination*

On December 18, DeCommer arrived at work to find no service calls assigned to him. He asked Humphrey about it, but Humphrey explained that some technicians were going to be sent home that day. DeCommer asked for a few jobs because he was about to go on vacation. Humphrey said he would consider possible assignments after the staff meeting. After the meeting, however, Russell called DeCommer into Humphrey's office for another meeting. At that point, Humphrey informed DeCommer that "our relationship is not working out. You're terminated." DeCommer asked if the termination related to his job performance. Humphrey merely reiterated, "It's not working."[19]

After terminating DeCommer, Humphrey documented the action in a "separation document" stating that DeCommer "[d]id not work to his potential in Smart Home Services consistently." As for the reason for the action, he simply wrote: "Relationship is not working out."[20] In an email to Robinson later that day, DeCommer asked, "Rob what did [I] do wrong? Why am [I] being fired?"[21] The Company did not respond.

F. *The Lack Of Comparable Discharges*

Prior to his record-setting performance in October, DeCommer was subjected to "coaching" conversations on three occasions in 2014: "Adding Time" on April 23; "Replenish Inventory" on June 13; and "Low SHS" on September 18. However, he was not subjected to any coaching conversations in November or December with respect to any facet of his performance.[22]

Three other employees "separated" from the Company around the same time as DeCommer. One employee, Warren Frazier, resigned for another job. In the other two instances, the employees were terminated. In both cases, the Company documented serious performance deficiencies. Greg Berhns was terminated on January 14, 2015, because he "struggled in many areas," and reached the breaking point when he "refused to perform [SHS sales] at job sites." Ryan Meyers was terminated for "performance" on January 24, 2015 because he "continued to fail metrics."[23] Prior to his termination, Meyers was counseled on eight occasions in 2014 for an assortment of deficiencies, including low SHS (twice), quarterly metrics, conduct, and improper uniform. His last counseling was on December 18, the same day that DeCommer was terminated.[24]

III. LEGAL ANALYSIS

A. *Prohibiting Disclosure Of Wage Information*

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Where the rule is likely to have a chilling effect on Section 7 rights, the maintenance of the rule is an unfair labor practice, even absent evidence of enforcement. In determining whether a challenged rule is unlawful, however, the rule must be given a reasonable reading; particular phrases must not be read in isolation, and improper interference with employee rights must not be presumed.

The rules at issue here prohibit an employee from making an unauthorized disclosure of "business secrets or confidential business or customer information, including any compensation or employee salary information," and "personnel data (includes salary information)."[25] Suspension and termination are listed as possible immediate consequences for breaking the unauthorized disclosure rules.

The Company's rule is facially invalid. An employer's interest in protecting its confidential business and customer information has long been recognized under Board law. However, an employer unlawfully intrudes into its employees' Section 7 rights when it prohibits employees, without justification, from discussing among themselves their wages and other terms and conditions of employment. See *Hyundai America Shipping Agency Inc.,* 357 NLRB No. 80, slip op. at 21 (2011) (employer violated Sec. 8(a)(1) by maintaining a provision in its employee handbook stating that "any unauthorized disclosure of information from an employee's personnel file is a ground for discipline, including discharge").[26]

Moreover, since the aforesaid rule was invalid on its face, it was not necessary for the General Counsel to demonstrate that it was illegally motivated, discriminatorily enforced, or even enforced at all. *Congoleum Industries*, 197 NLRB 534, 539 (1972); *Lexington Metal Products Co.*, 166 NLRB 878 (1967); *Farah Manufacturing Co.*, 187 NLRB 601, 602 (1970).

Under the circumstances, the Company violated Section 8(a)(1) of the Act by promulgating and maintaining a rule which prohibited employees from discussing their wages and other working conditions among themselves.

B. *Compulsory Arbitration Agreement*

The complaint also alleges that the Company violated the Act by maintaining an arbitration agreement as a condition of

[17] GC Exh. 5.

[18] The Company's rush to terminate DeCommer was reflected in an internal email the next day stating that his direct deposit information had already been deleted. (GC Exh. 10 at 1.)

[19] DeCommer and Humphrey provided consistent testimony that the latter simply referred to the employment relationship "not working out." (Tr. 37–38, 98.)

[20] GC Exh. 7.

[21] GC Exh. 4.

[22] Humphrey conceded the lack of any discipline issued to DeCommer in November or December. (Tr. 109.)

[23] GC Exh. 13.

[24] GC Exh. 11 at 7.

[25] GC Exh. 2 at 28.

[26] See also *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217 (1976) (employer violated Sec. 8(a)(1) of the Act by promulgating and maintaining a rule forbidding employees from discussing their wages at any time under penalty of dismissal); *Jeannette Corp. v. NLR.B*, 532 F.2d 916 (3d Cir. 1976), (employer violated Sec. 8(a)(1) by maintaining an unqualified rule prohibiting employees from discussing their wage rates).

its employees' employment that precludes them from filing any group, class, collective, or other representative action claims through arbitration or the judicial system.

In *D. R. Horton,* 357 NLRB No. 184, slip op. at 1 (2012), the Board found 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.'"[27]

The Company's "Open Door and Policy and Arbitration Program" lays out an internal procedure for the informal and formal resolution of employment-related issues. DeCommer was required to sign the arbitration agreement on April 18, 2013 or risk not being assigned any service calls, as a condition of his employment. As such, the arbitration agreement was a mandatory rule imposed by the Company as a condition of employment. Therefore, the agreement is evaluated in the same manner as any other workplace rule. See *D.R. Horton*, supra, at 5.

To determine if a rule, including a mandatory arbitration policy, violates Section 8(a)(1) of the Act, the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton*, supra, 357 NLRB No. 184. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to [Section 7] activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage,* supra at 647.

The Company's mandatory arbitration policy explicitly restricts activities protected by Section 7 by prohibiting employees from bringing class or other collective actions relating to Section 7 type claims: employment-related discrimination, compensation, promotion, demotion and disciplinary action.

Accordingly, I conclude the Company's maintenance of the mandatory arbitration agreement violates Section 8(a)(1) of the Act.

[27] Although *D. R. Horton* was overturned by the Fifth Circuit, it remains Board's precedent and its rationale was most recently affirmed in *Murphy Oil USA, Inc.,* 361 NLRB No. 72 (2014). The rationale used in *D.R. Horton* and confirmed in *Murphy Oil* consists of three main arguments. First, mandatory arbitration agreements that bar employees from bringing joint, class or collective workplace claims in any forum restrict the exercise of a substantive right to act concertedly for mutual aid and protection under Sec. 7 of the Act. Second, employer-imposed individual agreements that restrict the Sec. 7 rights of employees, including agreements requiring them to pursue claims against an employer individually, have been held to violate the Act. Third, a decision finding an arbitration agreement unlawful under the Act, because it precludes employees from bringing joint, class or collective claims in any forum, does not conflict with the Federal Arbitration Act.

C. Prohibiting DeCommer From Discussing Wage Complaints

"An employer violates Section 8(a)(1) by forbidding employees to discuss wages with other employees." *Highland Superstores,* 301 NLRB 191 (1991). Such a prohibition is unlawful even if the rule is only expressed orally and not reduced to writing. *Jeanette Corp.,* 217 NLRB 653 (1975), enfd. 532 F.2d 96 (3d Cir. 1976); *First Transit, Inc.,* 360 NLRB No. 72, slip op. at 14 (2014); *Double Eagle Hotel & Casino,* 341 NLRB 112, 115 fn. 14 (2004). The prohibitive statement does not have to be specific; "[a]ny ambiguity in a particular prohibition that sweeps so broadly as to put in doubt an employees' right to engage in [protected activity] without fear of punishment by his employer is construed against the employer which formulated that prohibition." *Baptist Medical Center,* 338 NLRB 346 (2002), citing *Grouse Mountain Lodge,* 333 NLRB 1322 (2001).

DeCommer spoke with Robinson about the compensation changes on December 12, at which point Robinson told him that he should not talk to other technicians about the matter, and should instead direct any concerns to himself or Humphrey. Robinson's statement to DeCommer explicitly and specifically prohibited discussion amongst employees about compensation. *Double Eagle Hotel & Casino,* supra, *Mediaone of Greater Florida, Inc.* 340 NLRB 277 (2003). Robinson admitted that he told DeCommer to speak with managers about the issues he had with the new system, even though DeCommer was already frequently communicating with managers regarding the change POV compensation. This reveals that Robinson's true intent behind his statement was to compel DeCommer to stop talking about the issue with other employees, not to encourage him to speak with management, something DeCommer was clearly willing to do. DeCommer disregarded the admonition and proceeded to talk to POV technicians and inform them about the content of DeCommer's conversation with Robinson.

I find the Company violated Section 8(a)(1) by instructing DeCommer to cease talking to other employees about the proposed change in compensation, effectively promulgating a rule prohibiting employees from discussing the Company's compensation system. *First Transit, Inc.,* 360 NLRB No. 72 (2014).

D. Discharge of DeCommer

The General Counsel alleges that the Company violated Section 8(a)(1) on or about December 18 by laying off DeCommer because he engaged in protected concerted activity. The Company denied the allegations and vaguely attributed his discharge to performance related issues.

On December 18, DeCommer arrived for work but did not have any assigned jobs. Humphrey called DeCommer into his office and told him that "our relationship isn't working out." In the termination documentation, Humphrey vaguely wrote that DeCommer was laid off because he "[d]id not work to his potential in Smart Home Services consistently," and the relationship between [the Company] and DeCommer "is not working out."

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must prove, by a preponderance of the evidence,

that an employee engaged in concerted protected activity, the employer had knowledge of the employee's protected activities, the employer took adverse action against the employee, and the action was motivated by a discriminatory impetus. Proof of discriminatory motivation may be based on either direct or circumstantial evidence, *Robert Orr/Sysco Food Services, LLC* 343 NLRB 1183 (2004). If the General Counsel establishes a prima facie case by meeting these elements, the burden shifts to the Company to prove, also by a preponderance of the evidence, that it would have taken such action even in the absence of the protected conduct. Simply presenting a legitimate reason for its action is not enough. *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 966 (2004); *T.J. Trucking Co*., 316 NLRB 771, 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

DeCommer exercised his Section 7 rights by complaining to management about the changes to compensation and discussing those complaints with coworkers. Management knew of his concerted activities because Robinson pulled DeCommer aside and instructed him to stop sharing his wage concerns with coworkers. There is no direct evidence that Humphrey and/or Robinson knew that DeCommer continued discussing POV compensation issues with coworkers after Robinson's admonition. However, the timing of DeCommer's discharge shortly after Robinson's unlawfully coercive admonition provides strong circumstantial evidence of such knowledge, as well as discriminatory motive. See, e.g., *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999); *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991); *NLRB v. Rain-Ware, Inc.,* 732 F.2d 1349, 1354 (7th Cir. 1984) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action.").

The Company's vague and transparently pretextaul explanation for discharging DeCommer—that "it wasn't working out—provides even stronger evidence of discriminatory motivation. See *All Pro Vending,* 350 NLRB 503, 508 (2007); *Rood Trucking Co.,* 342 NLRB 895, 897 (2004); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (pretextual explanation warrants inference that employer desires to conceal an unlawful motive) (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)). Company supervisors did not give DeCommer any indication that they were unsatisfied with his work in November or December, illuminating the fact that their proffered reason for discharge was pretextual and actually attributable to DeCommer's complaints regarding compensation.

Not surprisingly, the Company ignored DeCommer's inquiry for an explanation as to why he was discharged. It did not have a legitimate explanation since DeCommer's performance history was devoid of warnings or other discipline, and his previous coaching encounters were in line with Company practices relating to performance goals or behavioral expectations.[28] DeCommer's vaguely documented discharge, however, stands in stark contrast with those of other technicians "separated" from the Company based on performance around the same time. Even based on DeCommer's refusal to reach for another national record in SHS sales, the Company's departure from past disciplinary practice as to how it treated employees with subpar performance in SHS sales is further evidence of pretext supporting an inference of discriminatory motivation. When other employees had noticeable deficiencies in their performance the Company warned them and provided "coaching," rather than immediate termination. Such lesser discipline was not afforded to DeCommer, who was neither warned nor "coached" in November or December. See, e.g., *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 814 (3d Cir. 1986), cert. denied 481 U.S. 1069 (1987); *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1181 (6th Cir. 1985); *JAMCO,* 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir.), cert. denied 502 U.S. 814 (1991).

Although the Company correctly points out that DeCommer's performance in November fell well below his record-breaking performance in October, DeCommer still exceeded goals set by the Company. Therefore, the Company's explanation for termination is untrue, which further supports a finding of pretext. See, e.g., *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.,* 117 F.3d 1421 (6th Cir. 1997) (unpublished table decision); *Active Transportation*, 296 NLRB at 432, fn.7 and 8.

Having established a prima facie case that the Company discriminated against DeCommer, the burden shifted to the Company to prove, by a preponderance of the evidence, it would have laid DeCommer off even if he had not complained about the Company's POV compensation policy. The Company was unable to meet such a burden since its employees' performance and disciplinary records established that DeCommer's discharge was clearly inconsistent with its treatment of other employees. Accordingly, the Company violated Section 8(a)(1) of the Act by discharging DeCommer because he complained about changes to employee compensation.

CONCLUSIONS OF LAW

1. By (1) prohibiting James DeCommer from discussing his concerns over changes in compensation with coworkers; (2) implementing rules prohibiting unauthorized disclosure of employee compensation and salary information; and (3) compelling employees, as a condition of employment, to sign arbitration agreements waving their rights to initiate or maintain group, class, or collective actions in judicial forums, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging James DeCommer for objecting to changes in the terms and conditions of his employment and discussing his concerns with coworkers, the Company violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having discriminatorily discharged an employee, must offer him reinstatement and make him whole for

[28] GC Exh. 9, 12.

any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

The Company shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Company shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Company, Alternative Entertainment, Inc., Byron Center, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for complaining about the Company's compensation practices and policies.

(b) Preventing employees from discussing among themselves or otherwise disclosing personnel data or compensation-related information.

(c) Maintaining a mandatory arbitration agreement barring or restricting your right to file charges with the National Labor Relations Board or waiving the right to maintain class or collective actions in any arbitral or judicial forums.

(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 its handbook rule prohibiting employees from disclosing personnel data or salary information and furnish employees with a revised handbook indicating that the rule has been rescinded.

(b) Rescind its arbitration program in all of its forms and notify employees this has been done.

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

(d) Make James DeCommer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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

[29] 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.

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

(g) Within 14 days after service by the Region, post at its facilities in Grand Rapids, Michigan copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, 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 Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company 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 Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since April 18, 2013.

(h) 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 Company has taken to comply.

Dated, Washington, D.C. July 9, 2015

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 activi-

[30] 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."

ties.

WE WILL NOT do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to discuss wages, hours, and working conditions with other employees and WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT stop you from disclosing personnel data or salary information and WE WILL repeal the rule in our handbook on that subject and furnish you with an insert for the handbook that advises you that the unlawful rules noted below have been rescinded.

WE WILL NOT maintain a mandatory arbitration agreement that bars or restricts your right to file charges with the National Labor Relations Board, and WE WILL rescind our arbitration program in all of its forms and WE WILL notify you that this has been done.

WE WILL NOT maintain a mandatory arbitration agreement that requires you to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT discipline and/or fire employees because they exercise their right to discuss wages, hours, and working conditions with other employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer James DeCommer his job back along with his seniority and all other rights or privileges.

WE WILL pay James DeCommer for the wages and other benefits he lost because we discharged him with interest .and will reimburse him for all search-for-work and work related expenses

WE WILL remove from all of our files all references to the discharge of James DeCommer and WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

ALTERNATIVE ENTERTAINMENT, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-144404 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.