

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BASHAS' INC.

and

Case 28-CA-168505

CARLOS MEJIA, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE NATIONAL LABOR RELATIONS BOARD**

Nestor M. Zarate Mancilla
Counsel for the General Counsel
National Labor Relations Board
Region 28 – Phoenix
2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004
Telephone: (602) 416-4771
Facsimile: (602) 640-2178
E-Mail: nestor.zarate-mancilla@nlrb.gov

I. INTRODUCTION

Bashas' Inc. (Respondent), through its Member Handbook, maintains seven overly broad and coercive rules in effect at all of its locations in the Arizona and New Mexico that block employees from engaging in a wide variety of conduct protected by Section 7 of the National Labor Relations Act (the Act) in violation of Section 8(a)(1) of the Act.

The National Labor Relations Board (the Board) is charged with “preventing employees from being chilled in the exercise of their Section 7 rights . . . instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it.”¹ In furtherance of this aim, the Board has consistently held that an employer’s maintenance of a rule that “employees would reasonably construe . . . to prohibit Section 7 activity” is unlawful.² The rules maintained in Respondent’s Bashas’ Family of Stores Member Handbook would reasonably be read to prohibit employees from engaging in protected activities, thus leaving employees to “decide at their own peril” whether to engage in the activity.³

Counsel for the General Counsel (CGC) requests the Board issue a recommended Order requiring Respondent to cease and desist from maintaining overly broad and coercive work rules, to rescind the rules, and to post and distribute remedial notices at all of its facilities to cure all un-remedied unfair labor practices and to ensure employees the rules are no longer in effect.

II. STATEMENT OF THE CASE

Carlos Mejia (Charging Party) filed the original charge in this case on January 28, 2016, and filed the amended charge on April 4, 2016.⁴ The Regional Director for Region 28 issued a

¹ *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), *aff’d in relevant part*, 198 LRRM 2789 (5th Cir. 2014).

² *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

³ *Flex Frac*, 358 NLRB at 1132.

⁴ Am. Jt. Mot. p. 1-2, ¶ 5(a)-(b); Jt. Exh. 1(a)-(d).

Complaint and Notice of Hearing based on the charge on May 31, 2016.⁵ Respondent filed a timely Answer to the Complaint.⁶ On July 8, 2016, the parties filed a Joint Motion and Stipulation of Facts with the Board, and on August 8, 2016, the parties filed an Amended Joint Motion and Stipulation of Facts, seeking to transfer this case to the Board pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. On September 9, 2016, the Board issued an Order Approving Stipulation, Granting Motion and Transferring Proceeding to the Board.⁷ Pursuant to the Board's Order and Section 102.35(a)(9) of the Board's Rules and Regulations, CGC submits this brief.

III. STATEMENT OF THE ISSUES

Whether employees would reasonably construe the following rules in Respondent's Member Handbook to prohibit Section 7 activity, such that Respondent's promulgation and maintenance of the rules interfere with, restrain, or coerce employees in the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act:

- 1) Bashas' Pledge and Goals;
- 2) Performance Standards;
- 3) Confidential Proprietary Information;
- 4) Personal Belongings;
- 5) Cell Phones and Electronic Devices Usage;
- 6) Solicitation and Distribution Rules; and
- 7) Social Networking Communications Policy.

⁵ Am. Jt. Mot. p. 2, ¶ 5(d).

⁶ Am. Jt. Mot. p. 2, ¶ 5(e).

⁷ Am. Jt. Mot. p. 1-4; Unpublished Board Order dated September 9, 2016.

IV. STATEMENT OF THE FACTS

A. Respondent's Operations

It is undisputed that, at all material times, Respondent has been a corporation with offices and places of business in the States of Arizona and New Mexico, and has been engaged in the retail sale of groceries, meat, and related products under the store brands Bashas', AJ's Purveyors of Fine Foods, Food City, Bashas' Diné Market, and Eddie's Country Store.⁸ It is also undisputed that, at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.⁹ Respondent has stipulated that it customarily communicates with its employees at all of its offices and places of business by email and through an intranet system.¹⁰

B. Respondent's Member Handbook

Since at least on or before October 4, 2015, at all of its offices and places of business, Respondent has maintained the following rules in its Bashas' Family of Stores Member Handbook:

(1) Bashas' Pledge and Goals

...

In return, your commitment to Bashas' is expected and appreciated. We ask you to:

1. Show respect, and consideration for fellow members, customers, and your work environment.

...

6. Work in a cooperative manner with management, co-workers, customers and vendors.

...

⁸ Am. Jt. Mot. p. 2, ¶ 5(f).

⁹ Am. Jt. Mot. p. 2, ¶ 5(g)-(i).

¹⁰ Am. Jt. Mot. p. 3, ¶ 5(1).

(2) Confidential Proprietary Information

Bashas' treats its proprietary business information and its members' personnel records as confidential and will release it only to state, federal or legal agencies, or as otherwise required by law. All personnel records are considered property of Bashas'.

Divulging Bashas' proprietary business information, or confidential information regarding the company's vendors or customers, to individuals or entities that are not authorized to receive that information is unacceptable and can result in disciplinary action, up to and including termination of employment. Members who divulge such information also risk personal liability. This rule is not intended to cover members' discussion of wages, hours, or conditions of employment.

...

(3) Personal Belongings

...

Cell phones, iPods, and any other electronic devices must be turned off and kept in member's locker or car during work hours.

...

(4) Cell Phones and Electronic Devices Usage

...

While the use of personal cell phones, iPods, music video players and digital cameras is commonplace, they have no place during working time due to the potential for issues such as invasion of privacy (members and customers), sexual or other harassment, and protection of Bashas' proprietary information. Consequently, members may not use a cell phone, digital camera (including cell phone cameras), iPod or other personal electronic device during working time; and, during working time, such devices should be kept in a member's issued locker or his/her car.

Only with the permission of the store director or manager on duty is a member allowed to use a personal cell phone during working time.

...

(5) Solicitation and Distribution Rules

Providing the most ideal work environment possible is very important to Bashas'. We hope our members feel very comfortable and at ease when they are at work. Therefore, to protect our members and our customers from unnecessary

interruptions and annoyances, it is Bashas' policy to prohibit the distribution of documents and other items for non-company related activities or information in work areas and to prohibit solicitation and distribution of documents and other items for non-company related activities or information during working time. "Working Time" is the time a member is engaged, or should he engaged, in performing his/her work tasks for the company, excluding rest breaks, meal periods and before or after work. These guidelines also apply to solicitation by electronic means.

...

(6) Performance Standards

...

Bashas' asks that all of its members work in a cooperative manner with management and their coworkers

...

(7) Social Networking Communications Policy

...

Material or information that may not be posted includes, but is not limited to, information which: . . .

- Violates the privacy rights of another member, such as social security information.

...

Discipline

Members found to be in violation of this Social Networking Communications policy, directly or indirectly, may be subject to disciplinary action, up to and including termination of employment.¹¹

At all material times, employees hired by Respondent at all of its offices and places of business have been required to adhere to Respondent's Bashas' Family of Stores Member Handbook.¹²

¹¹ Am. Jt. Mot. p. 2, ¶ 5(j); Jt. Exh 2.

¹² Am. Jt. Mot. p. 2, ¶ 5(k); Jt. Exh 2.

V. ARGUMENT

The Board has held that an employer’s maintenance of a work rule that “would reasonably tend to chill employees in the exercise of their Section 7 rights,” violates Section 8(a)(1) of the Act.¹³ In particular, a rule is unlawful if “employees would reasonably construe [its] language to prohibit Section 7 activity.”¹⁴ Rules that explicitly restrict Section 7 activity and rules promulgated in response to, or applied to restrict, Section 7 activity are also unlawful.¹⁵

Whether a rule reasonably would tend to restrict Section 7 rights is an objective standard, and does not depend on how the employer interprets the rule or whether any employee actually refrained from exercising Section 7 rights as a result of it.¹⁶ The focus instead is on the text of the policy and the context in which it appears.¹⁷ In applying this standard, the Board “give[s] the work rule a reasonable reading and refrain[s] from reading particular phrases in isolation.”¹⁸ Any ambiguity in a rule must be construed against the promulgator of the rule.¹⁹

The Board has explained that “[t]his principle follows from the Act’s goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it.”²⁰ Thus, the Board has held that employees “should

¹³ *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

¹⁴ *Lutheran Heritage*, 343 NLRB at 647.

¹⁵ *Lutheran Heritage*, 343 NLRB at 646-47 & n.5

¹⁶ *Cintas Corp.*, 482 F.3d 463, 467 (D.C. Cir. 2003) (enforcing Board decision in *Cintas Corp.*, 344 NLRB 943 (2005), that found unlawful employer rule requiring employees to maintain “confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters”); *Lafayette Park Hotel*, 326 NLRB at 828.

¹⁷ *Cintas Corp.*, 482 F.3d at 467, 469-70.

¹⁸ *Albertson’s, Inc.*, 351 NLRB 254, 259 (2007).

¹⁹ *Flex Frac*, 358 NLRB at slip op. at 2; *Lafayette Park Hotel*, 326 NLRB at 828.

²⁰ *Flex Frac*, 358 NLRB at 1132.

not have to decide at their own peril” whether to engage in a protected activity that may be implicated by an ambiguously worded work rule.²¹

In *Layfayette Park Hotel*, the Board held that an employer may violate Section 8(a)(1) through the mere maintenance of certain work rules, “even absent evidence of enforcement.”²² The appropriate inquiry for such a case is whether the rule in question “would reasonably tend to chill employees in the exercise of their Section 7 rights.”²³ The Board refined this standard in *Lutheran Heritage*, by creating a two-step inquiry for determining whether the maintenance of a rule violates Section 8(a)(1).²⁴ First, a rule is clearly unlawful if it expressly restricts Section 7 protected activities.²⁵ If the rule does not, it will only violate Section 8(a)(1) upon a showing that:

(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.²⁶

As discussed below, an application of these standards establishes that maintenance of the above-referenced policies in Respondent’s Bashas’ Family of Stores Member Handbook interferes with, restrains, and coerces employees in the exercise of their Section 7 rights, including, but not limited to, their right to participate in protected concerted activity and their right to communicate with each other about their terms and conditions of employment.

²¹ *Id.*; cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (assessment of whether employer statements violate Section 8(a)(1) “must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear”).

²² 326 NLRB at 825.

²³ *Id.* at 825.

²⁴ 343 NLRB at 646-47.

²⁵ *Id.* at 646.

²⁶ *Id.* at 647.

**A. Respondent’s Bashas’ Pledge and Goals and Performance Standards
Unlawfully Restrict Section 7 Activity**

Rules that prohibit employees from engaging in “disrespectful,” “negative,” “inappropriate,” or “rude” conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful.²⁷ On the other hand, rules prohibiting conduct that amounts to insubordination would not be construed as limiting protected activities.²⁸ Rules requiring employees to cooperate with each other and the employer in the performance of their work also usually do not implicate Section 7 rights.²⁹ However, the Board has found rules not mentioning the company or management to be overly broad because they would be understood to encompass disagreements or conflicts among employees related to Section 7 concerns.³⁰

Recently, in *William Beaumont Hospital*, the Board found an employer maintained unlawful rules that prohibited employees from engaging in conduct that “impedes harmonious interactions and relationships.”³¹ Citing *2 Sisters Food Group, Inc.*,³² the Board found employer’s rule “sufficiently imprecise” such that employees would reasonably construe it to encompass Section 7 protected activities that caused disagreement or conflict among employees.³³

²⁷ See *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (2014).

²⁸ See *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 11-13 (2014).

²⁹ *Id.* slip op. at 1.

³⁰ See *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 1-2 (2016) (rule barring conduct “imped[ing] harmonious interactions and relationships” overly broad); *2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011) (rule subjecting employees to discipline for “inability or unwillingness to work harmoniously with other employees” overly broad).

³¹ 363 NLRB No. 162, at slip op. at 2 (2016).

³² 357 NLRB 1816, 1817 (2011).

³³ 363 NLRB No. 162, at slip op. at 2.

Following its decision in *William Beaumont*, the Board found unlawful a rule stating that the employer “expects all employees to behave in a professional manner that promotes efficiency, productivity, and cooperation. Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.” In finding the rule unlawful, the Board distinguished cases involving rules barring insubordination and further noted that words such as “efficiency, productivity, and cooperation” do not provide employees with a basis for determining “how the Respondent would enforce the provision in the context of Section 7-protected” activity that the Respondent views as undermining its work environment.³⁴

1. Respondent’s Bashas’ Pledge and Goals contains overly-broad rules that limit employee rights under Section 7

Respondent expresses its pledges to employees and states that it expects employees’ commitment by delineating goals to be met by employees as quid pro quo. Through two of its enumerated goals, Respondent limits employees’ exercise of their Section 7 rights.

First, Respondent, in its goal 1, asks employees to demonstrate their commitment by “[showing] respect and consideration for our customers and our work environment.”³⁵ While the policy does not explicitly restrict Section 7 protected activity, it contains no limiting language in relation to Respondent’s work environment whatsoever.³⁶ The overbroad language could reasonably be construed as asking employees to be respectful to management and the company, thereby, restraining their Section 7 right to communicate freely with fellow employees and others regarding work issues and for their mutual aid and protection. Moreover, to the extent that the

³⁴ *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at slip op. at 3 (2016).

³⁵ Am. Jt. Mot. p. 2, ¶ 5(j), (k); Jt. Exh 2, p.3.

³⁶ See *Durham School Services, L.P.*, 360 NLRB No. 85 (2014).

policy is ambiguous or vague, it must be construed against the Respondent, as the promulgator of the rule.

Second, Respondent, in its goal 6, further asks employees to “[w]ork in a cooperative manner with management.”³⁷ While rules requiring employees to perform work cooperatively with one another have generally been found not to implicate Section 7 activities, Respondent’s rule here differs because it extends an employee’s cooperation requirement to management. Employees have a right to engage in lawful strikes, work stoppages, or slowdowns in connection with concerns implicating wages, conditions of employment, or safety issues or other protected activity.³⁸ Additionally, in requiring employees to cooperate with management, Respondent is promulgating an overly broad rule that is “sufficiently imprecise” that employees would construe it to encompass Section 7 activity.³⁹ To alleviate any ambiguity, the Respondent could promulgate an appropriately narrow rule aimed at insubordination that would not encompass or reasonably be construed as encompassing Section 7 activity.⁴⁰ As such, a blanket requirement that employees cooperate with management would reasonably be construed as infringing on employees’ Section 7 rights.

Given the overbroad language in goals 1 and 6 of Respondent’s Bashas’ Pledge and Goals, CGC respectfully requests that the Board find that the rules violate Section 8(a)(1) of the Act.

³⁷ Am. Jt. Mot. p. 2, ¶ 5(j), (k); Jt. Exh 2, p.3.

³⁸ See *Labor Ready, Inc.*, 331 NLRB 1656, n. 2 (2000); *Ambassador Services, Inc.*, 358 NLRB 1172, 1172-1173 (2012), *vacated* 134 S. Ct. 2901 (2014), *reaffirmed in relevant part* 361 NLRB No. 106 (2014), *enfd.* 622 Fed. Appx. 891 (11th Cir. 2015).

³⁹ See *William Beaumont*, 363 NLRB No. 162, at slip op. at 2.

⁴⁰ See *Copper River of Boiling Springs*, 360 NLRB No. 60, slip op. at 11-13.

2. Respondent's Performance Standards is overbroad and infringes on employee rights under Section 7

Similarly, in its Performance Standards, Respondent “asks that all of its members work in a cooperative manner with management and their coworkers.”⁴¹ As stated above, the overbroad requirement that employees cooperate with management would reasonably be understood to infringe on employees’ Section 7 rights. CGC requests the Board find that Respondent’s Performance Standards rule violates Section 8(a)(1).

B. Respondent’s Confidential Proprietary Information Rule Unlawfully Restricts Section 7 Activity

It is well-established that employees have the right to communicate with each other and with non-employees about their terms and conditions of employment.⁴² Thus, an employer’s maintenance of work rules that employees would reasonably understand to restrict their ability to engage in such communications violates Section 8(a)(1).⁴³

Work rules prohibiting discussion of confidential information are unlawful if they define “confidential” so broadly as to cover terms and conditions of employment.⁴⁴ Instead, “it is the

⁴¹ Am. Jt. Mot. p. 2, ¶ 5(j), (k); Jt. Exh 2, p.28.

⁴² *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); *Flex Frac*, 358 NLRB No. 127 at slip op. at 1.

⁴³ *Cintas Corp. v. NLRB*, 482 F.3d 463, 468-69 (D.C. Cir. 2007) (rule prohibiting disclosure of “any information concerning” employees unlawful); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op. at 2-3 (2014) (rule requiring employees to “[k]eep customer and employee information secure” unlawful); *Flex Frac*, 358 NLRB No. 127, slip op. at 1-3 (rule prohibiting disclosure of “personnel information and documents” to persons “outside the organization” unlawful); *Trinity Protection Services*, 357 NLRB No. 117, slip op. at 2 (2011); *Hyundai Am. Shipping Agency Inc.*, 357 NLRB 860, 871 (2011) (rule prohibiting “[a]ny unauthorized disclosure from an employee’s personnel file”).

⁴⁴ *See, e.g., Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (unlawful rule “specifically define[d] confidential information to include wages and working conditions such as disciplinary information”), *enforced*, 414 F.3d 1249 (10th Cir. 2005); *see also Flex-Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 207, 209-10 (5th Cir. 2014) (unlawful rule defined confidential information to include “personnel information”); *cf. Bigg’s Foods*, 347 NLRB 425, 436 (2006) (distinguishing invalid confidentiality rule from valid one on the grounds that the former “specifically mentions salaries”).

responsibility of the [employer] to specifically define such information in a fashion that will clearly not include those matters that employees are entitled under the Act to discuss.”⁴⁵

Employees’ right to communicate with others about their terms and conditions of employment encompasses the right to disclose coworkers’ names and contact information to a labor organization in furtherance of an organizing effort or to other employees in aid of protected concerted activities.⁴⁶ Further, restrictions on disclosure of personnel records are unlawful.⁴⁷ Thus, rules that employees would reasonably read to restrict them from sharing such information are unlawful.⁴⁸ A rule restricting disclosure of personnel or employee information will only be found lawful if it is clear based on the language of the rule and the rule’s entire context that the rule *only* restricts disclosure of information not implicating Section 7 concerns, such as intellectual property, trade secrets, hotel guest information, and patient medical information.⁴⁹

Here, Respondent’s rule makes it clear that “[a]ll personnel records are considered property of [Respondent],” and that “[d]ivulging [Respondent’s] proprietary business information” to unauthorized individuals or entities can result in discipline or even discharge.⁵⁰

Respondent’s prohibition and admonition would lead an employee to reasonably construe

⁴⁵ *Hyundai*, 357 NLRB at 871 n.12; *see also Cintas Corp.*, 482 F.3d at 469 (emphasizing that employer “made no effort in its rule to distinguish section 7 protected behavior from violations of company policy”).

⁴⁶ *See Ridgely Mfg. Co.*, 207 NLRB 193, 196-97 (1972) (employee right to obtain names of coworkers from timecards), *enforced*, 510 F.2d 185 (D.C. Cir. 1975).

⁴⁷ *See Quicken Loans, Inc.*, 359 NLRB No. 141, slip op. at 8 (Jun. 21, 2013), *set aside in view of NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), *reaffirmed in relevant part* 361 NLRB No. 94 (Nov. 3, 2014) (finding unlawful rule prohibiting disclosure of “*Personnel Information* including, but not limited to, all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses) slip op. at; *Iris U.S.A., Inc.*, 336 NLRB 1013 (2001) (finding unlawful rule stating that each employee’s personnel records are considered confidential and will normally be available only to the named employee and senior management)

⁴⁸ *HTH Corp.*, 356 NLRB No. 182, slip op. at 42 n.19 (2011), *enforced sub nom. Frankl v. HTH Corp.*, 693 F.3d 1051 (9th Cir. 2012); *Albertson’s*, 351 NLRB at 259, 366 (rule prohibiting employees from disclosing work schedule).

⁴⁹ *Aroostook County Reg. Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 211-13 (D.C. Cir. 1996); *Mediaone of Greater Florida, Inc.*, 340 NLRB 227, 278-79 (2003); *Lafayette Park*, 326 NLRB at 826).

⁵⁰ Am. Jt. Mot. p. 2, ¶ 5(j), (k); Jt. Exh 2, p.17.

Respondent's rule from prohibiting employees from sharing employee names, addresses, work schedules, or phone numbers. As such, Respondent's rule is overbroad and impinges on employees Section 7 rights. Moreover, it would be reasonable to understand the rule to bar employees from providing copies of their personnel records to others for Section 7 purposes, such as giving their personnel records to other employees, labor organizations, the media, government agencies, and others as part of Section 7 activities.

Though the rule also states that it "is not intended to cover members' discussion of wages, hours, or conditions of employment," the rule does not clearly state that it only restricts disclosure of information not implicating Section 7 concerns, and a layperson would not necessarily understand this general provision to override the specific bar on disclosure of personnel records.⁵¹ Therefore, Respondent's limited caveat does not save its unlawful rule from violating Section 8(a)(1). CGC requests that the Board find that Respondent's Confidential Proprietary Information rule violates Section 8(a)(1).

C. Respondent's Personal Belongings and Cell Phones and Electronic Devices Usage Policies Unlawfully Restrict Section 7 Activity

Employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings.⁵² Following Board precedent establishing that workplace recording constitutes protected activity in certain circumstances, the Board faithfully applied the well-settled *Lutheran Heritage* test to reasonably conclude that the an employer violated Section 8(a)(1) of the Act by maintaining overbroad rules prohibiting all workplace recordings without

⁵¹ See *ISS Facilities Services, Inc.*, 363 NLRB No. 160, slip op. at 3 (2016).

⁵² See *Hawaii Tribune-Herald*, 356 NLRB 1275, 1275 (2011), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *White Oak Manor*, 353 NLRB 795, 795 (2009), *incorporated by reference*, 355 NLRB 1280 (2010), *enforced mem.*, 452 F. App'x 374 (4th Cir. 2011).

prior management approval.⁵³ Photography and audio or video recording in the workplace is protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present.⁵⁴ Such protected conduct includes, for example, recording images of protected picketing, documenting unsafe working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting potential employer unfair labor practices.⁵⁵ Accordingly, an employer violates Section 8(a)(1) of the Act by maintaining work rules that infringe on employees' Section 7 right to make workplace recordings when they are acting in concert for their mutual aid and protection and no overriding employer interest is present.⁵⁶

1. Respondent's Personal Belongings rule unlawfully restricts employees' ability to make workplace recordings and engage in protected activity

Though the rule does not explicitly ban taking pictures or recordings, Respondent's complete ban on cell phones interferes with employees' Section 7 rights. In relevant part,

⁵³ *T-Mobile USA Inc.*, 363 NLRB No. 171, at slip op. at 4 (2016), *review pending*, *T-Mobile USA Inc. v. NLRB*, Fifth Circuit Nos. 16-60284, 16-60497); *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3-4 (2015); *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, at slip op. at 4 (2015).

⁵⁴ *T-Mobile USA Inc.*, 363 NLRB No. 171, at slip op. at 4 (2016), *review pending*, *T-Mobile USA Inc. v. NLRB*, Fifth Circuit Nos. 16-60284, 16-60497); *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015); *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, at slip op. at 4 (2015).

⁵⁵ *Rio All-Suites Hotel & Casino*, 362 NLRB at slip op. at 4.

⁵⁶ *Id.*; *see also Hawaii Tribune-Herald*, 356 NLRB 661, 674-75 (2011), *enfd. Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1255-56 (D.C. Cir. 2012) (upholding the Board's finding that employees engaged in protected activity by planning to record, and actually recording, a meeting with a supervisor in which employees acted in concert to document what they perceived to be a potential violation of their rights.); *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991) (finding that an employee engaged in protected activity by carrying a tape recorder in the workplace to aid a federal government workplace investigation), *enforced mem.*, 976 F.2d 743 (11th Cir. 1992); *White Oak Manor*, 353 NLRB 795, 795 n.2 (2009), *reaffirmed and incorporated by reference at 355 NLRB 1280* (2010) (finding employee did not lose the protection of the Act by taking photograph where the photography was part of a concerted effort to induce group action regarding a dress code), *enforced*, 452 Fed. Appx. 374 (4th Cir. 2011); *Opryland Hotel*, 323 NLRB 723, 723 n.3 (1997) (in absence of valid rule, practice, or prohibition of the use of tape recorders, such use does not constitute misconduct sufficient to defeat reinstatement after an unlawful discharge); *cf. Gallup Inc.*, 334 NLRB 366 (2001) (promulgation of rule prohibiting tape recording was unlawful where it was enacted by employer in response to union organizing efforts), *enforced mem.*, 62 Fed. Appx. 557 (5th Cir. 2003).

Respondent's Personal Belongings rule states that "[c]ell phones, iPods, and any other electronic devices must be turned off and kept in member's locker or car during work hours."⁵⁷ Thus, the rule would necessarily prevent employees from using cell phones and any other electronic devices during working hours, including both breaks and working time, when, presumably, employees would most often be in a position to exercise their Section 7 right to take photographs or recordings documenting unsafe working conditions, discussions about terms and conditions of employment, or potential employer unfair labor practices. Certainly some lesser restriction than a complete ban on access to electronic devices during working hours would serve to address any interest Respondent may have in ensuring good customer service and protecting customer privacy.

CGC requests that the Board find that Respondent's Personal Belongings rule violates Section 8(a)(1).

2. Respondent's Cell Phone and Electronics Devices Usage rule unlawfully restricts employees' ability to make workplace recordings and engage in protected activity

The violative nature of Respondent's Personal Belongings rule discussed above is amplified by the Respondent's Cell Phone and Electronic Devices Usage rule. Although the ambit of this rule's prohibition on the usage of cell phones, digital cameras, and other electronic devices is restricted to working time as opposed to work hours, the rule maintains its unlawful nature by requiring that employees lock their devices in their store-issued locker or their cars. The rule makes it clear, that "[o]nly with the permission of the store director or manager on duty is a member allowed to use a personal cell phone during working time."⁵⁸ Requiring employees to leave cell phones, digital cameras (including cell phone cameras) and other "personal

⁵⁷ Am. Jt. Mot. p. 2, ¶ 5(j), (k); Jt. Exh 2, p.23.

⁵⁸ Am. Jt. Mot. p. 2, ¶ 5(j), (k); Jt. Exh 2, p.26.

electronic devices” in their lockers or cars during working time would interfere with the ability of employees to photograph or record unsafe working conditions, discussions about terms and conditions of employment, inconsistent application of employer rules, or evidence to be used in administrative and judicial forums in employment-related actions including Board cases, as part of Section 7 activities. These are the types of Section 7 activities that have led the Board to find rules about photographing and recording to be unlawful, and they are activities that would typically need to take place during working time, while work is ongoing or while employees are communicating with supervisors. Since the rules at issue inhibit all workplace recording, they would reasonably interfere with employees’ exercise of Section 7 rights.

CGC requests that the Board find that Respondent’s Cell Phone and Electronics Devices Usage rule violates Section 8(a)(1).

D. Respondent’s Solicitation and Distribution Rules Unlawfully Interferes with Employee’s Ability to Engage In Section 7 Activities

The Board has held that “employees who have rightful access to their employer’s email system in the course of their work” have a presumptive “right to use the email system to engage in Section 7-protected communications on nonworking time.”⁵⁹ An employer can only overcome the presumption that employees have such a right by establishing “special circumstances necessary to maintain production or discipline.”⁶⁰ The Board has explained that, “[b]ecause limitations on employee communications should be no more restrictive than necessary to protect the employer’s interests, we anticipate that it will be a rare case where special circumstances justify a total ban on nonwork email use by employees.”⁶¹ The Board has acknowledged that employers may, however, apply uniform and consistently enforced controls

⁵⁹ *Purple Communications*, 361 NLRB No. 126, slip op. at 14 (2014).

⁶⁰ *Id.*

⁶¹ *Id.*

over their e-mail systems, such as restrictions on the size of attachments or transmission of video files, if such controls are necessary to ensure functionality of the system.⁶²

Respondent's Solicitation and Distribution rules "prohibit the distribution of documents and other items for non-company related activities or information in work areas," and then, later, make a blanket statement that "[t]hese guidelines also apply to solicitation by other electronic means."⁶³ Thus, an employee would reasonably understand the restriction on "distribution of documents and other items for non-company related activities or information in work areas" to apply to distribution of documents by electronic means, using personal or employer-owned systems and devices, in working areas, regardless of whether such communications were sent during working or non-working time. *Purple Communications* only permits a temporal limitation on the ability to use employer-owned email systems for Section 7 communications, a limitation to non-working time; it does not permit a geographic limitation to non-working areas. Thus, employees would reasonably understand the solicitation and distribution rules to bar them from exercising their right to distribute documents electronically for Section 7-protected purposes during non-working time.

CGC requests the Board find that Respondent's Solicitation and Distribution Rules violate Section 8(a)(1).

E. Respondent's Social Networking Communications Policy Unlawfully Interferes with Employee's Ability to Engage In Section 7 Activities

The Board will find confidentiality rules that encompass "employee" or "personnel" information, without further clarification, to be overly broad as they reasonably would be understood

⁶² *Id.* at 14-15.

⁶³ Am. Jt. Mot. p. 2, ¶ 5(j), (k); Jt. Exh. 2, p. 27.

to restrict Section 7-protected communications.⁶⁴ General confidentiality rules that have no language categorizing or suggesting that information about employees or their terms and conditions of employment is confidential will not be found to be overly broad.⁶⁵

Here, Respondent enumerates different material or information which employees may not post on social media. One of the prohibited bulleted items is material or information that “[v]iolates the privacy rights of another member, such as social security information.”⁶⁶ Respondent’s rule ends by making clear that a violation of the rule may be grounds for discipline or termination.⁶⁷ Although Respondent may prohibit disclosure of another employee’s social security number, its rule goes further, prohibiting employees from posting information that violates other employees’ privacy rights. Employee would reasonably understand this broad rule to encompass information about other employees that employees may consider to be private but that they have a Section 7 right to disclose, such as employees’ names, telephone numbers, home addresses, information about their terms and conditions of employment.⁶⁸ Therefore, CGC requests the Board find that Respondent’s Social Networking Communication Policy violates Section 8(a)(1).

VI. CONCLUSION

Through the policies in its Bashas’ Family of Stores Member Handbook, Respondent interferes with employees’ ability to communicate with each other regarding terms and conditions of employment and otherwise unlawfully restricts employees’ right to engage in protected activity. Based on the foregoing reasons, CGC submits that Respondent has violated

⁶⁴ See *Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 n.3, 291-292 (1999); see also *Fresh & Easy*, 361 NLRB No. 8, at slip op. at 1-slip op. at 4 (unlawful rule instructing employees to “Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained”); *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001) (instructing employees that information “about...employees is strictly confidential [and]...must not be disclosed to anyone”).

⁶⁵ See *Lafayette*, 326 NLRB at 826; *Super K-Mart*, 330 NLRB 263, 263 (1999).

⁶⁶ Am. Jt. Mot. p. 2, ¶ 5(j), (k); Jt. Exh. 2, p. 30.

⁶⁷ *Id.*

⁶⁸ See *Ridgely Mfg. Co.*, 207 NLRB at 196-97.

Section 8(a)(1) of the Act as alleged in the Complaint. CGC respectfully urges the Board to find the that Respondent violated Section 8(a)(1) of the Act as alleged and order all such relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

Specifically, CGC seeks a remedy which would require Respondent to: cease and desist from maintaining its Bashas' Pledge and Goals, Confidential Proprietary Information, Personal Belongings, Cell Phones and Electronic Devices Usage, Solicitation and Distribution Rules, Performance Standards, and Social Networking Communications Policy in its Bashas' Family of Stores Member Handbook; notify all applicants and current and former employees who were subject to the Bashas' Family of Stores Member Handbook that the rules and polices discussed above have been rescinded or revised and, if revised, provide them a copy of the revised version; and post a notice at all locations, including by electronic means. Under applicable Board law, such remedies are appropriate.

Dated at Phoenix, Arizona this 30th day of September 2016.

Respectfully submitted,

/s/ N.M. Zárate Mancilla

Néstor M. Zárate Mancilla

Counsel for the General Counsel

National Labor Relations Board

Region 28

2600 North Central Avenue

Suite 1400

Phoenix, AZ 85004

Telephone: (602) 416-4771

Facsimile: (602) 640-2178

E-Mail: nestor.zarate-mancilla@nrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE NATIONAL LABOR RELATIONS BOARD in Bashas, Inc., Case 28-CA-168505 was served by E-Gov, E-Filing, and E-mail on this 30th day of September, 2016, on the following:

Via E-Gov, E-Filing:

The Honorable Gary Shinnors
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Via E-mail:

Thomas M. Stanek, Attorney at Law
Elizabeth Townsend, Attorney at Law
Ogletree, Deakins, Nash, Smoak, and
Stewart, PC
2415 East Camelback Road, Suite 800
Phoenix, AZ 85016
thomas.stanek@ogletreedeakins.com
elizabeth.townsend@ogletreedeakins.com

Carlos Mejia
161 South Maple Street
Chandler, AZ 85226-3561
cheleguanaco@live.com

/s/ Dawn M. Moore

Dawn M. Moore
Acting Secretary to the Regional Attorney
National Labor Relations Board
Region 28 - Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, Nevada 89101
Telephone: (702) 820-7466
Facsimile: (702) 388-6248
E-Mail: Dawn.Moore@nlrb.gov