

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 16, 2016

TO: Cornele A. Overstreet, Regional Director
Region 28

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Cardinal Financial Company, Limited
Partnership
Case 28-CA-175402

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The Region submitted this case for advice as to whether it is an appropriate vehicle to urge the Board to expand its holding in *Purple Communications, Inc.*¹ to find the Employer's prohibition against its employees' use of the internet and other electronic systems for non-business purposes on nonworking time unlawful. Further, the Region requested advice as to whether, assuming that the Employer's "business purposes only" restriction is unlawful, some of the Employer's content restrictions for employees using its electronic systems are similarly unlawful. Finally, the Region also requested advice as to whether the Employer's rules reserving its right to monitor the employees' use of its electronic communications systems and equipment are lawful.

While portions of the Employer's rules nominally allow for personal use of its communications systems, a number of other rules specifically prohibit such use, and the Employer has asserted that its electronic communications systems are reserved for business use only. We therefore conclude that given that employees use the Employer's electronic communications systems extensively while at work, this matter is an appropriate vehicle to expand the rationale of *Purple Communications* to cover those systems and find that employees have a Section 7 right to use them during

¹ 361 NLRB No. 126 (Dec. 11, 2014).

nonworking time for protected communications. Furthermore, assuming such a right exists, we find the Employer’s rule banning use of those systems for “distributions or solicitations” and other rules imposing content-based restrictions are overly broad because they chill employees’ exercise of their Section 7 rights under *Lutheran Heritage Village-Livonia*.² However, we conclude that the Employer’s reservation of the right to monitor employees’ use of its electronic communications systems and equipment is lawful, notwithstanding its assertion that it can do so “for any purpose,” where the Employer thereafter enumerated examples of legitimate business justifications for such monitoring.

FACTS

The Employer is a full-service mortgage banking firm headquartered in Charlotte, North Carolina, with offices throughout the United States. The Employer reports that all of its employees have access to desktop computers, laptops, smart phones, modems, software, network applications, email, internal and external networks, the internet, and instant messaging. Most employees use their computers throughout most of their shifts.

The Employer maintains a personnel handbook that employees are required to sign electronically after they are hired. The handbook includes certain policies relating to use of the Employer’s electronic communications systems. The portions at issue are set forth below.

A. The Employer’s Polices That Effectively Ban Non-Business Use of Its Electronic Communications Systems

8.8 OUTSIDE EMPLOYMENT OR BUSINESS ACTIVITIES

Employees are prohibited from using Company resources and work time for promoting or conducting personal business, outside business activities, or other personal activities not related to the Company’s business operations. No outside business or personal activities may be conducted on Company premises.

8.15. USE AND INSPECTION OF COMPANY EQUIPMENT

Employees are provided with desks, computers, office supplies and other items for use in the performance of their job. All such supplies and equipment are Company property. Employees shall use office

² 343 NLRB 646, 646-47 (2004).

supplies and equipment for Company business and not for personal use. Employees may not take office supplies and equipment home with them. Employees likewise may not use Company printers, copy machines, or fax machines for personal purposes and may not use the Company's postage stamps to send personal mail. The unauthorized use or taking of supplies and equipment from the Company constitutes theft. Employees caught taking or using Company supplies and equipment for non-Company purposes will be subject to discipline, up to and including termination of employment, and may also be subject to civil and criminal penalties.

15.2. COMPANY COMMUNICATIONS SYSTEMS

This policy applies to the entire network of the Company's electronic communications systems ("Communications Systems"). The term "Communications Systems" is intended to apply broadly to all of the various forms of electronic communication used by or in the Company. For example, it includes desktop computers, laptops, printers, software, network applications, modems, Internet, e-mail, copiers, fax machines, handheld devices, internal or external networks, video conferencing, telephones, cellular phones (including "smart phones"), voicemail, or instant messaging as well as any other form of electronic communication used at or by the Company or on Company equipment either now or in the future.

The Communications Systems are the sole and exclusive property of the Company. They are provided or made accessible by the Company solely for use in conducting the Company's business. Employees should understand that the Company reserves its property interest in all information, data, and communications that are stored in, transmitted by, or received from or on the Communications Systems. Furthermore, no one in the Company, without the consent, has the ability to convey, license, assign, sell, limit, impair or alter this property interest.

15.5. PERSONAL USE OF THE COMMUNICATIONS SYSTEMS

The Company permits employees to use its Communications Systems for personal purposes as long as the employee's personal use does not interfere with the employee's job responsibilities and otherwise complies with the Company's Internet, Electronic and Communications Systems Policy, the Social Networking Policy, and

other applicable policies in this manual or issued by the Company from time to time. Employees who spend excessive amounts of time using the Communications Systems for personal use will be subject to discipline, up to and including termination of employment. ...

B. The Employer's Policies Related to the Content of Employees' Electronic Communications

9. SOLICITATION

...

Employees may not use the Company's materials, supplies or equipment for the purpose of distributions or solicitations. Employees may not email, post notices, stickers or the like on bulletin boards, walls, windows or other facilities or equipment without prior approval of the Human Resources Department.

15.3. GENERAL GUIDELINES

The use of the Communications Systems is subject to a number of rules that are designed to ensure compliance with the Company's legal obligations and the protection of its business interests. In keeping with the purpose of the Communications Systems and the objectives of this policy, any individual who uses the Communications Systems must do so in a professional and appropriate manner that promotes the Company's business interests. Individuals must therefore engage in and conduct all activities involving the use of the Communications Systems with the utmost care. Their actions should reflect the same sound judgments and level of responsibility that they would exercise when sending letters or memoranda that are written on the Company's letterhead.

...

15.8. SPECIFIC PROHIBITIONS APPLICABLE TO ALL COMMUNICATIONS SYSTEMS

Any unlawful or otherwise inappropriate use of the Communications Systems is strictly prohibited and may result in disciplinary action, up to and including immediate termination of employment. While it is not possible to provide an exhaustive list of every type of inappropriate use of the Communications Systems, the following examples are designed to offer employees guidance:

(b) Prohibitions against Offensive, Defamatory, and Fraudulent Conduct

Employees are strictly prohibited from using the Communications Systems to create, send, transmit, deliver, disseminate, view, read, download, store, or access over the internet any fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, immoral, offensive, intimidating, defamatory, or other unlawful or inappropriate material, or any messages with any derogatory or inflammatory remarks or pictures.

...

(f) Improper Purposes

Employees may not use or allow the Communications Systems to be used for any purpose that is either damaging to or competitive with the Company, detrimental to its interests, or that creates an actual, potential or apparent conflict of interest.

(g) Personal Use

The use by employees of Company computers for personal or non-Company related reasons must not interfere with the performance of the employee's job responsibilities. Employees who spend excessive amounts of time using the Communications Systems for personal reasons will be subject to discipline. Employees shall not use Company computers or other technology resources for personal business or gain or for advancement of individual views or opinions.

...

C. The Employer's Policies Related to Monitoring Use of Its Electronic Communications Systems and Equipment

8.15. USE AND INSPECTION OF COMPANY EQUIPMENT

...

The Company reserves the right to inspect desks, cabinets, lockers, other furniture, and office equipment as well as any contents, effects or articles they contain. As explained in the Company's policy regarding Communications Systems, this includes all computers

(including all memory, whether or not password protected), Company communications systems and other data retrieval equipment, voice mail and email.

15.6. INSPECTION AND MONITORING

...

Employees using the Communications Systems should not have any expectation of privacy, either personal or otherwise, with respect to any information, materials, data, emails, messages, communications, or matters stored in, created with or on, received by, delivered by, or sent over or to the Communications Systems. The Company has the right to gain access to all information, data, communications, messages, emails, information, and materials stored in, created by, or transmitted by or to any component of the Communications Systems. The Company reserves the right to gain access to all information in or on the Communications Systems, as well as information material, data, communications, messages, and matters that have been transmitted or received with the aid of the Communication Systems. The Company may do so for any purpose, including but not limited to, its desire to protect the integrity of the Communications Systems from unauthorized or improper use and to monitor and enforce this policy. This can occur with or without prior notice to any employee, either before, during or after work. Pursuant to this Policy, the Company may review, read, record, and otherwise monitor an employee's voicemail and telephone calls, email, interoffice messages, instant messages, internet use, and all other use of any component of the Communications Systems. ...

16.3. PERSONAL USE OF SOCIAL MEDIA AT WORK OR WITH WORK EQUIPMENT

...

All contents of the Company's computers, networks, communications systems, and other IT resources are Company property. Employees have no expectation of privacy in any message, file data, conversation, comment, post or other social media activity transmitted to, received, or printed from the Company's resources. The Company reserves the right to monitor, intercept, and review every employee's activities using the Company's IT resources and Communications Systems,

including but not limited to social media activities, without notice and without the employee's consent.

Employer's Position on Special Circumstances

In response to the Region's inquiry about whether there are any special circumstances that would justify its restriction on non-business use of its electronic communications systems, the Employer stated that these systems are provided by the Employer for the purpose of allowing each employee to perform (b) (6), (b) (7)(C) or (b) (6), (b) (7)(C) employment duties, that the Employer wants employees to be as productive as possible, and that use of these systems for purposes that are not work-related would diminish productivity. The Employer further stated that the prohibition on employee use of these resources for non-business use minimizes the possibility that an employee would use those resources for inappropriate purposes.

ACTION

We conclude that the Region should use this case as a vehicle to urge the Board to extend the rationale of *Purple Communications* and allege that the Employer's policy violates Section 8(a)(1) by in effect prohibiting employees from using its electronic communications systems, including the internet and web-based instant messaging systems and the accompanying hardware and software/network applications, during nonworking time for Section 7 purposes. Further, we conclude that given the Section 7 right to use the Employer's communications systems during nonworking time for protected activity, certain content restrictions contained in the Employer's electronic communications rules, as described below, are overly broad under *Lutheran Heritage Village-Livonia*.³ Finally, we conclude that the Employer's rules reserving its right to monitor the employees' use of its electronic communications systems are lawful, notwithstanding its assertion that it could do so for "any purpose," where it thereafter listed as examples legitimate business purposes.

A. The Employer's Policies That Effectively Ban Non-Business Use of Its Electronic Communications Systems

Under the Board's recent decision in *Purple Communications*, employees have a Section 7 right to use their employer's email system for statutorily protected communications on nonworking time if employees have been granted access to the

³ 343 NLRB at 646-47.

employer's email system in the course of their work.⁴ Thus, any rule maintained by an employer that limits or chills an employee's protected email communications on nonwork time is presumptively unlawful.⁵ To justify a total ban on employees' nonwork use of email, an employer must demonstrate that "special circumstances make the ban necessary to maintain production or discipline."⁶ The Board's decision in *Purple Communications* specifically focused on the employer's email system and did not address other electronic communications systems employees use at work.⁷ However, the Board noted that "[o]ther interactive electronic communications ... may ultimately be subject to a similar analysis."⁸

Here, the Employer's electronic communications systems policy applies to all its electronic communications systems, including the internet and instant messaging, as well as the hardware and software/network applications necessary to access those systems. The internet and network instant messaging systems⁹ share many of the same features as email that were discussed by the Board in *Purple Communications*.¹⁰ Thus, the internet has become a critical means of communication

⁴ 361 NLRB No. 126, slip op. at 1.

⁵ *See id.*

⁶ *Id.*

⁷ *Id.* at 14.

⁸ *Id.* at 14 n.70.

⁹ While the Employer has made no specific "special circumstances" defense, we note that we have accepted a special circumstances defense with regard to "downloadable" IM programs because of the increased security risks associated with them, particularly where the employer is in a business that deals with sensitive customer information. However, web-based IM programs do not implicate the same security concerns. *See Space Coast Credit Union*, Case 12-CA-141201, Advice Memorandum dated March 2, 2016, pp. 8-10.

¹⁰ For example, the internet is one of the most efficient mechanisms for sharing information and opinions and has changed how individuals communicate in the twenty-first century. *See, e.g.,* Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 *Geo. Wash. L. Rev.* 262, 274-75 (2008) (discussing the internet's transformative effect on how Americans communicate, providing access to websites, blogs, and instant messaging); Susannah Fox & Lee Rainie, *The Web at 25 in the U.S.* (February 27, 2014), available at <http://www.pewinternet.org/2014/02/27/part-1-how->

in modern society, including for Section 7 purposes, for instance through social media and blogs.¹¹ Like communication by email, communication through the internet permits employees to wait to respond to messages until they are on nonworking time, and employees can easily ignore or delete messages.¹² Additionally, like email, not all employees have access to the internet outside of the workplace.¹³ Further, many employees may feel more comfortable engaging in Section 7-related communications

the-internet-has-woven-itself-into-american-life (87% of U.S. adults reported using the internet in 2014 study). *See also* (b) (7)(A)

(b) (7)(A)

¹¹ *See, e.g., Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 1-4, 6-8 (Aug. 22, 2014) (discussing employees’ protected right to engage in Facebook discussions and finding employer’s internet/blogging policy to be unlawfully overbroad), *aff’d sub nom. Three D, LLC v. NLRB*, 629 F. App’x 33 (2d Cir. 2015); *Purple Communications*, 361 NLRB No. 126, slip op. at 40-42 (Member Johnson, dissenting) (discussing the role of internet-accessible personal email and online social media networks); Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 *Geo. Wash. L. Rev.* at 274-75 (noting that “[w]idespread Internet availability in the workplace has provided unions with an important tool – which they have actively used – to organize and communicate with employees. . . . [U]nion campaigns frequently rely on employees’ ability to use the Internet to instigate or support organizing activity.”).

¹² *Cf. Purple Communications*, 361 NLRB No. 126, slip op. at 15 & n.72 (noting the similar attributes of email).

¹³ *Cf. id.*, slip op. at 6 n.18 (recognizing that due to costs and other circumstances, “some employees do not privately use any electronic media”). Although the internet may not be the same “natural gathering place” for employees of a particular employer as an employer’s email system, *see id.*, workers are increasingly turning to social media while at work to build connections with their co-workers. A recent survey showed that 17% of workers use social media on the job to “build or strengthen personal relationships with coworkers” and the same percentage uses social media “to learn about someone they work with.” *See* Kenneth Olmstead, Cliff Lampe & Nicole B. Ellison, *Social Media and the Workplace*, available at <http://www.pewinternet.org/2016/06/22/social-media-and-the-workplace> (June 22, 2016).

via personal email over the internet or via instant messenger communications, as opposed to an employer-provided email account. Finally, the hardware and associated software/network applications that serve as a conduit to the internet and instant messaging must also be available to employees on nonworking time for non-business use in order for the employees to access these electronic communications systems for Section 7 purposes.

Here, employees regularly use the Employer's electronic communications systems in the course of their work. And yet, Rules 8:15 and 15.2 respectively specifically limit their use to "Company's business and not for personal use" and "solely for use in conducting the Company's business." Further, although Rule 8.8 does not specifically reference any electronic communications systems, it broadly prohibits employees "from using Company resources ... for promoting or conducting personal business ... or other personal activities not related to the Company's business operations." Particularly in view of employees' extensive use of the Employer's electronic communications systems in performing their work, employees would reasonably understand the term "Company resources" to encompass those systems. Although Rule 15.5 seems to permit personal use of the Employer's electronic communications systems, the other rules barring such use would certainly give an employee wishing to use those resources to engage in Section 7 activities pause. Moreover, the Employer has confirmed that it in fact prohibits employees from using those resources for non-business purposes. In these circumstances, we conclude that the referenced Employer rules would violate the Act if the *Purple Communications* holding is extended to all of the Employer's electronic communications systems, unless the Employer can establish special circumstances.

In order to establish a defense to its prohibition against Section-7 protected use of its electronic communications systems, an employer "must demonstrate the connection between the interest it asserts and the restriction" it imposed.¹⁴ "The mere assertion of an interest that could theoretically support a restriction will not suffice."¹⁵ Here, while the Employer asserts that it does not allow non-business use of its electronic communications systems because non-business use could impact productivity, and because permitting non-business use could lead to inappropriate use, it has provided no evidence that non-business use of those resources during nonworking time would impact employees' productivity. Further, it has not explained what inappropriate uses it believes employees could make of those resources and why

¹⁴ *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 14.

¹⁵ *Id.*

some lesser restriction could not prevent such uses without restricting use for Section 7 activities.¹⁶

In all these circumstances, we conclude that this case is a good vehicle to present the Board with an opportunity to extend its holding in *Purple Communications* to these electronic communications systems. Accordingly, to the extent the Employer's rules prohibit all non-business use during nonworking time on any of the systems enumerated above, it is unlawful.

B. The Employer's Policies Related to the Content of Employees' Electronic Communications

Since we have concluded that the Employer may not ban employee use of its electronic communications systems for Section 7 activity on nonworking time, we examine the rules imposing content restrictions upon such use to see if they limit or chill employees in the exercise of their Section 7 right.

It is well settled that the mere maintenance of an overly broad rule violates Section 8(a)(1) because it "tends to inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline."¹⁷ The Board has developed a two-step inquiry to determine if a work rule would reasonably tend to chill protected activities.¹⁸ First, a rule is clearly unlawful if it explicitly restricts Section 7 activities. Second, if it does not, the rule will nonetheless violate Section 8(a)(1) if: (1) employees would reasonably construe the language to

¹⁶ Although the Employer operates a mortgage banking firm and thus stores sensitive customer information, the Employer has not asserted that fact as a special circumstance. Moreover, the sensitive nature of the Employer's customer information should not in itself defeat employee rights to engage in effective Section 7 activity at the workplace. *See Space Coast Credit Union*, Case 12-CA-141201, Advice Memorandum dated Oct. 8, 2015, p. 17, n.41 (noting that, because of the nature of the employer's business, the employer already had security measures in place that are presumably much greater than those of an average employer).

¹⁷ *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000), *enforced*, 297 F.3d 468 (6th Cir. 2002). *See also Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (finding that the mere maintenance of a rule that would reasonably have a chilling effect on employees' Section 7 activity violates Section 8(a)(1)), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

¹⁸ *Lutheran Heritage Village-Livonia*, 343 NLRB at 646-47.

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.¹⁹ In determining how an employee would reasonably construe a rule, particular phrases should not be read in isolation, but rather considered in context.²⁰ Rules that are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful.²¹ In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.²² Any ambiguity in an employer's rule is construed against the employer as the promulgator of that rule.²³

Applying those principles here, we find the following rules unlawfully overbroad. First, Rule 9 broadly bars use of the Employer's equipment, including electronic communications equipment, for solicitation and distribution. Thus, this rule squarely encompasses Section 7 communications and, since the prohibition is not limited to working time, it is unlawfully overbroad.²⁴ The portion of Rule 9 that precludes

¹⁹ *Id.*

²⁰ *Id.* at 646

²¹ See *2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011) (finding rule that subjected employees to discipline for "inability or unwillingness to work harmoniously with other employees" unlawful absent definition of "work harmoniously"); *University Medical Center*, 335 NLRB 1318, 1320-22 (2001) (finding work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no such limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), enforcement denied in relevant part *sub nom.* *Community Hospital Centers of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003).

²² See *Tradesmen International*, 338 NLRB 460, 460-61 (2002) (determining that prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

²³ *Lafayette Park Hotel*, 326 NLRB at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

²⁴ See, e.g., *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3-4 (Dec. 6, 2014) (rule prohibiting solicitation in workplace at any time for any purpose overbroad and unlawful); *Our Way, Inc.*, 268 NLRB 394, 394 (1983) ("[t]he governing principle is that

employees from emailing or posting notices without the prior approval of Human Resources would reasonably be read to interfere with Section 7 activity and thus is also unlawfully overbroad.²⁵

Second, that portion of rule 15.8 (g) that requires that “Employees shall not use Company computers or other technology resources ... for advancement of individual views or opinions” would reasonably be construed to encompass protected activity, such as the voicing of opinions about unionization or the Employer’s labor relations policies, and is unlawful for that reason.²⁶

Third, Rule 15.3 requires employees to use its electronic communications systems “in a professional and appropriate manner that promotes the Company’s business interests.” The introduction to Rule 15.8 similarly prohibits “inappropriate use.” Since the Employer might consider Section 7-protected criticisms of terms and conditions of employment to be unprofessional, inappropriate, and against its best interests, an employee would reasonably understand these rules to prohibit Section 7 activities and therefore they are unlawful under *Lutheran Heritage*.²⁷

a rule is presumptively invalid if it prohibits solicitation on the employees’ own time,” citing to *Republic Aviation Corp. v. NLRB*, 324 US 793 (1945)); Cf. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 621 (1962) (employer may lawfully prohibit solicitation on working time).

²⁵ See, e.g., *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 2-3, 8 (Mar. 30, 2015) (rule unlawfully overbroad where, among other things, it required prior approval before posting communications about the employer or employees on the internet); *Trump Marina Associates*, 354 NLRB 1027, 1027 n.2 (2009) (two-member Board) (rule requiring employees to obtain prior authorization from management before releasing statements to the media found overly broad), *adopted by a three-member panel*, 355 NLRB 585 (2010), *enforced mem.*, 435 F. App’x 1 (D.C. Cir. 2011).

²⁶ See *Allegheny Ludlum Corp.*, 333 NLRB 734, 740, 744 (2001) (citation omitted) (Section 7 protects both the “right to express an opinion or to remain silent” about protected or union activity), *enforced*, 301 F. 3d 167 (3rd Cir. 2002).

²⁷ See, e.g., *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. 2 (Apr. 1, 2014) (rule requiring employees to represent the company “in a positive and professional manner” unlawfully overbroad). See also *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 6-7 (Aug. 22, 2014) (rule that prohibited “inappropriate discussions about the company, management, and/or co-workers” on social media unlawfully overbroad), *aff’d sub nom. Three D, LLC v. NLRB*, 629 F. App’x 33 (2d Cir. 2015).

Fourth, Rule 15.8(b) bars use of the Employer's systems for various types of conduct that employees would reasonably understand to encompass Section 7 activities, including the exchange of "embarrassing, ... offensive, intimidating, defamatory,²⁸ or other ... inappropriate material, or any messages with any derogatory or inflammatory remarks or pictures."²⁹

Finally, Rule 15.8 (f)'s prohibition on use "for any purpose that is either damaging to ... the Company, [or] detrimental to its interests" also would be reasonably construed to preclude protected activity, such as criticism of the Employer's labor policies or management.³⁰

Thus, each of these rules would be unlawful under a *Lutheran Heritage* analysis required under an expanded *Purple Communications* holding.³¹

²⁸ See, e.g., *UPMC*, 362 NLRB No. 191, slip op. at 1 & n.5, 21 (Aug. 27, 2015) (electronic messaging policy that barred nonwork use that "may be disruptive" or "offensive" or "harmful to morale" found unlawful); *NCR Corp.*, 313 NLRB 574, 577 (1993) (unlawful rule restricting bulletin board postings that contain "offensive language"); *Quicken Loans, Inc.*, 359 NLRB 1201, 1201 n.3, 6 (2013) (rule requiring employees to not "publicly criticize, ridicule, disparage or defame" employer found unlawfully overbroad), *incorporated by reference*, 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014), *enforced*, ___ F.3d ___, 2016 WL 4056091 (D.C. Cir. 2016). Advice has found the word "intimidating" unlawfully overbroad when contained in a rule that contains other overbroad terms. See (b) (7)(A) [REDACTED] (b) (7)(A) [REDACTED].

²⁹ Cf. *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (rule prohibiting "derogatory attacks on...hospital representative[s]" unlawful), *enforced in relevant part*, 916 F.2d 932, 940 (4th Cir. 1990).

³⁰ See, e.g., *Schwan's Home Service*, 364 No. 20, slip op. at 5 (June 10, 2016) (finding unlawful a rule that prohibited "Conduct on or off duty which is detrimental to the best interest of the company or its employees"); *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2, n.5 (Apr. 2, 2014) (rule stating employees would be disciplined for participating in outside activities "detrimental to the company's image or reputation" unlawful).

³¹ Given that these rules are unlawfully overbroad under *Lutheran Heritage Village-Livonia*, it is unnecessary to consider whether they would also be "discriminatory" under *Register Guard* or under the discrimination standard in effect prior to *Register Guard*. Indeed, discrimination is relevant in Section 8(a)(1) cases only to the extent that it "weakens or exposes as pretextual the employer's business justification."

C. The Employer's Maintenance of Policies Related to Monitoring Use of Its Electronic Communications Systems and Equipment

The Employer's policies stating that it may inspect, monitor, and review all computer usage and electronic communications are lawful. Employers generally can monitor employee behavior at work for legitimate and nondiscriminatory business reasons.³² The Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not "do something out of the ordinary."³³ Thus, an employer's monitoring of electronic communications on its email system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists.³⁴ And the Board has explicitly noted that an employer ordinarily may notify its employees that it monitors (or reserves the right to monitor) computer and email use for legitimate management reasons and that "employees may have no expectation of privacy in their use of the employer's email system."³⁵

While it is true, as noted by the Region, that Rule 15.6 allows monitoring "for any purpose," and is not expressly limited to monitoring for legitimate business purposes, that phrase is directly followed by a listing of legitimate business reasons for

Register Guard, 351 NLRB 1110, 1129 (2007) (Members Liebman and Walsh, dissenting) (citation omitted), *enforcement denied in part*, 571 F.3d 53 (D.C. 2009).

³² See *Caterpillar, Inc.*, 322 NLRB 674, 683–84 (1996) (holding supervisory monitoring to ensure that employees are doing the work for which they are paid is not unlawful simply because employees choose to conduct union activity in the sight of the supervisor). See also *Wal-Mart Stores*, 350 NLRB 879, 883 (2007) (finding no impression of surveillance where employees conducted union activity on shop floor that manager was overseeing).

³³ *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991) (quoting *Metal Industries*, 251 NLRB 1523 (1980)). See also *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 16 (those who choose to openly engage in union activities at or near the employer's premises cannot complain when management observes them).

³⁴ *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 16.

³⁵ *Id.*

monitoring.³⁶ Moreover, there is no evidence that the Employer has done “something out of the ordinary” by focusing on employee Section 7 activity. Accordingly, this policy does not unlawfully create an impression of surveillance.

Accordingly, the Region should issue complaint, absent settlement, consistent with the foregoing.

/s/
B.J.K.

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³⁶ *Cf. Tradesmen International*, 338 NLRB at 460-61 (determining that prohibition against “disloyal, disruptive, competitive, or damaging conduct” would not be reasonably construed to cover protected activity, given the rule’s focus on other clearly illegal or egregious activity and the absence of any application against protected activity). *See also* “Report of the General Counsel Concerning Employer Rules,” GC Memorandum 15-04, p. 18, dated March 18, 2015 (where rule includes examples or otherwise clarifies that it is directed at legitimate business interests, it will not be found unlawful).