

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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T-MOBILE USA, INC.	)	
	)	
<i>Respondent</i>	)	
	)	
and	)	Case 14-CA-155249
	)	14-CA-158446
COMMUNICATIONS WORKERS OF	)	14-CA-162644
AMERICA, AFL-CIO	)	14-CA-166164
	)	
<i>Charging Party</i>	)	
_____	)	

**RESPONDENT’S BRIEF IN SUPPORT OF EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Mark Theodore, Esq.  
Irina Constantin, Esq.  
Proskauer Rose LLP  
2049 Century Park East, Suite 3200  
Los Angeles, CA 90067  
Tel. No.: (310) 284-5640  
Fax No.: (310) 557-2193  
Attorneys for T-Mobile USA, Inc.

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), respondent T-Mobile USA, Inc. (“Respondent,” or the “Company”) submits this Brief in support of its exceptions to Administrative Law Judge Sharon Levinson Steckler’s Decision<sup>1</sup> in the above-referenced matters.

## **INTRODUCTION**

In her decision in the above-captioned cases, the ALJ repeatedly erred by ignoring or mischaracterizing key facts, misapplying Board decisions and finding, contrary to undisputed record evidence and under theories that are inconsistent with established law, that the Company violated the National Labor Relations Act (“Act”). For example:

- The ALJ found that the Company disparately enforced policies governing the use of information technology systems and solicitation when asking an employee not to send mass emails despite the fact that there was absolutely no evidence of: 1) the employee being granted access to send such emails, for *any* purpose, including work; or 2) employees with similar email capabilities sending comparable facility-wide messages.
- The ALJ reached this erroneous conclusion by, *inter alia*, mistakenly comparing management-generated emails about Company-sponsored events to employee emails of a personal nature and wrongly substituting her judgment for that of management to evaluate whether Company-initiated events served a legitimate business purpose.
- The ALJ concluded that a security guard’s apparent authority to act on behalf of the Company “regarding who could control access to the property” also conveyed agency status to communicate the Company’s distribution policy to employees and attempt to enforce it; this, in spite of testimony from the employee at issue that a security guard specifically told her it was not within his realm of responsibility to enforce Company policies and that she had no prior interaction with a guard in connection with any of her numerous Union-related activities.
- The ALJ found that the Company unlawfully “isolated” Union supporters by assigning them seats separated by small distances in an area measuring 10 to 15 feet. The ALJ concluded this in spite of: Board law clearly establishing that isolation rests on the principle that it is unlawful for an employer to attempt to prevent the dissemination of union views by isolating union supporters from the rest of the workforce, not from each other; the clear ability of all employees to communicate freely among each other in the small area; and the absence of any adverse consequence resulting from the seating assignments.
- The ALJ determined that a supervisor engaged in unlawful surveillance and interrogation despite testimony from the Charging Parties’ own witnesses that there was no indication

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

of Union activity that would have prompted the supervisor to observe anything and the absence of any questions related to Union activity.

Through its Exceptions and Brief in Support of Exceptions, the Company respectfully submits that the ALJ's determinations are based on flawed factual findings and legal conclusions and should not be adopted.

### **STATEMENT OF FACTS**

#### **I. Nature of the Company's Business and the Wichita Call Center**

The Company is a national wireless telecommunications carrier that, *inter alia*, operates several Customer Care call centers across the country. One of these call centers is located in Wichita, Kansas ("Wichita Call Center") and is led by Call Center Director Jeff Elliott. There are approximately six hundred CSRs who work at the Wichita Call Center. (Tr. at 375:9-376:4.)<sup>2</sup> They are tasked with taking calls from customers and assisting them with various account-related matters. (*Id.* at 375:9-20.) The call center handles 8,000 to 12,000 customer calls each day. (*Id.* at 376:5-7.)

The CSRs work in teams. (Tr. at 412:2-17.) Each team consists of approximately 15 CSRs, a Senior Representative and a Coach. (*Id.* at 246:15-19, 526:22-527:1.) The CSRs and the Senior Representative report to the Coach who, in turn, reports to the Team Manager. The CSRs rotate and join new teams within their respective departments approximately every six months. (*Id.* at 210:6-15.) Based on their performance during the prior six-month period, CSRs may select or "bid" for the team and Coach they would like to join as part of the next rotation. (*Id.* at 249:22-251:2.) Each team works in a self-contained area, or "pod," measuring approximately 10 feet wide and 15 feet long. (*Id.* at 42:4-25, 505:2-7; GC Ex. 5, 17.) The CSRs sit around the perimeter, and the Senior Representative and the Coach sit in the Center. (*Id.*)

The Union has been engaged in ongoing efforts to organize the Wichita Call Center for the past nine years. (Tr. at 31:2-9.) While those efforts have not been successful, some of the Company's employees do support the Union, and they express that support openly and

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<sup>2</sup>References to "Tr. \_ \_: \_ \_" refer to the official pages and lines of the transcripts of the proceedings.

frequently. (*Id.* at 73:23-74:10, 162:13-22, 184:17-185:9.) These employees routinely wear Union T-Shirts and pins to work, distribute Union literature in non-work areas, post Union calendars or posters at their desks, and bring in doughnuts and other treats for their colleagues, on behalf of the Union. (*Id.*)

## **II. The Company's Policies Concerning the Use of Computer Systems and Solicitation in the Workplace**

The Company maintains several policies governing the use of its information technology systems and workplace solicitations. As relevant here, these include the *Enterprise User Standard*, the *Acceptable Use Policy for Information and Communications Resources* (“*Acceptable Use Policy*”) and the *No Solicitation or Distribution* policy. (GC Ex. 11, 13, 18.) Among other things, these policies have as a common objective preventing disruption to the work environment during times that employees are expected to be engaged in discharging their job duties. (*Id.*)

The *Enterprise User Standard* provides, in relevant part, that “[a]ll access [to information technology systems] that is not explicitly authorized is forbidden.” (GC Ex. 18.) CSRs are not authorized to access and use facility-wide email distribution lists, such as the distribution list that includes all CSRs at the Wichita Call Center. (Tr. at 379:10-381:7.) This restriction aims to prevent the disruption that would be created if CSRs were given permission to indiscriminately email the entire facility at once (about any topic). Providing hundreds of individuals with the ability to email the entire facility throughout the workday would inevitably disrupt employees engaged in discharging their duties and impact production. (*Id.* at 381:8-18.) An additional restriction is built into the back-end of the email system, with the same concern in mind. That restriction rejects any email sent to more than 100 individual recipients. (*Id.* at 50:3-7, 79:3-9, 81:9-18.)

The *Acceptable Use Policy* prohibits certain uses of the Company's information and communications resources, including “distribut[ion] [of] junk mail and chain letters.” (GC Ex. 11.) The *No Solicitation or Distribution* policy prohibits “solicitation of any kind by employees .

. . . during working time (of either the employee engaged in soliciting or the employee being solicited).” (GC Ex. 13.) It further prohibits distribution “of non-work related literature or materials of any kind by employees in working areas at any time.” (*Id.*) These policies are formally promulgated, in stand-alone documents or as part of manuals such as the Employee Handbook, and are published and made accessible on the Company’s Intranet, known as OneVoice. (R. Ex. 22.) It is not alleged that any of these policies are unlawful in any way.

### **III. Befort’s Multiple Identical Emails to Nearly Six Hundred CSRs in the Span of Minutes, and the Company’s Lawful Response**

On May 29, 2015, Befort used the Company’s email system to send multiple Union-related emails to the entire CSR population at the Wichita facility. (Tr. at 45:25-48:6; R. Ex. 1-18.) Befort testified that initially, she searched for the email addresses of all Wichita CSRs, copied 595 of them, in alphabetical order, pasted them into the “To” field of her email message, typed the body of the message, and, at approximately 3:43 p.m., clicked “Send.” (*Id.* at 49:7-20; 77:7-78:10; R. Ex. 2.) Shortly thereafter, she received the following automatically-generated notification:

[t]h[e] message wasn’t delivered to anyone because there are too many recipients. *The limit is 100.* This message has 595 recipients.

(*Id.* at 50:2-7; R. Ex. 2.) (Emphasis added.) In spite of the notification, Befort proceeded to try to “reach as many people as possible as quickly . . . as possible,” and continued in her attempts to send emails to as wide a population of CSRs as she could contact in a short period of time. (*Id.* at 46:7-10, 76:5-8.)

- At 4:27 p.m., she attempted to send the same email message to 136 recipients. (R. Ex. 3.) That, too, was rejected. (R. Ex. 4.)
- At 4:28 p.m., Befort unsuccessfully tried to reach approximately 125 recipients. (R. Ex. 6.)
- At 4:35 p.m., she sent another rejected message, this time to 207 recipients. (R. Ex. 8.)
- At approximately 6:30 p.m., she sent her first successful message to all CSRs whose last names began with the letters “A” and “B” of the alphabet. (R. Ex. 9.)
- At 6:31 p.m., she sent the same message to all CSRs whose last names began with the letters “C” and “D.” (R. Ex. 10.)

- Between 6:32 p.m. and 6:34 p.m., Befort sent three additional emails, capturing all CSRs whose last names began with the letters “E” through “N.” (R. Ex. 11-13.)
- At 9:50 p.m., Befort again attempted to email her message to an excessively large list of recipients, and that message was rejected. (R. Ex. 15.)
- Between 9:49 p.m. and 9:51 p.m., she successfully sent three additional emails containing the same message, until she “complete[d] the list of representatives in Wichita.” (Tr. 50:24-51:2; R. Ex. 16-18.)

In total, Befort compiled an addressee list and pressed send approximately 13 times. She succeeded in reaching the entire CSR population through 8 separate email messages. In each email, all addressees were set forth in the “To” line. All CSRs whose last names began with the letters “A” through “N” received the message within a timespan of 4 minutes, through 5 separate messages. (R. Ex. 9-13.) All remaining CSRs received the message within the timespan of 2 minutes, through 3 additional messages. (R. Ex. 16-18.) All 8 successful attempts were made during times that the call center was operational.

Befort “understood [that] some” of these recipients “would be working” when they received her email,” and her actions unsurprisingly proved to be disruptive. (Tr. at 87:14-17.) As more than half of the CSR population received the messages between 6:30 p.m. and 6:34 p.m. and the remainder of CSRs received them between 9:49 p.m. and 9:51 p.m., Befort’s emails reached many while they were engaged in work. And, given the nature of Befort’s message, the CSRs predictably had certain reactions. “Multiple” CSRs “came forward” during their working hours to express that they were “upset about [Befort’s] communication and wanted it recalled.” (*Id.* at 377:13-14; *see also id.* 351:16-21.) Others expressed that “they did not want to have to come to work and experience” receiving such communications. (*Id.* at 459:12-16.) And, as Befort testified, at least one employee responded to her directly and told her that he or she “would rather not receive those types of emails.” (*Id.* at 51:6-12.)

Befort acknowledged receipt of and access to the Company policies governing her conduct, as well as her obligation to periodically familiarize herself with those policies.<sup>3</sup>

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<sup>3</sup> (Tr. at 413:22-414:6; R. Ex. 22.) (“I acknowledge that I have read or will promptly read . . . the Handbook, Code of Conduct and the policies and procedures that are available to me via OneVoice. I will periodically review the Handbook, the Code of Conduct and the policies and procedures available on OneVoice . . . . I accept full

From the Company’s perspective, Befort, as a CSR, did not have authority to send facility-wide emails. She did not have access to use any call center distribution lists, and automatically-generated messages alerted her that she was not to email more than 100 recipients. Her sending multiple mass emails, until she reached the entire facility, violated the Enterprise User Standard. Jeff Elliott, the Call Center Director, concluded Befort had “go[ne] around th[e] process [of a CSR not having access to distribution lists] and group emails and sen[t] them out separately behind that,” essentially “go[ing] around the policy.” (Tr. 380:8-10.)

A. *The Company Lawfully Addressed Befort’s Disruptive Actions*

i. The June 2, 2015 Meeting with Befort

Befort was not disciplined for her actions. (*Id.* at 88:10-14, 90:1-4.). Instead, upon becoming aware of the scope of Befort’s actions and the disruption they caused, the Company decided to remind her of the lawful restrictions against using the system beyond permitted access, sending mass unsolicited emails—or “junk” emails—and the prohibition against solicitation of employees who are actively working. To that end, the Company arranged a meeting between Befort, her Coach, Angel Meeks, and her Team Manager, Lillian Maron. (Tr. at 51:16-22, 88:6-9.) That meeting took place on June 2, 2015. (*Id.*) The Company provided Maron with “Talking Points” that she was to follow during her conversation with Befort. (*Id.* at 416:18-417:2; R. Ex. 23)<sup>4</sup> Maron read the Talking Points *verbatim*. (*Id.*; *see also id.* at 418:21-419:5, 460:21-461:13, 462:15-24.) They provided, in relevant part, as follows:

It was reported to us that . . . you sent emails to hundreds of employees in the Wichita Call Center. Several employees told us it was disruptive and unwanted communication. We don’t allow non-business related mass communications for any purposes since it disrupts the work place and distracts employees from their work.

You may solicit concerning [U]nion issues during non-working time—[which is what Befort alleged she did]—but you may not solicit while the person you are soliciting is supposed to be

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responsibility for familiarizing myself with the contents of the Handbook, Code of Conduct and the other policies and procedures posted on OneVoice.”)

<sup>4</sup> Meeks did not speak during this meeting. (Tr. at 460:8-15.)

working. You had to be aware that many employees were actively working when you sent these emails . . . .

(R. Ex. 23.) Entirely contrary to the Charging Parties' allegations, the Talking Points went on to clearly affirm Befort's right to speak about the Union at work, "when [she] and others [we]re not working," and to "use email to communicate about the [U]nion:"

Question: Can I use e-mail to communicate about the [U]nion?

Answer: *Yes* . . . .

(R. Ex. 23.) (Emphasis added.)

Befort testified that she received exactly such message:

Q: . . . Maron stated that the [C]ompany recognized your right to support the [U]nion?

A: Yes.

Q: . . . And *Maron told you that you could use the work email for these messages* as long as it wasn't done in a disruptive manner.

A: Yes.

(Tr. at 89:19-23.) (Emphasis added.)

In response to the information imparted by Maron from the Talking Points, Befort replied that "she was not working" at the time she sent the emails. (Tr. 418:21-419:13.) Consistent with the message she had been delivering, Maron replied "I acknowledge that you were not working, however, several of the people that you sent the email to . . . were working, and therefore it created a disruption to them being able to service our customers." (*Id.*) Maron did not say anything else during this meeting, which only lasted approximately five minutes. (Tr. 419:20-22.) She did not tell Befort that she was not allowed to speak about the Union during working time, and did not tell her that she could not send Union-related emails to employees' work email addresses or discuss the Union in working areas. (*Id.* at 420:3-421:2.).

*ii.*     The June 2, 2015 Email from Jeff Elliott

Also on June 2, 2015, because the email had been sent to all CSRs in the facility, after assessing "the impact to employees" and "the disturbance that [Befort's email] created, Elliott sent an email to everyone at the Wichita facility reminding them that pursuant to the Company's policies governing use of email systems and solicitation, it was "not appropriate . . . to send

emails to large numbers of employees.” (GC Ex. 7.) Elliott’s email went on to explain that the Company does not “allow mass communications for . . . non-business purpose[s] since [they] disrupt[] the work place and distract[] employees from their work,” and that “it is not appropriate to solicit other employees for any purpose when employees are working.” (*Id.*) The email then reinforced employees’ ability “to communicate with others *when they are not working*—about the union or anything else.” (*Id.*) (Emphasis added).

Alyssa Jones, a CSR, testified that she replied to Elliott’s email by hitting the “reply to all” button to address the entire facility and state that she did not think employees could speak with management about the Union. (Tr. 108:4-10; R. Ex. 7.) While Jones testified that her response went to the entire facility, the actual email clearly shows that, consistent with the fact that CSRs do not have access to send facility-wide emails, her response went only to Elliott. (R. Ex. 7.)

#### **IV. Maron’s Meeting with Meeks’ Team and Meeks’ Subsequent Interactions with Her Team Members**

Shortly after the events of June 2, 2015, Maron was informed that someone had put leaflets on all of the desks in Meeks’ pod, in violation of the Company’s distribution policy, and was asked to address the issue in a meeting with Meeks’ team. (Tr. 421:3-422:6, 465:21-24.) On direct examination, Befort testified that she was the one who “passed out” the Union “flyer” that Maron discussed during the team meeting. (Tr. 61:8-23.) She directly contradicted this testimony on cross examination, stating that she did not “recall” distributing the flyer. (*Id.* at 90:14-18.)

Maron held a meeting with Meeks’ team on about June 4, 2015. (*Id.* at 463:23-464:13.) Again, the Company provided Maron with “Talking Points” that she was to use in speaking with the team. (*Id.* at 466:7; R. Ex. 24.) The talking points read, in relevant part, as follows:

Yesterday, someone left leaflets on each of the work stations in the pod. . . . We just wanted to remind you that it is not appropriate to distribute materials while you are working or while the recipient is working, and such materials are not to be left or distributed in any work areas of the call center. . . . We certainly recognize your

right to support the union, or not support the union. *And we want to make it clear that you can distribute materials regarding the union in non-working areas, and when you are not working.*

(R. Ex. 24.) (Emphasis added). Consistent with the reason behind the meeting—the distribution of Union literature in work areas—the only Company policy addressed in the Talking Points was that governing when and where employees could circulate flyers or other materials. There is no reference in the talking points as to when and where employees may discuss the Union.

As she did in her meeting with Befort, Maron read the Talking Points verbatim:

Q: Okay, and then [the] Talking Points.

A: And then, . . . I had a folder with me, and I had my Talking Points, so I started to -- .

Q: . . . [D]id you have anything else in the folder with you, anything else you used?

A: No, just my folder and my paper.

Q: . . . [A]nd then you start reading the bullet-points?

A: Yes.

Q: *And did you read verbatim?*

A: *I did.*

. . .

Q: . . . [A]re you really reading word for word, or are you looking down, understanding what's being said, and then putting your spin on it?

A: *No. I was instructed to read word for word, and that's what I did.*

(*Id.* at 418:21-419:3, 467:11-24, 468:22-469:2.) (Emphasis supplied). Maron added no “additional verbiage,” and simply “stuck to the Talking Points.” (*Id.* at 423:18-20.) Befort's testimony corroborated as much:

[ Maron] had a folder that she would look at and then speak.

. . .

[S]he was using the folder as if to look at it to reference what she was talking about. An example would be if you thinking of [someone] giving a speech and they've got an outline or notecards that they look at and then look up and continue speaking.

[S]he appear[ed] to be . . . referencing [the folder] to make sure that she hit all the points that she needed to.

(Tr. at 62:14-15; 63:10-14, 19-21.) None of the points that Maron “needed” to “hit” concerned when employees may or may not speak about the Union, (R. Ex. 24.), and she did not instruct employees that they could not speak about the Union during working time but could address other non-work topics during working time. (*Id.* at 425:13-18.)

Befort’s own notes, which she took immediately after the meeting ended to make sure that she “didn’t forget anything”—a statement and intention that the ALJ credited (ALJD at 13:27)—further confirm that no topics other than those outlined above were discussed. (*Id.* at 65:4-10, 97:11-98:1; R. Ex. 19.) The notes follow almost the exact outline of the Talking Points, starting with Maron’s reminder that employees should not distribute materials in work areas, and moving on to mention: Maron’s response to the message of the Union flyer, alleging that employees do not have a voice, which response reminded employees that they can talk to management; the fact that, even where elected, the Union may only make demands of management, not outright decisions; and the fact that the Connecticut engineers filed a petition to decertify the Union. (R. Ex. 19; *see also* R. Ex. 24.) These are the exact and *only* topics referenced in the Talking Points that Maron used. (*Id.*) Nothing in Befort’s notes even alludes to any allegedly unlawful remark about employees not being able to discuss the Union “during working time.” Nor do the Talking Points make reference to this topic.

A. *Post-Meeting Break*

The Charging Parties’ witnesses testified that CSRs were provided with a short break after their meeting with Maron, and that a number of them went to take this break in a picnic area, *in front of* the designated smoking area, and not in the actual “smoke shack,” as the ALJ found (ALJD at 13:17; Tr. at 63:25-64:22; 95:6-24.) The picnic area is a public area equally accessible to both management and CSRs; it is open to anyone in the facility just like any other common area. (*Id.* at 96:5-18, 112:2-113:2, 129:3-6, 130:12-21, 145:2-6, 156:5-23.) In fact, both Coaches and Team Managers are frequently in this location. (*Id.*)

According to the testimony provided, Meeks told her team that she would join them outside. (Tr. at 96:19-21.) Testimony from the Charging Parties’ witnesses also acknowledges

that Meeks could not have known that employees planned to discuss the Union while there, (*Id.* at 156:24-157:7), or that once outside, some of the CSRs planned to exchange or even exchanged Union-related text messages and/or notes on their phones (*Id.* at 131:6-18, 156:24-157:18.) The entire team was taking a break. In fact, when Meeks purportedly asked the CSRs what it was that they were viewing on one of the phones, they lied to her and told her they were looking at an entirely unrelated picture and non-work appropriate material. (*Id.*) Once the break time ended, the CSRs went back into the building (*Id.* at 115:16-17.) Meeks continued to stay in picnic area. (*Id.* at 115:12-17.)

#### **V. The August 20, 2015 Incident Involving Abigail Parrish**

On August 20, 2015, Abigail Parrish, then a CSR at the Wichita Call Center, engaged in the distribution of Union literature on Company premises—more specifically, inside of the front entrance to the facility and then again in the designated smoking area, known as the “smoke shack.” (Tr. at 166:6-14, 167:17-168:7.) Her activities were permitted by the Company’s solicitation and distribution policy. (GC Ex. 13.) In fact, Parrish had previously engaged in exactly such distribution.<sup>5</sup>

On the date in question, Parrish was off duty and arrived at the facility with Union representatives to take part in leafleting. Parrish, being an employee, chose to enter the premises and exercise her right to leaflet in non-work areas. She initially was observed handing out flyers outside the front entrance, by a security guard working at the Wichita Call Center. (Tr. at 166:2-14.) Believing that Parrish was a third party and not an employee, the security guard instructed her that she was on private property and was not permitted to hand out flyers in that particular area. (*Id.* at 166:15-18.) Once Parrish informed him that she was an employee of the Company,

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<sup>5</sup> See Tr. at 162:

Q: Let’s talk about the distribution of flyers. . . . Where would you do so?

A: . . . I did some distribution of flyers in the lunchroom area. *I also distributed some flyers in [the] smoke shack outside.* I also distributed flyers at the end of the driveway . . . .

(*Id.*) (Emphasis added).

“he just . . . responded with, oh, okay and then . . . turned back around and went inside,” leaving Parrish to her activity. (*Id.* at 166:19-167:1.)

Parrish then walked to the back of the facility to the smoke shack area. There, she encountered a second security guard, Joe Weigand. (Tr. at 168:8-169:8.) Weigand approached Parrish and informed her that “it was Company policy” that she could not pass out flyers, including “for a food truck advertising” or “for a party.” (*Id.* at 169:9-15, 195:14-24.) They then engaged in a back-and-forth about the proper interpretation or application of the Company’s policy as it pertained to the distribution of literature. (*Id.*; *see also id.* at 169:16-170:2, 195:2-6.) Based on her proper understanding of the Company’s actual policy, Parrish disputed the correctness of Weigand’s representation. (*Id.* at 169:16-170:2, 195:2-6.) Nevertheless, she chose to cease her activity so as to not “escalate” the situation. (*Id.* at 170:13-17.)

Promptly after encountering Parrish, Weigand reported his interaction with her to Larissa Wray-Tolbert, a Human Resources manager at the Wichita Call Center. In no ambiguous terms, Wray-Tolbert informed Weigand both that his representation to Parrish regarding her ability to distribute literature on Company premises was incorrect *and that he acted outside of the scope of his authority* in providing directives to a Company employee. (Tr. at 330:18-331:8.) Wray-Tolbert also took immediate steps to remedy the situation with Parrish. As Parrish was not working, Wray-Tolbert sent her an email clearly stating that Weigand’s conduct was wrong and that Parrish was permitted to engage in distribution of Union literature in any non-work areas on Company premises. (Tr. 329:17-330:6.) The email provided, in relevant part:

[w]e understand that a security guard approached you in the smoking area and told you that you were not allowed to hand out leaflets in that area. The security guard was in error. There is no prohibition against your distributing Union literature in a non-working area during non-working time. Please let me know if you have any questions.

(GC. Ex. 10.) Parrish testified that she understood Wray-Tolbert’s email to mean that what she “w[as] told by the security guard was incorrect.” (Tr. at 198:1-4.) She did not have any questions for Wray-Tolbert. (*Id.* at 198:17-24.) No Company manager ever contacted Parrish

about this issue again and, according to her exchanges with the Union, she did not receive any “pushback” from anyone. (*Id.* at 199:20-25; R. Ex. 20.) There is no evidence that Parrish or any other employee was in any way prohibited from handing out flyers on Company property after the email was sent to Parrish. Throughout the course of her entire employment with the Company, Parrish did not have *any* contact with a security guard about any of her numerous and open Union activities. (Tr. at 185:23-186:4.)

Security guards at the Wichita facility are employed by a third party provider by the name of Universal (known as Guardsmark at the time of the events in question.) (Tr. at 3440:12-19.) The third party provider presents the guards with their job description. (GC Ex. 20.) That job description makes clear that the guards’ responsibilities center on securing the Company premises. (*Id.*) That is, guards are expected to conduct continuous patrols for purposes of identifying any suspicious activity and damage, respond to medical emergencies, and act as an escort for visitors and employees who request escort services. (*Id.*)

Security guards at the Wichita facility give new employees an overview of the services guards provide during the new employees’ orientation. (Tr. at 70:3-9; ALJD at 29:36-38.) What employees are told conforms with the guards’ job description—that guards there to provide employees with access badges, respond to any medical emergencies they may have, and offer first aid if needed. (*Id.*, Tr. at 120:1-2, 149:1-3, 331:20-332:2.)

## **VI. Croxson’s Employment as Part of Belinda Spencer’s Team**

At all relevant times, Croxson held the position of Senior Representative at the Wichita Call Center. In that position, she was responsible for providing assistance to CSRs, handling calls that customers escalated, and ensuring that her team met required metrics in areas such as sales, commitment to schedule and credits and adjustments to customer accounts. (*Id.* at 482:12-25.) She was expected to spend approximately eighty percent (80%) of her time walking around

and engaging with CSRs in the pod, and approximately twenty percent of the time at her desk, performing administrative tasks. (*Id.* at 483:1-15.)<sup>6</sup>

A. *March 2015 through May 2015*

Croxson first became part of Spencer's team in about March 2015. (Tr. at 479:5-13.) At that time, Spencer left her Corporate Trainer position and assumed the position occupied by Croxson's former Coach, who went on a medical leave of absence. (*Id.* at 480:2-10.) The team occupied pod number 28, on the North end of the facility. (*Id.* at 481:11-13; GC Ex. 5.) All CSRs were already in their respective seats at the time Spencer took over. (*Id.*)

Shortly after Spencer assumed the role of Coach, Croxson volunteered that she belonged to the Union and that she felt her perception as a Union supporter was a negative one. (Tr. at 488:13-17.) She also mentioned that she did not "really even want to be part of [the Union]" and that "she felt . . . that was something she needed to do to save her job." (*Id.* at 488:25-489:5.) "Spencer believed [ ] Croxson made an effort to show she was not involved in the Union." (ALJD at 16, fn. 16.)<sup>7</sup> In addition to Croxon, there were several other open Union supporters on Spencer's team as of March 2015. They included Dante Jones, Cheryl Bell, and Daniva [last name unknown]. (Tr. at 495:20-496:14, 505:19-506:10.)

In or about April or May 2015, Spencer's team became part of the newly created On-Boarding department. (Tr. at 490:22-491:7.) Spencer was not at work during the last two weeks of May 2015 due to a previously scheduled vacation and a family emergency. (*Id.* at 491:11-19.) In her absence, her team moved to the South end of the facility, to pod number 10. (*Id.* at 491:20-492:4; GC. Ex. 5.) The CSRs chose not to take their previously assigned seats in the new pod, opting instead to sit where they pleased. (*Id.* at 492:18-493:3.)

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<sup>6</sup> The Senior Representative position is considered a springboard into managerial positions. (Tr. at 484:2-19, 555:9-23.)

<sup>7</sup> Both on this occasion and on the subsequent occasions on which Croxson brought up the Union, Spencer informed her that she "didn't really care what her affiliation was with anyone" or about "what happened in the past." (*Id.* at 488:18-24, 489:12-25.)

B. *Summer and Fall of 2015*

Spencer returned from leave in the beginning of June, 2015. (Tr. at 493:4-7.) Upon her return, she learned of Befort's facility-wide emails from comments made during a managers' meeting. (*Id.* at 493:8-20.) Spencer never saw the emails, and the only thing she knew about their contents was that they pertained to the Union. (*Id.* at 493:21-22, 547:14-17.) Spencer asked Croxson if she saw Befort's email and if she knew what it said. (*Id.* at 493:23-494:8.)<sup>8</sup> The two had no additional exchanges regarding the email. (*Id.* at 494:23-495:1.)

At the end of July, 2015, the teams realigned once again. Croxson chose to bid to remain on Spencer's team. (Tr. at 499:3-9.) Bell and Daniva, two well-known Union supporters, likewise opted to stay with Spencer. (*Id.* at 548:19-549:9.)<sup>9</sup> This was the first time that Spencer took over a team from the time that it was formed and from the team's first day of work. Accordingly, Spencer had to assign seats to the team members. As she does with all Senior Representatives reporting to her, Spencer consulted Croxson regarding seating arrangements for the new team. (Tr. at 500:19-501:5.) In determining where to sit CSRs, Spencer considers their tenure, their experience with a certain type of work, their performance and their personalities, among other things. (*Id.* at 500:6-18.) With this in mind, Spencer provided Croxson with the new team list and asked her if there was anybody that she had previously worked with, what the person's strengths and weaknesses might be, and where she thought certain CSRs might benefit from getting to know each other. (*Id.* at 501:5-14.) The ALJ credited Spencer's testimony on this point. (ALJD at 16:34-35.) This process resulted in a seating chart that was distributed to the new team members on July 23, 2015. (GC Ex. 17.)

At the time the seating chart was created, Spencer knew that one of the individuals joining her team, Alyssa Jones was a Union supporter. (Tr. at 503:2-6.) She also knew that Jones and other individual joining her team, Holly Robinson, were dating. (Tr. at 504:4-9.)

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<sup>8</sup> The ALJ's finding that Spencer asked Croxson if she saw Befort's "response" email to Elliott, is incorrect. (ALJD at 16:13-14.) The only employee who sent a response email to Mr. Elliott was Jones and, as discussed above, Jones' email only reached Mr. Elliott, and not the entire facility.

<sup>9</sup> Mr. Jones had assumed a higher-level position for which he was recommended by Spencer.

Croxson, as Senior Representative, had a fixed seat in the very center of the pod. Consequently, no matter where any CSR was placed, Croxson would be seated close. And, Croxson was expected to spend approximately eighty percent of her time *walking around* the pod. (*Id.* at 505:2-7; GC Ex. 17.) In this case, Croxson was seated two to three feet to the left of Jones, the exact same distance away from Robinson, and “three to four” feet away from Daniva. (*Id.* at 503:7-14; GC Ex. 17.) Bell was seated one seat away from Robinson<sup>10</sup> and immediately to the left of Croxson. (*Id.*)

### ANALYSIS

#### **I. Because There Is No Evidence that Respondent Applied the Applicable Rules In a Disparate Fashion, the ALJ Erred in Finding a Violation of the Act**

As the ALJ explains, in order to establish that an employer disparately enforced a policy in violation of the Act, the Charging Parties must show that the employer applied the policy “against statutorily protected activity” but not “against other similar activity under similar circumstances.” (ALJD at 20:42-44.) (citing *Stabilus, Inc.*, 355 NLRB 836, 839 (2012)). Here, these requirements are not met. First, the activity with respect to which the policies were applied—Befort sending repeated mass emails to the entire CSR population at the call center—was not statutorily protected. That is because Befort, as a CSR, was not authorized to access and use the email system to compose and send messages on a facility-wide basis. This is evident from the fact that she did not have access to email distribution lists, including the distribution list used for all Wichita CSRs, and that she received repeated system-generated messages alerting her that she was prohibited from addressing emails to more than 100 recipients. The law does not protect employee activity reserved for authorized personnel.

Second, the Company’s policies were not discriminatorily applied against Befort’s actions. Application of the policies was appropriate, and there is no evidence whatsoever of any employee at Befort’s level or with the same level of access to the email system sending email

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<sup>10</sup> The ALJ’s finding that “Bell was placed . . . four seats away from Robinson” is erroneous and contradicted by the seating chart. (ALJD at 17:12-13; GC 17.)

messages on a mass basis. Insofar as the ALJ found otherwise, that finding is erroneous, for the reasons discussed below. Also erroneous is the ALJ's determination that facility-wide emails sent by management or at management's direction about Company-sponsored events demonstrated that mass emails were permitted, so long as they were not about the Union. So too is the ALJ's substituting her judgment for the business judgment of the Company's managers to conclude that management's communications were comparable to those of Befort. It was not proper for the ALJ to find, contrary to management's business judgment, that the initiatives about which management sent facility-wide emails properly served the stated, legitimate business purpose of improving employee morale.

Furthermore, in determining whether the Company applied its policies to Befort's conduct in a disparate fashion—which is what the Complaint alleged and what the ALJ found—the ALJ engaged in and relied upon flawed legal analysis. In *Purple Commc'ns, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014), the Board held that employees who have been granted access to an employer's email system in the course of their work may use the email system for statutorily protected communications taking place during nonworking time. *Id.*, slip op. at 14. The Company does not dispute this here. It argues, however, that the level of access available to employees for purposes of engaging in concerted activity is proportionate to that provided to them for work purposes. The ALJ erred in not addressing, or, at best, glossing over this issue. The ALJ additionally erred in relying, in parts of her decision, on an evaluation of whether the Company could rebut the presumption that Befort possessed the right to use the email system to engage in concerted activity through a showing of “special circumstances” necessary for the maintenance of production and discipline. (*See, e.g.*, ALJD at 20:26-29.) A showing of “special circumstances” is only required where the employer seeks to impose a “total ban” on non-work email use by employees who otherwise have access to the email system. *Purple Commc'ns*, 361 NLRB No. 126, slip op. at 14. These are not the circumstances of this case, however. Equally inapplicable was the ALJ's analysis of whether the policies enforced by the Company, which were in place well before Befort sent her emails, were needed to maintain production and

discipline. That is because it was never alleged, in the Complaint or during the hearing, that the *Acceptable Use*, *Enterprise User Standard* or *Solicitation* policies are overbroad and/or unlawfully restrict concerted activity or email access rights. The only claim (and finding) is that of disparate application of the policies, and the only relevant question is whether the policies were enforced against Union-related activity but not against other similar conduct.<sup>11</sup>

A. Befort's Use of the Company's Email System Exceeded the Restricted Access She Was Provided for Work Purposes

The Board made clear in *Purple Commc'ns* that its decision in that case “do[es] not require an employer to grant employees access to its email system where it has chosen not to do so.” *Purple Commc'ns*, 361 NLRB No. 126, slip op. at 15. That the employer is not required to provide any access to its email system *to begin with* necessarily implies that it is not required to expand the level of access it does provide so that an employee is able make greater use of the email system and its functionality for nonwork purposes than for work purposes. In other words, the grant of limited access for work purposes does not translate into broader or unqualified access for Section 7 purposes. In most, if not all, organizations, access rights to any information technology systems, including email, are approved based on a variety of critical considerations. These considerations attempt to balance the scope of functionality needed by the employee to discharge his or her job responsibilities with, among other things, the employer's significant data security responsibilities and the potential for misuse and disruption. In some cases, these considerations weigh in favor of not granting the employee any access or ability to use the system at all. The Board specifically held that were the employer has made such a determination with respect to its email system, it stands—the employer is not required to provide access to email system for Section 7 purposes where it has “chosen not to do so” for work purposes. *Id.* It logically follows that the employer is not required to provide greater access or ability to use the email system for Section 7 purposes than it provides for work purposes. The ALJ's dismissal of

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<sup>11</sup> Nevertheless, should the Board determine that the question of whether the Company's policies are lawful is also raised (although, as the ALJ acknowledges in the Decision it was not), the Company presented testimonial evidence that they were necessary to maintain production and discipline.

this argument in one sentence, holding that the principle articulated in *Purple Commc'ns* only applies where the employer “has not chosen to give any access” and does not extend to situations where the employer has chosen to give some, but not unqualified access, is simplistic, ignores the realities of the workplace, and should be rejected. (ALJD at 22:8-9.)

It is clear that the Company chose to not authorize Befort to access the email system to send emails on a wide scale, and certainly not to the entire facility. Testimony from *both* the Charging Parties’ and the Company’s witnesses confirms that access to facility-wide distribution lists is granted on a limited basis, and only to employee who hold the title of “Senior Representative” or above. (Tr. at 259:19-260:7; 320:11-19; 379:17-380:14) (testifying that employees holding titles below “Senior Representative” do not have access to the email system’s distribution lists). There simply is no dispute about this fact. (*Id.*)

Further, restrictions implemented on the back-end of the Company’s information technology systems automatically reject email communications addressed to over 100 individual recipients. Befort undeniably had notice of these restrictions. Her email system would not have permitted her to pull up any facility-wide distribution list; and, when she attempted to input the email addresses of all CSRs at the facility or of even smaller groups, she received automated (and plainly nondiscriminatory) notice after notice of the email system’s limitations on such mass emails. Nevertheless, each time, Befort ignored the notice and made several attempts to defeat the restrictions until she ultimately was successful. (*Id.*) The fact that Befort successfully defeated the restrictions does not equate to authorization; a computer hacker’s ability to enter a system does not equate to permission. Befort did not have a right to circumvent her limited-access capabilities and the Company could not have engaged in a violation of such right.

- i. *The ALJ’s Factual Findings Concerning Email Access, Derived from Testimony About the Use of the “Reply All” Function, are Contrary to the Record or Unsupported, and Should be Dismissed.*

Although the ALJ did not address the Company’s lack of access argument from a legal standpoint, she nonetheless found that “employees,” including Befort, had access to address emails to the entire call center from testimony about the use of the system’s “reply all”

functionality. The ALJ made 4 findings with respect to this functionality, each of which are either contrary to the facts or concern emails that are not comparable to those sent by Befort.

The ALJ improperly found that “Befort, respond[ed]” to Elliott’s email “through the ‘[r]eply [a]ll’ function, stating that she thought the employees were not supposed to talk to their coaches and managers about unionization.” (ALJD at 10; R. Exh. 21.) This finding is contradicted by testimony and the documentary evidence to which the ALJ cites. Nowhere in her testimony does Befort say that she replied to Elliott’s email. The only individual who testified to that is Jones, also a CSR. (Tr. at 108:4-10.) And while Jones testified that she replied to all recipients of Elliott’s email (or all employees at the Wichita facility), Elliott explained that as a result of her access restrictions, Jones’ reply was delivered only to him. (Tr. at 387:5-388:1.) The copy of Jones’ reply plainly corroborates Elliott’s testimony, showing him as the reply’s only recipient. (*See* R. Ex. 21.) (*Compare with* GC Ex. 7, showing, on the recipient, or “To” line, the distribution list including the email addresses of all employees at the Wichita facility). In other words, Ms. Jones may have clicked “reply all,” but her message was only delivered to a single person. Thus, the ALJ contradicted the record by concluding that employees were able to rely all and communicate with all others at the Wichita call center.

For the same reasons, the ALJ’s finding that “[o]ther CSRs testified that they use the ‘[r]eply [a]ll’ function for distribution lists to the entire facility” is also flawed. (ALJD at 5.) Again, the only CSR who testified to replying to a distribution list covering the entire facility was Jones, who said that she did this on the single occasion discussed above. Testimonial and documentary evidence shows that she did not actually reach the entire facility. (Tr. at 108:4-10; R. Ex. 21.)

The ALJ also reached the unsubstantiated finding that “[t]he facility sent notifications of birth announcements to all employees [and] some employees would respond for congratulations through the ‘[r]eply [a]ll’ function, which would send the email to all recipients.” (ALJD at 5.) To begin with, even if the “facility,” through the individuals it empowered to send facility-wide emails, would send such emails, that does not prove that an employee in Befort’s position was

permitted to engage in similar activity. As to replies to such emails, the testimony in the record is only that some individuals “repl[ied] all” to some of these messages. (Tr. at 177:10-179:1.) There is no evidence that such emails went to all employees, and based on Mr. Elliott’s uncontroverted testimony, the evidence shows such delivery by individuals without special access is not possible. For these reasons, the ALJ’s finding that the “[r]epl[y [a]ll” function was used in response to baby showers and death notices” also carries no weight insofar as the issue of Befort’s access is concerned. (ALJD at 21:8-10.) In addition, the finding is erroneous because no one testified to having replied or having seen any replies to announcements of either “baby showers” or “death notices.”

B. The Findings and Conclusions Upon Which the ALJ’s Holdings Concerning Discriminatory Application Are Based Are Erroneous

Even if Befort was authorized to access the email system in the way that she did, the Company’s response did not constitute discriminatory application of its policies. There simply is no history of CSR use of the email system to send emails on a facility-wide basis, to CSRs or to any other groups at the call center. In fact, the record contains not a single mass or facility-wide email from any CSR other than Befort. While the Charging Parties and the ALJ have pointed to several emails that were sent to multiple recipients (*see* GC. Ex. 8), these emails are fundamentally different in purpose and nature.

First, the emails were sent by employees who were specifically granted access to facility-wide distribution lists and, thus, had the ability to address the entire facility at once.<sup>12</sup> This is plainly obvious on the face of the emails. While Befort intentionally circumvented her limited-access rights by copying and pasting employee email addresses into the “To” field, the senders of the emails relied on by the Charging Parties had access to distribution lists that allowed for the emails’ widespread dissemination. With the exception of a single email concerning the Company’s Chief Executive Officer, in which the “To” field is hidden, it is easy to see that the

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<sup>12</sup> *See* Tr. at 318:13-18; 319:2-6; 320:17-19 (establishing that access to these functionalities generally was only granted to employees holding the position of Senior Representative and above); *Id.* at 389:10-394:18 (testifying as to authorization to send emails reflected in General Counsel’s Exhibit 8 ).)

communications were all sent to the “WIC CC Everyone” distribution list, which only employees in the position of Senior Representative or above could access. Indeed, many of the emails were sent by the Resource Planning Communications department or Elliott’s assistant, at his direction. (Tr. at 390:16-391:4.) None of the emails in GC Ex. 8 are from a CSR and addressed to multiple individual recipients, let alone hundreds of individual recipients. And not one CSR testified that she drafted and sent an email to such a wide population—or, importantly, any email at all. The only testimony is that certain emails were “seen,” with no information as to exactly who sent them and to how many people, an assertion that carries no weight. The only record evidence introduced by the Charging Parties as to emails that may have been seen were sent by members of management and/or their agents, to inform employees of events considered of importance to management.<sup>13</sup> Regarding the contention that CSRs “replied” to facility-wide emails, it is unavailing for the reasons discussed above.

Second, the emails to which the Charging Parties point have legitimate business purposes. As Elliott explained, they were sent in connection with efforts to enhance employee morale and foster teamwork by providing employees with free food and engaging them in team building activities, such as a “salsa challenge” or a “lip sync battle.” (Tr. at 57:2-14, 389:10-394:18, GC Ex. 8.) The ALJ erred in failing to properly distinguish between emails sent by or at the request of *management*, alerting employees of *Company-sponsored initiatives*, and emails such as those sent by Befort. (ALJD at 23:1-10.) Emails and communications from management and its agents, informing employees of efforts and/or initiatives that the *company* sponsors, are qualitatively different from emails sent by non-management employees for personal reasons of any kind. The former speak for the employer, as to issues and matters the employer deems of importance to the entire organization, whereas the latter do not; in fact, it is

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<sup>13</sup> As to the one email regarding a lost charger, that sender, too, had the requisite access. (See Tr. at 389:10-394:18; GC Ex. 9 at 1-9.) That email should be deemed incomparable to those sent by Ms. Befort for this reason alone. In addition, the email differs in that, as discussed below, it is not solicitous in nature and/or of the type that invites discussion. In any event, this single email sent by a Sr. Associate cannot, in of itself, establish disparate enforcement.

why the Company here does not consider it necessary or appropriate to provide employees who have no managerial responsibilities with the ability to address the entire organization. Therefore, the ALJ's conclusion that the Company applied its policies in a discriminatory manner because it did not prohibit emails about Company or management-sponsored events relies on entirely inappropriate comparables and should be reversed.

The ALJ further erred in inappropriately substituting her judgment for the business judgment of the Company's managers and determining that the types of events promoted by the Company for purposes of furthering employee morale did not demonstrate a legitimate business purpose. Finally, the ALJ erred in finding, (seemingly in the alternative), that in order to establish that the initiatives about which the Company emailed constituted legitimate business purposes, the Company had show, through the use of "metrics," that the initiatives actually had the effect of improving employee morale. (*Id.* at 22.) These findings constitute a significant and improper intrusion into management's prerogative to exercise its business judgment in furtherance of the business (including its workforce morale), as it sees fit.

An employer and its management possess the right to exercise their judgment for the benefit of the business and sponsor, create and announce any company initiatives they believe benefit the organization. And an employer has unquestionable business-related interests in fostering employee morale and team building efforts. *See, e.g., Kallail v. Alliant Energy Corp. Servs., Inc.*, 691 F.3d 925, 931 (8th Cir. 2012) (holding that employment action taken in order to "maintain morale" was for "legitimate business reason[.]"); *Wimberly v. Shoney's, Inc.*, No. CV585-098, 1985 WL 5410, at \*13 (S.D. Ga. Sept. 19, 1985) ("Maintaining morale and good relations . . . is a legitimate business concern.").<sup>14</sup> It is up to the employer—not the courts—to determine how it wishes to accomplish these goals; and there is no legal requirement compelling the employer to measure and show that its programs and initiatives have been successful in order

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<sup>14</sup> The ALJ incorrectly disregarded the simple proposition for which these cases are cited—that the goal of fostering employee morale serves a legitimate business purpose—and inappropriately distinguished the cases based on the types of claims they addressed and the fact that the employers' chosen methods for enhancing morale were different.

for them to be considered in the legitimate interests of the business. Befort's emails did not have any business-related and, as she admitted, they were solely intended to garner support for the Union and attract attention to its organizing efforts. (Tr. at 45:25-46:10.)<sup>15</sup> Accordingly, the ALJ's efforts to equate emails informing employees about Company-sponsored programs to the emails sent by the Befort should be rejected. Simply put, consistent testimony and documentary evidence establish that the Company did not permit any other activity similar to Befort's; and, to the Company's knowledge, no other employee attempted to engage in such activity. (Tr. at 388:24-389:1, 402:25-403:4.)

Lastly, the ALJ erred in drawing an impermissible inference from Elliott's testimony and relying upon that inference to conclude that the Company was motivated by anti-Union animus in enforcing its policies. Elliott testified that management sometimes chooses to announce the birth of a child because, in his view, those working at the Wichita facility "are like a family." (Tr. at 407:23-408:20). Through a strained and highly speculative interpretation, the ALJ determined that Elliott's testimony as to employees being "family . . . [s]uggest[e]d that [the Company] considers [U]nion involvement as disloyalty." (ALJD at 21, fn. 29.) This conclusion requires great leaps in reasoning and is in no way supported by the cases to which the ALJ cites. Those cases involved statements *to employees*, telling them that they ended the employer's "family atmosphere" because they voted for the union or referencing the "family" feel of the organization and potential threats to it in communicating about the union. (ALJD at 21, fn. 29.) The cases could not be further departed from the circumstances from which the ALJ drew her inference. Here, there is no allegation and no single piece of evidence that similar statements were made to employees. Elliott's remark was made while on the stand, was offered as a simple explanation for why management may sometimes choose to recognize certain events in the lives of employees, and was not made in the context of any statements about the Union. The inference

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<sup>15</sup> For these reasons, and contrary to the ALJ's skepticism, a management email about a Company-sponsored bowling event designed to recognize high performers is entirely different from the bowling-related announcement made by Ms. Befort. (Tr. at 408:8-20; ALJD at 5:34-35.)

that Elliott’s testimony showed that the Company views those who support the Union to be “disloyal[]” is implausible and unsubstantiated. As such, the inference and all conclusions based upon it should be rejected.

*i. Erroneous Findings and Conclusions Particular to the Acceptable Use Policy*

In addition to the invalid findings and conclusions set forth above, the ALJ made several other incorrect determinations to hold that the Company applied its policies in a discriminatory manner. The ALJ mistakenly concluded that the Company’s application of the *Acceptable Use Policy* was improper because Befort’s emails did not constitute spam. First, even if the Company’s enforcement of the policy were not proper because Befort’s conduct did not fall within its scope, that would not prove it was discriminatory. And, insofar as the Company’s existing policies are concerned, the only unlawful act alleged in the Complaint, and the only unlawful act the ALJ found, was discriminatory application.

Second, Befort’s emails fell directly within the *Acceptable Use Policy*’s prohibition of “junk mail.” In fact, they had all of the characteristics of email spam, (also known as junk email)—they were unsolicited bulk emails involving identical messages, sent to numerous recipients simultaneously in a mass effort to reach as many people as possible. Regardless of the definition used, spam or junk mail has key characteristics also attributable to Befort’s emails—they are “unsolicited,” “sent to a large number of [email] addresses” or “recipients,” consisting primarily of “requests” or “promotional material” or messages.<sup>16</sup> It is undisputed that Befort’s emails were unsolicited and sent to a large audience. They were also promotional in nature, encouraging employees to “join [a] movement” and attend a party in support of such movement. (GC Ex. 6.) For this reason and the reasons discussed above, the ALJ’s conclusion that the Company applied its *Acceptable Use* policy in a disparate manner should be rejected.<sup>17</sup>

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<sup>16</sup> See <http://www.merriam-webster.com/dictionary/spam> (2016); <http://www.merriam-webster.com/dictionary/junk%20mail> (2016).

<sup>17</sup> As to the ALJ’s findings about and conclusions based upon the alleged use of the “reply all” function (ALJD at 21:9-12), they should be rejected for the reasons discussed above.

ii. *Erroneous Findings and Conclusions Particular to the Enterprise User Standard*

In addition to those discussed above, the ALJ relied on two other improper reasons to conclude that the Company discriminated in its enforcement of the *Enterprise User Standard*: the lack of evidence that the *Enterprise User Standard* was previously enforced at the Wichita facility and the fact that Elliott testified or “admitted” that had Befort sent her message to a smaller number of recipients, there is a chance the Company would not have known about it. (ALJD at 22:20-21.) These findings do not support a holding of disparate enforcement. As to the former, it ignores that to the Company’s knowledge, no one at the Wichita Call Center has ever engaged in activity similar to Befort’s. (Tr. at 402:25-403:4.) As to the hypothetical suggestion that the Company might not have known of a narrower communication, the only thing it shows is that had Befort complied with the email access restrictions applicable to employees at her level and built into the system, nothing would have happened. As such, these findings should be rejected.

iii. *Erroneous Findings and Conclusions Particular to the Solicitation Policy*

The ALJ concluded that the Company disparately enforced its *Solicitation* policy because Befort’s email message did not constitute solicitation. Even if Befort’s message did not fall within the scope of the policy, which it does, that alone would not prove discrimination. As explained above, discrimination is the only violation alleged and found by the ALJ, and no other claim may be entertained at this stage. Nevertheless, Befort’s email messages did constitute solicitation and were covered by and in violation of the *Solicitation* policy; the ALJ’s determination to the contrary should be rejected. The ALJ first found that the emails did not constitute solicitation because they were not “oral.” (ALJD at 23:28-32.) Such a conclusion, however, entirely disregards one of the central premises in the Board’s decision in *Purple Commc’ns*—that email communications have replaced oral communications in the workplace to a considerable extent. *See Purple Commc’ns*, 361 No. 126, slip op. at 11. It also disregards the

Board's explicit observation that, in this environment, "individual messages sent and received via email may . . . constitute solicitation." *Id.* at 12-13.

The ALJ then found that Befort's email messages did not constitute solicitation because they were not a "concrete effort to obtain a signature on an authorization card." (ALJD at 23:32-33.) In support of this conclusion, the ALJ cited to the Eight Circuit Court of Appeals' decision in *ConAgra Foods, Inc. v. NLRB*, 813 F. 3d 1079 (2016). In that case, however, the Eight Circuit held that Board precedent and the policies of the Act do not require that a communication request a signature on an authorization card in order for it to constitute solicitation; in fact, holding that a communication only qualifies as solicitation where it expressly seeks a signature on an authorization card is an "incorrect application of the law." *Id.* at 1087-89. Rather, communications or discussions that constitute "entreat[ies] to support the union," that "solicit union support," or that "request support for union organization" may "be subject to a blanket prohibition by the employer during working time." *Id.* Befort's email messages clearly were "entreaties to support the [U]nion" and its organizing efforts, asking employees to "join the [Union] movement," and requesting that they "please join" a Union-sponsored event. (GC Ex. 6.) As such, they constituted solicitation.

C. The ALJ's Analysis of Whether the Company's Policies Are Justified by the Need to Maintain Production and Discipline and the Conclusions Drawn from that Analysis Are Incorrect

The ALJ erred in employing an analysis of whether the policies are justified by the need to maintain production and discipline in her evaluation of whether the policies were disparately enforced against Befort. The legality of the policies has no bearing on whether they were disparately enforced, because it was never alleged in this litigation that the policies themselves are unlawful or improperly restrict employees' ability to engage in Section 7 activity, such that they would have to be justified by a showing of need to maintain production and discipline. The only theory of violation with respect to the Company's official, existing policies has always been discrimination or disparate treatment.

Nevertheless, there sufficient information and evidence demonstrate that the restrictions contained in the policies are necessary to maintain production. In granting employees a presumptive right to use an employer's email system for purposes of engaging in concerted activity, the Board did not depart from the long-established principle that "working time is for work." *See Republic Aviation*, 324 U.S. 793, 803 fn. 10 (1945) (holding that "[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work . . ."). In fact, the Board explained that the presumptive right "is expressly limited to nonworking time." *Purple Commc'ns*, 361 NLRB No. 126 , slip op. at 15. As such, it is recognized that whether oral or written, solicitations may be disruptive not only to those doing the solicitation, but also to those being solicited. Consistent with this, the Board has recognized that even a single email sent to a working employee carries with it the potential for distraction. *UMPC*, 362 NLRB 191, slip op. at 4 (Aug. 27, 2015) ("We do not doubt that using [the employer's] email system during working time may be distracting . . ."). And, with each additional recipient of an email, that potential grows. The Charging Parties' witnesses testified to exactly this. *See* Tr. at 178:19-25 (Parrish testifying to her annoyance with unsolicited emails concerning births, noting "you'd get ten emails [from] people you barely knew" saying "[c]ongratulations on the baby."); *Id.* at 88:15-89:25 (Befort testifying that she understood the rationale provided to her regarding the prohibition against mass unsolicited emails).

In the very least, a mass email requires large numbers of employees (especially those whose duties involve communicating in email form on a regular basis) to stop work and read the incoming email for purposes of assessing its subject matter, determining whether it is work-related, and judging whether it requires them to take any action. More likely, however, a mass email also invites responses to the sender and the other recipients, increasing the level of distraction and the amount of time being taken away from work on a significant scale. In fact, where employees disagree with the message, they may feel required or compelled to respond in real time even if they do not otherwise wish to participate in a conversation on the particular

topic. In this case, for example, employees stopped to respond to Befort to tell her that they did not wish to receive communications of the type she sent and also to complaint to management, in person, that they did not wish to receive such emails when coming to work. *See* Tr. at 51: 6-15 (Befort’s testimony regarding complaints); *Id.* at 377:9-14 (Elliott’s testimony regarding complaints); *Id.* at 351:16-21 (Wray-Tolbert’s testimony regarding complaints.) That work was disrupted, by only a single employee who found a workaround the system to send mass emails, is beyond dispute. Granting hundreds of employees the ability to send mass emails would undoubtedly disrupt working time to an even greater extent.<sup>18</sup> An employer need not decide between granting its management the ability to inform employees about Company-sponsored initiatives or Happy New Year greetings and opening itself up to every employee’s facility-wide email, at his or her whim. The Charging Parties’ claim would impose nothing less, and would significantly undermine the bedrock principle that working time is for work, for both the employee doing the soliciting and the employee being solicited. There is, therefore, a clear connection between the Company’s policies and its managerial interest in maintaining production and discipline.<sup>19</sup>

## **II. The ALJ Erred in Concluding that Elliot Promulgated New and Unlawful Work Rules**

Elliott’s email did not promulgate any new rules, but simply reminded employees of existing rules that, in conjunction, worked to prohibit the types of disruptive mass communications sent by Befort. (Tr. at 383:14-16, 388:19-23.) Elliott’s email also did not expand the scope of existing rules or alter them in any way. (*Id.* at 384:10-17, 386:8-13.)

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<sup>18</sup> Further highlighting the potential for disruption from the wide distribution is that although Befort requested for interested employees to contact her “outside of working hours” (GC Ex. 6), the fact is that the majority of CSRs at the facility did not work with her and likely did not know her schedule. Therefore, even if those interested would have contacted her when they were not working, it’s very probable that some of them would have reached her while she herself was expected to be engaged in discharging her duties.

<sup>19</sup> The ALJ’s determination that an interest in maintaining production and discipline justifying the policies cannot be established because Befort’s emails did not attach large files or audio or video segments should be rejected. (ALJD at 22:21-22.) *Purple Communications* does not limit employers’ ability to apply controls for purposes of maintaining production to instances in which employees send large emails or attach audios and videos. The section of the Board’s opinion mentioning such attachments and files provides a mere example of when controls may be applied. *Purple Communications*, 361 NLRB No. 126, slip op. at 15.

A. Employees Could Not Reasonably Construe Elliott’s Email as Promulgating Rules That Replaced Respondent’s Unchallenged Policies with Rules That Prohibit Protected Activity

The record simply does not support the claim that Elliott promulgated new rules in his June 2, 2015 email. Indeed, the email stated, “I’d like to take this opportunity [t]o *remind* you that it is not appropriate for employees to send emails to large numbers of employees.” (GC Ex. 7.) (Emphasis added). It then went on to briefly summarize the existing policies that rendered such action inappropriate: “[w]e don’t allow mass communications for any non-business purpose [*i.e.* junk or spam email] since this disrupts the workplace . . . [and] it is not appropriate to solicit other employees for any purpose when employees are working.” (*Id.*)

Aside from its plain language, Elliott’s email could not reasonably be construed by employees as enacting new employment policies because Company’s employment policies, including all of those at issue here, are formally promulgated, in stand-alone documents or as part of manuals such as the Employee Handbook, and are published and made accessible on the Company’s Intranet, known as OneVoice. (R. Ex. 22.) Employees acknowledge both the existence of the policies on OneVoice and their continuing obligation to familiarize themselves with them. (*Id.*) New policies simply are not promulgated in single email messages that the employees may choose to either keep or discard. Further, Elliott’s email also did not mention anything from which an employee would reasonably infer that new policies or rules were being enacted. As discussed above, the Company had in place lawful policies governing all of the topics addressed in the email. (GC Ex. 11, 13, 18.)

B. Even if Elliott’s Email Were Read as Promulgating New Policies, Which it Should Not Be, Those Policies Would Not Be Unlawful

Even if Elliott’s email were read as communicating new Company policies, its language cannot reasonably be construed as hindering Section 7 rights. The purportedly new rule against “mass emails” would not be unlawful for the reasons discussed above.

As to the second alleged rule “prohibiting employees from discussing the [U]nion during work time” (Complaint, ¶ 6 (a)(ii)), it fails as a matter of law even if believed to be entirely true.

(See Third Consolidated Complaint ¶ 6.) The Board has explained that employers may restrict engagement in concerted activities while employees are actively at work, which is exactly what the rule would say. See *Essex Int'l, Inc.*, 211 NLRB 749, 750 (1974). To that end, employers may lawfully promulgate rules that prohibit these activities during “working time” or “work time,” because these terms “connote[] the period of time that is spent in the performance of actual job duties,” (as distinguished from “working hours,” which “connotes the period of time from the beginning to the end of a workshift”). *Id.* See also *Schnadig Corp.*, 265 NLRB 147, 156 (1982) (explaining that “confin[ing]” non-solicitation rules “to the time the employees [a]re actually working” is proper and lawful). The allegation thus fails on its face.<sup>20</sup>

Nor does Elliot’s email support the Charging Parties’ claim that the email contains a new and overbroad policy regarding social media usage. (Tr. at 20:7-19; Complaint ¶ 6 (a) (iii).) The first paragraph of the email reminds employees of Company policy; the remaining paragraphs respond directly to the substance of Befort’s email. (GC Ex. 7 at 1.) Elliott expressly says as much, stating, “[s]ince this [mass and unsolicited] email address union issues, I’d like to take this opportunity to respond.” (*Id.*) But, even if the email were read as a statement of policy, it would not be reasonably construed as anything other than a lawful working time restriction. While Elliott’s reference to social media usage “off the job” may be read, in isolation, as prohibiting nonworking time use, the surrounding context makes clear this is not the case.<sup>21</sup> Just prior to the “off the job” language, Elliott notes employees have “countless opportunities to communicate with others when they are *not working*—about the union or anything else.” (*Id.*) (Emphasis added). Consistent with the Company’s formal social media policy (GC Ex. 19), the “off the job”

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<sup>20</sup> Even if the Board were to look beyond the face of the allegation, which it should not, Mr. Elliott’s email explicitly states that “[e]mployees have countless opportunities to communicate with others when they are not working—about the Union or anything else.” (GC Ex. 7.) This language is entirely lawful and consistent with Board law providing that prohibitions on concerted activities during times that employees are working are lawful. In fact, Mr. Elliott testified that his intention matched the reasonable interpretation of the language he used—that intention was to remind employees that they should not engage in discussion of non-work topics while actively assisting customers. (Tr. at 385:7-12.)

<sup>21</sup> The Board has instructed that language must not be read in isolation when determining a policy’s lawfulness, but must be considered in its full and proper context. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

language merely enumerates one of the “countless” ways an employee may communicate while “not working.” (*Compare* Tr. at 406:1-3 (“Q: So when you say here they can use social networks off the job, of course – A: Any time you are not talking to a customer.”) *with* GC Ex. 19 at 1 (“[O]ccasional, personal Social Media use on your work computer or during work hours may be acceptable as long as it doesn’t interfere with your job responsibilities and is consistent with this Policy and the other applicable documents and policies listed below.”).) Reading the language in context, an employee would not reasonably construe the language as an improper limitation on Section 7 rights. Both in conjunction with its formally promulgated policies and independent from them, Elliott’s email, reasonably construed, merely reflects employee rights to support the union and the Company’s right to control working time. *Essex Int’l, Inc.*, 211 NLRB at 750. Both are appropriate; neither supports the Charging Parties’ claims.

**III. The ALJ Erred in Concluding that the Company Violated the Act by Telling Employees that It Was Creating a Seating Chart to Isolate Employees because of Their Union Sympathies and Creating and Maintaining Such a Seating Chart**

The ALJ’s determinations concerning the seating chart allegations do not fall under any viable theory of law and are not supported by the record. On these allegations, the ALJ reached two separate conclusions: 1) that the Company “violated Section 8(a)(1) of the Act by *telling* employees that it was creating a seating chart to isolate employees because of their Union activities;” and 2) that the Company “violated Section 8(a)(3) of the Act by *creating and maintaining* a seating chart to isolate employees because of their Union activities and sympathies.” (ALJD at 32-33, 36.) (Emphasis added).

The hearing testimony provided by the Charging Parties’ witnesses varied as to how and why Spencer took the alleged actions. In one scenario, Spencer expressed to Croxson that she did not wish to sit Union supporters near her so as to avoid the perception that she would favor them. (Tr. at 209:23-210:5.) In another, Spencer told Croxson that she would not to sit Alyssa Jones and Holly Robinson near each other because they were Union supporters and also in a relationship. (Tr. at 212:13-213:15.) The ALJ credited the Charging Parties’ witnesses as to

both scenarios. (ALJD at 17:1-6.) The alleged statement regarding favoritism by Croxson is improbable in light the ALJ's other determination—that as early as the Spring of 2015, Croxson attempted to show, and Spencer believed, that Croxson wanted to distance from the Union. (ALJD at 15:45-16:2, fn. 16.) The allegation that Spencer did not wish to sit Jones and Robinson together because of their Union support is undermined by the fact that there is zero dispute they were, indeed, in a relationship.

In finding an 8(a)(1) violation on grounds that Spencer's "statement" to Croxson was "coercive because it convey[ed] [her] plan to isolate [U]nion supporters," the ALJ did not explain on which of the two alleged statements to Croxson she relied. (ALJD at 32:34-38.)<sup>22</sup> Nevertheless, neither one of the two statements, even if believed to be true, may be considered unduly coercive. In this context, coercive statements are those that threaten employees with adverse consequences, such as loss of benefits or less favorable and/or more onerous working conditions if they engage in Union activity. The cases cited by the ALJ in support of her holding establish as much. The threat at issue in *Bowling Transportation, Inc.*, 336 NLRB 393, 400 (2001), was of adverse action in the form of discipline. In *Yale-New Haven Hosp.*, 309 NLRB 363, 367-368 (1992), the threat was of potential job loss and/or worsened working conditions—*i.e.* telling the employee that the company "would come after him and they would be head-hunting after the election." *Id.*

The statements purportedly made by Spencer do not fall under this category and do not constitute an actionable, coercive threat of reprisal. No adverse action of any type could have resulted had either of Spencer's alleged statements been carried out. The alleged remark that Spencer wished to avoid any perceptions of favoritism toward other Union supporters does not threaten any adverse action against Croxson, either expressly or impliedly. In fact, the seating of other Union supporters would not and could not impact Croxson's job conditions *in any way*,

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<sup>22</sup> In its post-hearing brief, the General Counsel relied on both of the alleged statements in support of the claimed violation. See Counsel for the General Counsel's Brief to the Administrative Law Judge, dated May 13, 2016 (herein after "GC Br.") at 58-60. The ALJ found a violation as to one.

especially in a work area measuring approximately 10 feet wide and 15 feet long, and an environment in which Croxson was expected to spend 80% of her time standing and walking around the pod. (Tr. at 505:2-7.) The same is true of the alleged statement of preference or intention to not sit two Union supporters next to each other; it did not threaten any adverse impact on Croxson's, or anyone else's, terms and conditions of employment. As to the theory that the statements were unlawful because they threatened retaliation in the form of isolation, it fails because there is no viable theory of isolation under the facts of this case.<sup>23</sup>

The ALJ concluded that the Company, through Spencer, discriminated against Union supporters by creating and maintaining a seating chart to isolate them because of their Union activities and sympathies. (ALJD at 36:31-32.) The ALJ further determined that the isolation occurred because Spencer separated the Union supporters from each other “with four seats between each in a U-shaped pod.” (ALJD at 32:45-33:3.) As a preliminary matter, this factual finding is incorrect and contradicted by documentary evidence. The seating chart created by Spencer shows that there was only one seat between Robinson and Bell. (GC Ex. 17.) In addition, Croxson was seated in the center of everyone. (*Id.*) While Robinson and Jones were assigned seats right across from each other, they were only three to four feet away from Croxson. The other Union supporter, Daniva, is also in close proximity to Croxson, sitting about three to four feet away from her. (*Id.*; Tr. at 503:12-14.) Bell is even closer to Croxson and, based on the pod layout, as reasonably close to Croxson as any CSR could get. (GC Ex. 17.) These facts rebut any contention that employees were isolated from Croxson due to any favoritism-related concerns.

None of the now three theories that have now arisen in this litigation—sitting employees away from Croxson, sitting Jones and Robinson away from each other, or sitting Union supporters “with four seats between each” other—support a viable claim of unlawful isolation

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<sup>23</sup> It is telling that in advocating for the application of the *Wright Line* analysis to the claim that Spencer's statements resulted in a violation of the Act, the General Counsel never specifies the exact adverse action that was purportedly motivated by Spencer's alleged anti-Union animus. (*See* GC Br. at 60.)

and an 8(a)(3) violation. The ALJ erred in not addressing the Company's argument on this point. (*See Resp. Br. at 49-51.*) A claim of isolation rests on the principle that it is unlawful for an employer to attempt to prevent the dissemination of union views by isolating union supporters from the rest of the workforce—not that it is unlawful to separate union supporters from each other. *See, e.g., International Ship Repair & Marine Servs., Inc.*, 329 NLRB 213, 217, 224-25 (1999) (finding that employer engaged in unlawful isolation of Union supporter by assigning him to a separate work area and work hours that inhibited his contact with other employees); *Fabric Mart Draperies, Inc.*, 182 NLRB No. 55, slip op. at 10 (May 12, 1970) (concluding that employer violated the Act when it punished an employee who participated in a prior Board proceeding by assigning her to a “remote and essentially isolates work station.”) Every case decided by the Board has addressed claims of unlawful isolation with this principle in mind; and neither the Charging Parties nor the ALJ cite to any Board cases that depart from it.

As such, in order to establish that the Company discriminated against any employees by isolating them, the Charging Parties must show that the challenged seating arrangement was put in place according to a predetermined, animus-motivated plan to separate the employees from the rest of the workforce and prevent them from disseminating their views or otherwise engaging in Union activities. *See, e.g., Am. Red Cross Missouri-Illinois Blood Servs. Region*, 347 NLRB 347, 365 (2006) (concluding that union supporters were unlawfully isolated and undermined in their abilities to organize when their schedules were grouped together). That cannot be done here. It is undisputed that Croxson was not separated from other employees or prevented from engaging in Union activities. Indeed, she sat in the middle of *all* employees, with her desk “more or less equidistant” to everyone else, and was actually expected to spend approximately 80% of her time walking around the entire pod, interacting and working with each CSR, in an area measuring approximately 10 feet by 15 feet. (ALJD at 15:21-22; Tr. at 266:18-267:25; 505:2-10.) As described above, she also sat quite close to a number of the Union supporters. Croxson had precisely the same ability to engage in Union activities after July 2015 as she did prior to that time.

The seating assignments for Jones and Robinson, who sat on either side of Croxson, similarly had no actionable isolating effect. Jones and Robinson were not prevented from speaking to each other, or with any other employee, about any matter. (Tr. at 318:18-23.) The record is replete with testimony that CSRs interacted often during work hours and even communicated via text or Instant Messenger. That Jones and Robinson did not sit next to each other could not have inhibited this or any other Union-related interaction they might have wished to have, as the area in which they sat was small and contained.

Finally, there is no contention or evidence that the seats assigned to Croxson, Jones and Robinson somehow prevented them from engaging in Union activity with other employees for one simple reason: if Croxson's testimony is taken as true, and it is believed that Union supporters were somehow separated (which the seating chart refutes), this would have allowed them to talk to *more* people about their efforts than if they sat close to each other. As discussed above, this is *contrary* to cases in which the Board has found unlawful isolation to have occurred. *See, e.g., Corliss Resources, Inc.*, 362 NLRB No. 21, slip op. at p. 3 (February 27, 2015) (finding that advancing an employee's start time so that he left before other drivers arrived resulted in his unlawful isolation); *Am. Red Cross Missouri-Illinois Blood Servs. Region*, 347 NLRB at 347, 354-55 (scheduling union supporters together resulted in their unlawful "isolation" because it "significantly altered their ability to discuss the [u]nion with other employees.").

Moreover, even if some adverse event occurred (which it did not), it cannot be established it was motivated by anti-Union animus. Both Croxson and Spencer testified that Croxson participated in making seating arrangement decisions, and the seating chart was created *shortly after Croxson bid to remain a part of Spencer's team*. In addition, the testimony is consistent that Spencer's concern regarding the possibility of Jones and Robinson sitting together centered on their being in a personal relationship. (Tr. at 212:4-25, 213:20-22, 503:25-505:1.) These facts greatly undermine Croxson's testimony regarding Spencer's motivations, and there is no other evidence that even remotely links anti-Union animus with the seating chart decisions.

The ALJ's inference of animus from the fact that this was the first time Spencer created a seating chart is erroneous. This would have had to be Spencer's first seating chart, as this was the first time she was to manage a team from its inception. For all of the foregoing reasons, the seating-chart related allegations should be dismissed.

**IV. The ALJ Erred in Concluding that the Company May Be Held Liable Under the Act for the Conduct of Security Guard Weigand**

A. The Determination that Weigand Was an Agent of the Company for Purposes of the Challenged Conduct Is Erroneous

“The burden of proving an agency relationship is on the party asserting its existence.” *United Auto Workers, Local 509 (Fiat Chrysler Automotive Group)*, 363 NLRB No. 147 (Mar. 17, 2016), slip op. at 4, quoting *Cornell Forge Co.*, 339 NLRB 733 (2003). That party must demonstrate the agency relationship exists with respect to the “*specific conduct*” alleged as unlawful. *Id.* (Emphasis added); *Station Casinos, Inc., et al.*, 358 NLRB 637, 645 (2012) (“although Rubio was [r]espondent's agent for many purposes, such as passing out work assignments, Rubio was not Respondent's agent when he allegedly threatened Corpus with termination for his union activities.”); *Pessoa Construction Co.*, 356 NLRB 1253, 1255 (2011) (finding that assignment dispatcher was the employer's agent for many purposes, but not for the alleged unlawful conduct; “[t]here was no reason for [employee] to believe that [assignment dispatcher] was authorized by [the employer] to make these remarks”).

An agency relationship may be established by actual or apparent authority. *UAW, Local 509*, 363 NLRB No. 147, slip op. at 4. Actual authority exists where the principal creates the authority by manifestation to the agent. *Communications Workers of America, Local 9431 (Pacific Bell)*, 304 NLRB 446, 446, n. 4 (1991). Apparent authority, on the other hand, may be established by demonstrating that the principal “knows or ‘should know’” that the principal’s manifestations to third parties would “likely . . . cause third parties to believe that the agent has authority to” engage in the specific conduct. *Id.* In either case, the manifestations may be express or implied. *Id.*

The specific conduct at issue here is Weigand’s communicating “[C]ompany policy” concerning the distribution of literature to an employee, Parrish, and instructing her to cease distributing such literature pursuant to the purported policy. That is made abundantly clear by the Complaint and by the hearing testimony. The Complaint alleges that Weigand “prohibited [Parrish] from distributing [U]nion materials in nonwork areas during nonworking time;” and Parrish testified the issue was that Weigand “told [her] it was [C]ompany policy that [she] couldn’t be passing out flyers,” and that it was her understanding he was speaking about T-Mobile’s policy. (Complaint at ¶ 9, Tr. at 169:16-20.)

Contrary to the Charging Parties’ contentions, the specific conduct with respect to which they carry the burden of showing agency is *not* controlling access or monitoring or reporting Union activities. It is not alleged that Weigand acted unlawfully in denying Parrish access or monitoring or reporting her. He did, in fact, report his interaction with Parrish to Human Resources, but it is *not* alleged that he violated the law in doing so. It also is not alleged that he acted unlawfully in connection with these responsibilities—*i.e.* he did not eject or prevent Parrish from accessing the premises.

Yet, these are the *only* responsibilities with respect to which the ALJ found that Weigand was an agent. Specifically, the ALJ held that “[a]n employee would reasonabl[y] believe that Weigand was acting as an agent on behalf of Respondent regarding who could access the property.” (ALJD at 30:44-45.). It is contrary to governing Board law to conclude that apparent authority to control “who could access the property” translates into apparent authority to enforce the Company’s distribution policy, which is the only way in which Weigand is alleged to have acted unlawfully. And the record does not support a finding that Weigand was an agent of the Company for purposes of communicating, enforcing, or promulgating employment policies.

*i. Weigand Did Not Possess Actual Authority*

There was no manifestation to Weigand that he was authorized to enforce the Company’s employment policies or promulgate similar rules of his own. The job description provided to Weigand specified that his responsibilities focused on conducting continuous patrols for

purposes of identifying any suspicious activity and damage, responding to medical emergencies, and acting as an escort for visitors and employees who request escort services. (GC Ex. 20.) There is no reference to Weigand enforcing employment policies of any kind. In fact, Parrish testified that when she asked, on a separate occasion, why a security guard was not enforcing rules pertaining to smoking on the premises, he responded that this was not within his realm of responsibility. (Tr. at 186:5-188:12.)

Weigand, like all security guards, was also expected to follow a protocol that required him to inform the Human Resources Department or Company management if he believed action needed to be taken against an employee and explain the circumstances that needed to be addressed. (*Id.* at 345:5-10.) (“he needs to come find myself or Jeff Elliott, our Call Center Director, and let us know what is going on, so we can figure out what we need to do”); (*Id.* at 331:5-8.) (“I told [ Weigand] that he was incorrect . . . and that in the future he needed to come find me before he gave direction to any of our employees.”).) The ALJ incorrectly disregarded Wray-Tolbert’s testimony on this point by observing that “guards did not contact Human Resources in every instance, nor did the TPA reports reflect such instruction.” (ALJD at 30:4-5.) There is no record evidence of any instance in which a security guard took action without notifying the Company, and the ALJ did not point to any. In addition, there is no reason for the TPA reports, which are filled out by Wray-Tolbert, to contain every instruction governing security guards’ job duties, and the ALJ did not explain why that should be the case. The ALJ further erred in disregarding this testimony on grounds that the first security guard that Parrish encountered “took action without any contact with Human Resources” by informing Parrish that she was on private property. (ALJD at 30:39-40.) That incident proves the exact opposite, as the guard turned away and let Parrish continue in her activity as soon as she informed him she was an employee.

*ii. Weigand Did Not Possess Apparent Authority*

Employees are notified of the security guards’ limited duties from the onset of their employment. (ALJD at 29:36-38.) These duties extend solely to monitoring and securing

Company premises, informing Company employees of the presence of any third party visitors and/or potential damage to their property (*i.e.* vehicles), issuing identification cards to individuals that the Company chooses to provide with physical access to its facility, and providing emergency aid. *Id.*; *see also*, Tr. at 341:12-15, 18-21; 331:19-332:2. This is confirmed by the Charging Parties' own witnesses, who testified that their interactions with Weigand and/or other security guards did not exceed this scope. As described by these witnesses, interactions extended only to guards notifying them when items or persons arrived (*Id.* at 173:23-174:5), providing them with training on parking restrictions and identification requirements (*Id.* at 175:1-12, 17-25), notifying them when their cars were parked in the wrong spot (*Id.* at 175:19-176:3), had flat tires or were impacted by weather conditions (*Id.* at 116:22-23), aiding them with temporary badges (*Id.* at 120:1-2), sending out emails when items were lost and found (*Id.* at 143:7-9), and assisting in cases of emergency (*Id.* at 149:1-3). Given this evidence, the ALJ herself found that Weigand's job duties centered and on providing security—arranging for entry to the facility, generating temporary access badges for employees, patrolling the grounds, and monitoring for damage to vehicles. (ALJD at 29:29-38.)

The Charging Parties (who have the burden of proof on this issue) did not introduce any evidence of security guards performing other duties; and they certainly introduced no evidence of security guards engaging in the “specific conduct” in question here. In fact, there is *no* evidence in the record that security guards ever enforced *anything* or directed employees in any way—only that they communicated the existence of certain activities or circumstances to Human Resources. Parrish herself testified that she was specifically informed *by a security guard* that *it was not within his scope of responsibility to enforce Company policy* (Tr. at 186:5-188:12.), that she *never* had any prior contact with a security guard in connection with her numerous Union-related activities on Company property (*id.* at 184:11-186:4.), and that she did not believe Weigand's comments to her reflected or represented Company policy although that's what he purported to communicate. (Tr. at 169:25-170:2.)

Finally, Parrish testified as to very divergent actions by the two security guards she encountered on the day in question. The first guard allowed Parrish to continue her solicitation and distribution after ascertaining she was an employee. Weigand's actions that same day were directly opposite. (Tr. at 166:20-167:3.) There is simply no way to establish a greater scope of authority than that expressly prescribed on such a contradictory record. While the Charging Parties argue, and the ALJ found, that apparent authority to decide "who could access the property," (ALJD 30:44-45), equates to apparent authority to enforce or change policies as they pertain to employees, the Board has held otherwise. *See UAW, Local 509*, 363 NLRB No. 147, slip op. at 4.<sup>24</sup>

The cases relied upon by the ALJ do not stand in contradiction with this Board law. In *Saint John's Health Ctr.*, 357 NLRB 2078, 2095-2096 (2011) security guards acted "*under the direct [and express] authority of Respondent's vice president for human resources in carrying out [r]espondent's access policy.*" *Id.* (Emphasis added). Not only is nothing remotely close to express authority alleged here, but the conduct at issue in *Saint John's Health Ctr.*—controlling access to property—fell squarely within the security guard's job responsibilities. In *Cooking Good Div. of Perdue Farms, Inc.*, 323 NLRB 345, 351 (1997), the Administrative Law Judge found, and the Board agreed, that a security guard placed in "a position to stop persons entering the plant premises and to confiscate materials" before entry acted with apparent authority when he confiscated an employee's union handbills. (*Id.*) In *Cooking Good*, too, the security guard

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<sup>24</sup> In *UAW, Local 509*, 363 NLRB No. 147, slip op. at 4, an employee who served as a health and safety representative for the union, regularly made the employer "aware of [health and safety] issues when they arose and . . . work[ed with the employer] . . . to correct them," became involved in a confrontation with another employee over a matter relating to health and safety. *Id.*, slip op. at 4. Allegedly unlawful conduct arose when the health and safety representative complained about the confrontation to the employer on behalf of the union, knowing that the complaint would lead to discipline, and discipline was imposed. *Id.* It was argued that the discipline was discriminatory and that the union should be held liable for causing or attempting to cause an employer to discriminate against the disciplined employee. *Id.* The Board, adopting the Administrative Law Judge's dismissal of the complaint, disagreed; it found that the health and safety representative's authority to regularly inspect and report health and safety issues on behalf of the union did not also present him with apparent authority to act upon those issues in any other way. *Id.* As the Administrative Law Judge explained, the recipient of the health and safety representative's complaint was more likely to understand the complaint as "personal[]." (*Id.*)

*See also Station Casinos, Inc.*, 358 NLRB at 645 (Agency status for things such as "passing out work assignments" did not confer authority to threaten employee with termination for union activities.)

acted in accordance with his clear responsibility to control access to property and the items being brought onto it. Here, there is no issue with Parrish's access having been restricted, and Weigand's conduct fell well outside of the responsibilities with which he was entrusted.

The connection between Weigand's actual authority to secure property and report observed activity on the premises and any authority to act to enforce Company policy is nonexistent and strained at best. No law supports the ALJ's conclusion that "evidence . . . show[ing] th[at] guards monitor who enters and exists the property" and "detain people at the front desk and require identification" translates into apparent authority to enforce employment policies. (ALJD at 30:31-33.) This is especially the case here, where not one of the General Counsel's witnesses testified that she interacted with a security guard in connection with any concerted activity or other employment matters, at least one of them was told by a security guard, that he could not even enforce rules concerning where employees should smoke, and, Third Party Activity Reports to which the Charging Parties point as evidence of the security guards authority specifically state "*do not approach employees . . .*" (GC. Ex. 24.)<sup>25</sup> Simply put, there was no reason for Parrish to believe that Weigand was authorized to instruct her on whether she could distribute Union literature or engage in any other type of Union activity.

B. The Determination that the Company Did not Effectively Repudiate Weigand's Conduct Is Erroneous

The Company's actions promptly after learning of Weigand's interaction with Parrish not only confirm that he was not an agent of the Company for purposes of the challenged conduct, but also establish that the conduct was effectively repudiated.

"It is settled that under certain circumstances an employe[r] may relieve [it]self of liability for unlawful conduct by repudiating the conduct." *Passavant Mem'l Area Hosp.*, 237 NLRB 138, 138-39 (1978). To be effective, the repudiation must be "timely," "unambiguous,"

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<sup>25</sup> These reports are also irrelevant for the reasons discussed above—they evidence nothing other than mere reports of certain activity, and it is not alleged that Mr. Weigand's reporting of Parrish's activity to Wray-Tolbert was unlawful. In fact, that report led to an effective repudiation of his conduct and a clear communication by the Company of its correct and lawful distribution policy. (In addition, the Third Party Activity reports are not themselves alleged to be unlawful in any way).

“specific in nature to the coercive conduct,” and “free from other proscribed illegal conduct.” *Id.* (quoting *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016, 1024 (1977).) There must also be “adequate publication of the repudiation to the employees involved,” “no proscribed conduct on the employer’s part after the publication,” and “assurances that in the future [the] employer will not interfere with the exercise of . . . Section 7 rights.” *Passavant Mem’l Area Hosp.*, 237 NLRB at 138. This standard need not be applied with hyper-technical precision, but instead must be aimed at encouraging good faith remedial action. *Station Casinos, LLC, et al.*, 358 NLRB 1556, 1576 (2012) (“by its terms the *Passavant* decision indicates that what an employer must do to cure a violation may depend on the nature of the violation”); *River’s Bend Health & Rehabilitation Serv.*, 350 NLRB 184, 193 (2007) (*Passavant* defense valid even though repudiation did not completely accord with requirements of timeliness and lack of ambiguity).

The Company’s actions effectively repudiated Weigand’s conduct under the applicable standard. The entire event, from Weigand’s interaction with Parrish to Respondent’s repudiation, took place within the time span of approximately one hour. (Tr. at 333:12-13.) Shortly after Weigand encountered Parrish, he reported his interaction with her to Wray-Tolbert. In no ambiguous terms, Wray-Tolbert explained to Weigand that he was both incorrect and acting outside of the scope of his authority in instructing Parrish to stop distributing Union literature. (Tr. at 331:4-8.) Wray-Tolbert also promptly sent an email to Parrish informing her that the security guard was in error and that there was no prohibition against her activities. (Tr. at 333:12-13; GC Ex. 10 at 1.) Parrish testified that she understood the email, that she agreed with its representations, that it accurately summarized the incident, and that she had no further questions. (Tr. at 197:13-194:24.)

It is plainly evident that Wray-Tolbert’s email adequately repudiated Weigand’s conduct. The email was timely, specific as to the conduct being repudiated, unambiguous in disavowing the conduct and adequately published to the only person that was exposed to the conduct. As such, the standards set forth in *Passavant* are sufficiently met. *See, e.g., Raysel-IDE, Inc.*, 284 NLRB 879, 881 (1987) (finding that violation concerning statement to employee that she could

not wear a union button was adequately repudiated where the statement was retracted within twenty-four hours and employee was assured she could wear her button).

The ALJ was incorrect in holding that the Company did not effectively repudiate Weigand's actions because other unfair labor practices occurred and Weigand's conduct occurred within a 60-day notice posting period concerning an unrelated settlement. The incident involving Parrish was truly isolated. There is no allegation or fact to show that any other employee was involved or witnessed the interaction with the security guard. There is no allegation that this incident was somehow related to any of the other issues in this case. And Respondent's remedial actions in August were undertaken in good faith, should be encouraged, and should not be denied effect merely because unrelated claims of improper conduct occurred two months before and three months later. *See Broyhill Co.*, 260 NLRB 1366, 1367 (1982) ("In sum, the conclusion is inescapable that Respondent did all that it reasonably could do to disavow the unlawful conduct of its supervisor. Such voluntary action by employers should be encouraged by this Board.")

Lastly, the ALJ was incorrect in holding that the Company did not effectively cure Weigand's conduct due to its failure to assure Parrish that the conduct would not occur again. The case cited by the ALJ in support of this conclusion, *Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 355 (4th Cir. 2001), does not hold that employers are required to explicitly state that the challenged conduct will not happen again. The case stands for the larger proposition, encompassed in the Board law discussed above, that as a result of the cure, the employee should have an "assurance" that the conduct in which he or she engaged was permissible and will not be prohibited in the future. That assurance did not exist in *Consol. Diesel*, where the only communication to the employee constituted of an "indirect apology," communicated orally. *Id.* Parrish, on the other hand, had ample assurance. Wray-Tolbert contacted her in writing, informed her not only that Weigand's conduct was wrong, and in very clear terms stated that the Company's policy permitted Parrish to engage in the very conduct that was restricted by Weigand—"distribut[e] Union literature in the non-work areas during non-working time." (GC

Ex.10.) Parrish testified that she understood she would be allowed to do just that and had no questions about what might or might not be permissible. Therefore, no reasonable inference that Parrish was left uncertain about whether she would again be prevented from leafleting on Company grounds can be drawn.

**V. The ALJ Erred in Concluding that Maron Unlawfully Prohibited Employees from Engaging in Concerted Activities**

Unambiguous testimony and documentary evidence establish that Ms. Maron only made lawful statements to employees. Ms. Maron is alleged to have made unlawful statements on two occasions on: June 2, 2015, and again on or about June 4, 2015. (Complaint, ¶ 7.) She testified, consistently and unequivocally, that on each occasion, she read from prepared “Talking Points.” The ALJ incorrectly disregarded and/or minimized the weight to be accorded to this concrete documentary evidence, which directly contradicts the allegations of the Complaint. The ALJ similarly erred in not addressing documentary evidence created by the Charging Party’s own witness, which itself corroborates that Ms. Maron did not make the alleged statements, and in ignoring the witness’ contradictory testimony and the resulting impact on her credibility.

Finally, the ALJ erred in drawing an inference against Maron and the Company because Meeks, who was also present during Maron’s meetings, did not testify. (ALJD at 26:1-10.) The very case to which the ALJ cites, *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006) establishes that an adverse inference in these circumstances is inappropriate. In that case, the Board concluded that the judge erred in drawing an adverse inference from the employer’s failure to call a supervisor who participated in the events at issue, where “other record evidence,” including testimony from other “high-level managers,” made [the supervisor’s] testimony unnecessary,” *Id.* at 1022. Here, clear documentary evidence created by the Company and the Charging Party’s own witness rebuts the allegations of the Complaint, the Company elicited contradictory testimony from this witness as to both meetings, and Maron testified in an unwavering manner.<sup>26</sup>

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<sup>26</sup> While the ALJ found that there were “variations” in Maron’s testimony, she does not specify what they are, and the record simply does not reveal any.

In the June 2, 2015 meeting with Befort, Maron communicated lawful, pre-existing Company policies (and not, as the Charging Parties contend and addressed above, a new rule). (See R. Ex. 23.) The finding that in this meeting, Maron told Befort that she “could not use [her] work email to send any messages about the Union” (ALJD at 36:19-20) is wholly refuted both by the document from which Maron read and, importantly, Befort’s own testimony. The document specifically poses a question and answer, which Maron testified that she prefaced with the words “you may ask,” and read to Befort:

Question: Can I use e-mail to communicate about the Union?

Answer: Yes, but your use of [C]ompany systems for these purposes has to be while neither you nor the person [with whom] you are communicating are working, and under circumstances which are not likely to disrupt work at the call center . . . .

(R Ex. 23) (Emphasis added). Befort testified that she received exactly this information. She stated that “ Maron told [her] that she *could* use the work email for [Union] messages as long as it wasn’t done in a disruptive manner. “ (Tr. at 89:19-23.) The ALJ presents no valid reason for disregarding *both* documentary evidence and testimony from the Charging Parties’ both witness. The ALJ’s explanation for doing so—that Maron testified she read the document Talking Points verbatim and then she “admitted” she also responded to a remark from Befort—is unsatisfactory. That Maron responded to Befort in no way contradicts that she also read the Talking Points verbatim, as she was asked to do. Further, the ALJ erred in not addressing Befort’s testimony, contradicting the allegation of the Complaint, in any way.

The allegation that Maron “prohibited employees from talking about the Union during working time while permitting employees to talk about other non-work subjects” also fails. The Talking Points from which Maron read speak to employees not *soliciting* while they or those being solicited “are supposed to be working,” and she repeatedly testified that she referred only to restrictions on solicitation, during times that employees were actively helping customers or answering their calls. (R. Ex. 23.) The Board has indicated that “working time . . . connote[s] the period of time that is spent in the performance of actual job duties,” (as distinguished from

“working hours,” which “connotes the period of time from the beginning to the end of a workshift”). *Essex Int’l, Inc.*, at 750. Restrictions on solicitation during working time are lawful. As to the allegation that Maron unlawfully communicated a restriction on the sending of “mass emails,” that restriction is lawful for the reasons discussed above.

The ALJ was also incorrect in concluding that in her meeting with Meeks’ team, Maron “prohibited employees from talking about the Union during working time while permitting employees to talk about other non-work subjects.” Nothing in the Talking Points that Maron read, verbatim, addresses when employees may or may not speak about the Union. The Talking Points make clear that the meeting was called to address an entirely different activity—leaflet distribution in work areas—and no reference to distribution of literature is alleged to have been unlawful. Significantly, Befort’s notes, taken *immediately* after the meeting to ensure that she “didn’t forget anything,” confirm that Maron made no reference to when it was permissible or impermissible to speak about the Union. (Tr. at 65:4-17. 97:3-22; R. Ex. 19.). The ALJ credited Befort’s testimony that she wrote down what happened in the meeting with Maron as soon as it ended, specifically to make sure that she captured everything. (ALJD at 13:27.) Yet, the ALJ did not explain why she chose to disregard these notes, the existence of which greatly undermine the Charging Parties’ allegation as to what Maron actually said. There is no valid reason for having done so. There also is no valid reason for ignoring that Befort gave contradicting testimony as to the impetus for the June 4 meeting, stating on direct examination that she distributed the flyers that prompted the meeting and denying doing so on cross-examination. (Tr. at 61:8-23, 90:14-18.) This direct contradiction undermines Befort’s credibility, and the ALJ should have found accordingly. Also unpersuasive is the ALJ’s reason for discrediting Maron’s testimony—that while she stated she read the Talking Points verbatim, when asked, she also “admitted” that she stopped to answer a question from an employee. (Tr. at 418:24-419:13.) That question and Maron’s response had absolutely nothing to do with her allegedly unlawful remark and, again, the fact that Maron also answered an employee’s question does not, in any way, negate or refute her testimony that she also read the Talking Points verbatim.

## **VI. The ALJ Erred in Concluding that the Charging Parties Established Viable Claims of Surveillance and Interrogation**

The Charging Parties failed to carry their burden of proof and establish that Meeks engaged in unlawful surveillance and interrogation of employees, and the ALJ erred in concluding otherwise. To establish a claim of unlawful surveillance, the Charging Parties must first demonstrate the existence of open Union activity. Under well-settled law, an employer engages in unlawful surveillance when it photographs, video tapes or openly conducts recordkeeping of employees participating in *open* union activities, or observes *open* union activities in such a way as would reasonably coerce or restrain those engaging in them. *See, e.g., National Steel and Shipbuilding Co.*, 324 NLRB No. 85 (Sep. 30, 1997). Here, taking the testimony of the Charging Parties' witnesses as true, there was no open Union activity and, as such, no way for Meeks to engage in unlawful surveillance when she joined her team in the picnic area on the Company's premises. As the Charging Parties' witnesses testified, they did not announce, and there was no way for Meeks to know, that they would be engaging in concerted action. It follows that Meeks could not have made the decision to join them outside in order to monitor such action. There was also no way for Meeks to know that CSRs were engaging in concerted activity once outside and in her presence; indeed, the CSRs chose to tell Meeks that they were doing something entirely different and there was not as much as a reference to the Union, by anyone. With no open Union activity, and without being aware of such activity, there was no way for Meeks to engage in unlawful surveillance.

Even if employees *did* engage in open Union activity that could be the subject of surveillance, which they did not, it is not alleged that Meeks engaged in coercive conduct such as photographing, videotaping or openly conducting recordkeeping of the employees' activities. In addition, "Board law establishes that 'those who choose to openly engage in union activities at or near the employer's premises cannot be heard to complain when management observes them.'" *Purple Commc'ns*, 361 NLRB No. 126, slip op. at 16. That is because they "they could not expect not to be observed." *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005) (management's

presence in the dining room “where managers and employees dined was routine,” and “their consequent observation of employees engaged in solicitations” did not amount to surveillance; “employees congregated in an open area often frequented by management and, to the extent they wished to engage in concerted activity, they could not expect not to be observed.”<sup>27</sup>

In this case, the employees’ alleged Union activity was in the open, in a nonworking area on the Company’s grounds that is frequented by management. Accordingly, observation by management, to the extent discernable Union activity occurred, does not amount to surveillance. The ALJ’s reliance on the fact that Meeks did not smoke to find that her presence in the nonworking area was out of the ordinary and coercive is mistaken. The employees engaged in the alleged Union activity at issue testified that they were not in the “smoke shack,” as the ALJ found, but in a picnic area in front of the “smoke shack.” (ALJD 13:17.) As smoking is restricted to the “smoke shack” and the picnic area is open for any activity, the fact that “Meeks did not smoke” is irrelevant, and any inference drawn from it should be rejected. (ALJD 27:44-46.)

Meeks also did not unlawfully interrogate employees. The standard for determining whether an interrogation violates the Act is whether under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with the rights guaranteed by the Act.” *Rossmore House*, 269 NLRB 1176 (1984), enf’d 760 F.2d 1006 (9th Cir. 1989). In *Rossmore*, the Board stated, “Some factors that are considered factors which may be considered in analyzing alleged interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place of interrogation.” *Id.* at 1178, n. 20. Questions that fall under this standard are those that probe into employees’ sympathies for the union or the number or identity of employees who may have participated in union activities, and similar questions accompanied by threats or coercion. *Benham Corp.*, 284 NLRB 481, 481 (1987) (rhetorical question posed to employee in lunchroom, as opposed to management or

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<sup>27</sup> See also *Wal-Mart Stores*, 340 NLRB 1216, 1223 (2003) (finding that a manager's 30-minute observation while sitting on a bench outside the store of union handbilling taking place in the employer's public parking lot, unaccompanied by other coercive behavior, did not constitute unlawful surveillance).

production area, without “any apparent pressure for response even though employee may have replied,” not unlawful). General questions that do not seek to obtain such information, are unrelated to protected activities and are “casual” in nature do not amount to unlawful interrogation. *See id.* (dismissing allegation regarding interrogation where the supervisor’s statement “sought general information about a well-publicized union meeting as opposed to a specific probing into the number or identity of employees who may have participated in that meeting,” and the statement was “unaccompanied by any threats [or] coercion.”).<sup>28</sup>

Again taking the testimony of the Charging Parties’ witnesses as true, the questions purportedly asked by Meeks fall well short of the types of questions that would constitute unlawful interrogation and are far less egregious in nature than even those asked in the above-cited cases, in which the Board found no violation of the law. The testimony is that Meeks merely asked employees what they were doing, and whether she could see the information that they were viewing on one of their phones, with no knowledge whatsoever of what was actually happening. The questions did not reference the Union at all, and could not reasonably be construed as attempts to ascertain employees’ sympathies for the Union in any way. No information pertaining to the Union was sought and no coercive or threatening statements were made—indeed, none are alleged in the Complaint. For the foregoing reasons, the claims pertaining to Meeks should be dismissed.<sup>29</sup>

### **CONCLUSION**

For the foregoing reasons, the Board should sustain the Company’s exceptions.

Dated: August 12, 2016

PROSKAUER ROSE LLP

By:  \_\_\_\_\_

Mark Theodore, Esq.

Irina Constantin, Esq.

Attorneys for T-MOBILE USA, INC.

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<sup>28</sup> *See also Plated Plastic Indus., Inc.*, 311 NLRB 638, 643 (1993) (no unlawful interrogation where the owner of the plant asked a “casual question” about “whether employees were signing cards for another local,” did not press for information once employee responded that he did not know, and “did not make threats . . . about any employees who might have signed cards or the person who was collecting signatures for the other local . . .”).

<sup>29</sup> While the ALJ drew an adverse inference from the fact that Meeks did not testify, that inference is inappropriate where, as here, the Charging Parties fail to carry their burden of proof in the first instance.

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On August 12, 2016, I served the following document, described as:

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

- (By Electronic Filing) By transmitting a true and correct copy thereof via electronic filing through the National Labor Relations Board's website.
- (By Email) By transmitting a true and correct copy thereof via electronic transmission to the email address listed on the attached Service List.
- (By Fax) By transmitting a true and correct copy thereof via facsimile transmission to the addressee.
- (By Mail) I am "readily familiar" with the Firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- By causing such envelope to be delivered by the office of the addressee by OVERNIGHT DELIVERY via Federal Express or by other similar overnight delivery service.

**SEE ATTACHED SERVICE LIST**

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

Executed on August 12, 2016 at Los Angeles, California.

\_\_\_\_\_  
Olia A. Golinder  
Type or Print Name

\_\_\_\_\_  
*Olia Golinder*  
Signature

**SERVICE LIST**

William F. LeMaster  
Field Attorney  
National Labor Relations Board  
Subregion 17  
8600 Farley Street  
Suite 100  
Overland Park, KS 66212-4677  
Email: [William.LeMaster@nlrb.gov](mailto:William.LeMaster@nlrb.gov)

*Via Email*

Glenda L. Pittman , ESQ., Attorney  
Glenda Pittman & Associates, P.C.  
4807 Spicewood Springs Rd  
Bldg. 1, Ste 1245  
Austin, TX 78759-8479  
Email: [gpittman@pittmanfink.com](mailto:gpittman@pittmanfink.com)

*Via Email*

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