UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AT&T MOBILITY, LLC
Respondent

and Case 05-CA-178637

MARCUS DAVIS, an Individual
Charging Party

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

A. Respondent's Business 2

B. Respondent's Rules 3

C. Employer's Threat To Enforce an Unlawful Rule 4

III. ARGUMENT 6

A. Respondent's Privacy of Communications Rule is Overly Broad and a Reasonable Employee Would Interpret Its Language to Restrict Section 7 Activity 6

1. Respondent's Does Not Have An Overriding Interest in the Rule As Drafted Because the Privacy of Communications Rule is Not Narrowly Tailored to Protect Respondent's Interest 8

2. Respondent's Claim That Davis Was Not Engaged in Protected Activity When He Recorded Throyer's Meeting Is A Red Herring 13

B. A Reasonable Employee Would Interpret the Privacy of Communication Rule to Restrict Section 7 Activity 15

C. Respondent Violated Section 8(a)(1) When Collings Threatened to Fire Davis 17

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Cy-Fair Volunteer Fire Department, 364 NLRB No. 49 (2016)..... 17

Flagstaff Medical Center, 357 NLRB 659 (2011)..... 1, 7, 8, 9, 11, 13

Flamingo Hilton–Laughlin, 330 NLRB 287 (1999)..... 15

G4S Secure Solutions (USA) Inc., 364 NLRB No. 92 (2016)..... 1, 7, 8, 16

Jet Spray Corp., 271 NLRB 127 (1984)..... 17

Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)..... 1, 15

Mediplex of Danbury, 314 NLRB 470 (1994)..... 17

Rio All-Suites Hotel & Casino, 362 NLRB No. 190 (2015)..... 6, 15

Schwan's Home Service, 364 NLRB No. 20 (2016)..... 15

Thor Power Tool Co., 148 NLRB 1379, enfd. 351 F.3d 584 (7th Cir. 1965)..... 14

T-Mobile USA, Inc., 363 NLRB No. 171 (2016)..... 1, 7, 8, 14, 16

Wexler Meat Co., 331 NLRB 240 (2000)..... 17

Whole Foods Market, Inc., 363 NLRB No. 87 (2015), affd __Fed. App'x __, 2017 WL2374843 (2d Cir. June 1, 2017)..... 1, 6, 7, 14, 15, 16

Yale New Haven Hospital, 309 NLRB 363 (1992)..... 19

Federal Statutes

42 U.S.C. § 1320d-6..... 7

Board Rules and Regulations

Section 102.46(a)(2)..... 20

I. INTRODUCTION

This case involves two straightforward issues of Section 8(a)(1): (1) whether AT&T Mobility, LLC's ("Respondent" or "company") Privacy of Communications rule violated Section 8(a)(1) under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); and (2) whether Respondent's Area Retail Sales Manager Andrew Collings ("Collings") violated Section 8(a)(1) when he implied union representative Marcus Davis[1] ("Charging Party" or "Davis") and other employees could be disciplined if they did not adhere to the unlawful Privacy of Communications rule.

The Board has repeatedly found rules prohibiting employees from recording conversations, phone calls, images, or company meetings with a camera or recording device without prior approval from management to be overly broad. *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3–5 (2015), affd __ Fed App'x__, 2017 WL2374843; *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 4–5 (2016); *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 5–6 (2016). Although Respondent contends that its interest in maintaining the privacy of customer information renders its policy lawful under *Flagstaff Medical Center*, 357 NLRB 659 (2011), Respondent's argument ignores fundamental distinctions between the wording and scope of its rule and the rule at issue in *Flagstaff*. The ALJ correctly concluded that Respondent's Privacy of Communications rule violates Section 8(a)(1) because it is overly broad when balanced against its interest in protecting customer information. (ALJD 4:24–25, 5:29–30.)[2]

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[1] To date, and during all material times related to the Complaint allegations, Davis has been employed by Respondent.

[2] In this brief, citations to the ALJ's decision appear as "ALJD [page numbers]." Citations to the transcript appear as "Tr. [page numbers]." Citations to the General Counsel's exhibits will appear as "GC Exh.[exhibit number]," and

In addition, the record demonstrates that Collings threatened to terminate Davis if he did not comply with the unlawful rule. During a meeting in or about mid-May 2016,[3] Collings instructed Davis that Davis was not permitted to record meetings. Specifically, the ALJ found that Collings told Davis that he did not want to see any employees held accountable for not following the policy. The ALJ also correctly concluded that Collings' statement was a violative threat under Section 8(a)(1). (ALJD at 5:20–24; 31–33.)

II. STATEMENT OF FACTS

A. Respondent's Business

Respondent is engaged in the business of providing wireless telecommunication services and devices.[4] Respondent operates at least five retail sales locations in the Washington, D.C. area, including its store at 1518 Connecticut Avenue in Washington, D.C. ("Connecticut Avenue Store.") (Tr. at 31:17–19.) The Communications Workers of America ("Union") is the collective-bargaining representative of Respondent's employees nationwide. (Jt. Exh. 2 at ¶3.) Davis has worked at the Connecticut Avenue Store since approximately April 2012, and has been a Union shop steward since October 2012. (Jt. Exh. 2 at ¶1, 4; Tr. 30:24–31:2, 41:10–12.) As a shop steward, Davis processes grievances for employees at all five of Respondent's locations in the Washington, D.C. area. (Tr. 31:12–19, 41:8–9.)

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citations to Respondent's exhibits appear or "R Exh. [exhibit number]." Finally, citations to joint exhibits appear as "Jt. Exh. [exhibit number]."

[3] Hereinafter, all dates occur in 2016 unless otherwise noted.

[4] Respondent is a limited liability company with and office and place of business in the District of Columbia (Respondent's facility) and has been engaged in the business of providing wireless telecommunication services and devices. (GC Exh. 1-C at ¶2; GC Exh. 1-E at ¶2; Jt. Exh. 2 at ¶5.) Respondent acknowledged in it its answer, and the ALJ found, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. (GC Exh. 1-C at ¶2; GC Exh. 1-E at ¶2; ALJD at 1.) Respondent has not excepted to the ALJ's jurisdictional finding.

Respondent's Connecticut Avenue Store includes public and non-public areas. (Id. at 29:8–30:21.) The public area includes a counter with a computer and printer, a device to transfer information to a new phone, a device to troubleshoot phones that are not working properly, as well as display tables, an "experience" table, and cash registers. (Id. at 29:10–23.) The non-public area of the store includes restrooms, a closet, lockers, an inventory room, a break room, and a manager's office with a door. (Id. at 29:24–30:9, 30:17–21, 40:23–41:6.) The non-public area also includes a counter-space with a computer and fax machine where employees check e-mail, process products and services, and complete training. (Id. at 30:9–16.)

Jason Yu ("Yu") is the Retail Sales Manager at the Connecticut Avenue Store. (GC Exh. 1-C at ¶3; GC Exh. 1-E at ¶3; Tr. 71:22–72:3.) Yu reports to Collings. (Tr. 36:14–25; 58:11–18.) Collings is the Area Retail Sales Manager for the Washington, D.C. area, which includes the five stores mentioned *supra*. (GC Exh. 1-C at ¶3; GC Exh. 1-E at ¶3; Tr. at 36:22–25; 57:13–23.) All five store managers—as well as one to four assistant managers per store—report to Collings. (Tr. at 36:22–25; 58:7–18.) One of Collings' duties is to enforce Respondent's policies, and he possesses authority to discipline employees. (Tr. 37:1–3; 67:19, 69:25–3.)

B. Respondent's Rules

Respondent maintains an internal intranet site called C2IT that includes links to Respondent's workplace policies and its Code of Business Conduct. (*See* GC Exh. 5 at 5–11; R. Exh. 5; R. Exh. 6; R. Exh. 7; R. Exh. 8.) One of Respondent's policies accessible through C2IT is its Privacy in the Workplace Policy. (*See* GC Exh. 2; R. Exh. 1; Tr. 41:22–42:3.) The Privacy in the Workplace Policy focuses on the protection of *employee* data, stating that "[t]he privacy of employment records (sensitive personal information, employment data, health records, etc. regarding current and former employees) is important to every employee, and all employees

must maintain the security of employee records. Prevention of identity theft is just as critical for employees as it is for our customers." (GC Exh. 2; R. Exh. 1.)

In addition, the Privacy in the Workplace Policy includes a rule titled Privacy of Communications. (GC Exh. 2; R. Exh. 1.) The Privacy of Communications rule states: "Employees may not record telephone or other conversations they have with their co-workers, managers, or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and with any applicable company policy." (GC Exh. 2; R. Exh. 1.) Neither the Privacy in the Workplace policy, nor the Privacy of Communications rule at issue in this case, mention *any* specific legal requirement to maintain the privacy of customer data.[5]

C. Employer's Threat To Enforce an Unlawful Rule

In about May 2016, Davis attended a grievance and termination meeting for Courtney Throyer ("Throyer"), a Union member who worked in Respondent's store in Chevy Chase, Maryland. (Tr. 33:2–10, 42:14–43:3,44:24–45:2.) Union Vice President Robin Jones ("Jones"), Store Manager Richard Berlot ("Berlot"), Assistant Store Manager James O'Neil ("O'Neil"), and Assistant Manager Ron Aldareina ("Aldareina") also attended the meeting. (Id. at 33:18–24; 43:4–21, 51:17–52:4.) Davis recorded the meeting on both his personal cell phone and his Respondent-owned cell phone.[6] (Id. at 34:10; 43:22–44:10.)

[5] In contrast, Respondent's Code of Business Conduct, its separate Privacy of Customer Information rule, and its Information Security Breaches rule each specifically address Respondent's responsibilities for customer data under the law. (*See* R. Exh. 5 at 6; R. Exh. 6; R. Exh. 7.)

[6] Respondent provides its employees with cell phones—known as company official use ("COU") phones—so that employees so they will be familiar with the devices when making sales with customers. (Tr. at 59:7–60:1.)

When Davis returned to the Connecticut Avenue store the next day, Yu approached Davis on the sales floor.[7] (Id. at 34:14–20, 45:3–5.) Yu told Davis that he needed Davis' company cell phone. (Id. at 34:17–18.) Davis gave Yu his company cell phone but did not ask why Yu needed it. (Id. at 34:22–35:2.)

Later that afternoon, Yu called Davis to the manager's office. (Id. at 35:3–9, 45:6–10, 76:2–17.) Yu asked if Davis knew why Yu had taken Davis' company cell phone. (Id. at 35:9–10.) Davis indicated that he did know why, and Davis stated that Respondent's management thought Davis recorded the grievance and termination meeting the previous day. (Id. at 35:10–11.) Yu told Davis that he (Davis) knew that Respondent's rules prohibited company employees from recording employees, managers, or their interactions on Respondent's property. (Id. at 35:13–15, 76:20–23.) After Yu told Davis that he was going to give Davis a coaching about the rule, Yu instructed Davis not to record meetings again and directed Davis to erase the recording from his company cell phone.[8] (Id. at 35:15–17, 45:11–21.) Davis explained that Washington, D.C. law permits recordings when one party gives consent, but Yu simply reiterated Respondent's recording rule. (Id. at 35:19–24.)

The next day, Collings approached Davis while Davis used the computer in the non-public area of the store. (Tr. 36:8–12, 46:5–10.) Collings instructed Davis not to record anymore. (Tr. 37:7–8.) Collings told Davis that Respondent's rule prohibited recording. (Id. at 37:8–9, 47:4–8.) The ALJ found that Collings told Davis that he (Collings) did not want to see any employees held accountable for not following the recording policy. (ALJD at 2:22–24, fn.

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[7] Davis and Yu disagreed about where this initial interaction occurred. (*See* Tr. 35:3–9, 45:6–10; 73:22–74.3.) The actual location of the interaction is irrelevant to any issue in this case.

[8] Davis and Yu disagreed about who erased the recording from Davis' Company cell phone. (*See* Tr. 35:16–17, 77:11–16.) Nevertheless, it is irrelevant as to which of them erased the recording.

2.) Davis then told Collings that Respondent was violating state law, and Collings promised Davis he would provide him with a copy of the Privacy of Communications rule. (Tr. at 37:9–13.) After Davis and Collings returned to the sales floor, Davis reiterated that the Respondent's rule violated state law. (Id. at 37:17–21, 47:14.) Collings stated that he did not "give a shit" about state law and that he only cared about Respondent's rule. (Id. at 37:22–23, 47:11–14.) Finally, Collings reiterated that Davis was not to record. (Id. at 37:24.) On May 27, Collings followed through on his promise to provide a copy of the rule when he e-mailed a copy of the rule to Jones and Davis. (Id. at 39:3–5, 47:15–22; GC Exh. 3.)

III. ARGUMENT

Respondent's exceptions and brief in support attack the ALJ's findings on several points. As explained below, the credible evidence and Board precedent support the ALJ's findings and conclusions. The Board should therefore overrule Respondent's exceptions and adopt the ALJ's findings on the two alleged violations of Section 8(a)(1).

A. Respondent's Privacy of Communications Rule is Overly Broad and a Reasonable Employee Would Interpret Its Language to Restrict Section 7 Activity

Employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity when no overriding employer interest is present. *See, e.g.*, *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 3 (2015). The Board has repeatedly found rules prohibiting employees from recording conversations, phone calls, images or company meetings with a camera or recording device without prior approval from management to be overbroad because an employee would reasonably interpret the rule to restrict Section 7 rights. *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3–5 (2015); *T-Mobile USA*,

Inc., 363 NLRB No. 171, slip op. at 4–5 (2016); *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 5 (2016).

In analyzing the contours of employees' Section 7 right to record, the Board in *Whole Foods Market Inc.* acknowledged that employees' Section 7 rights are not absolute. *See* 363 NLRB No. 87, slip op. at 3–4 & fn. 9–14. Specifically, the Board explained its decision in *Flagstaff Medical Center*, 357 NLRB 659 (2011). The employer in *Flagstaff* maintained a rule prohibiting the use of electronic equipment during work time and prohibited "'[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities . . . .'" 357 NLRB at 662. The Board in *Flagstaff* relied on its observation that hospital patients have a weighty interest in privacy, and it recognized that the employer, in a medical context, had "a significant interest in preventing the wrongful disclosure of individually identifiable information, including by unauthorized photography." *Id.* at 663 (citing 42 U.S.C. § 1320d-6 (prohibiting wrongful disclosure of individually identifiable health information)). In *Whole Foods Market Inc.*, the Board observed that the interests in the *Flagstaff* case justified the rule the hospital had written. 363 NLRB No. 87, slip op. at 3–4 & fn. 9–14.

Nevertheless, the *Flagstaff* decision stands only for the proposition that employer interests *may* justify a rule restricting these Section 7 rights depending on the text of the employer's rule. Contrary to Respondent's argument, the Board did *not* conclude that an employer's compelling interests justify *every* rule restricting employees' right to record regardless of the breadth of the rule. Instead, the rule in question must be narrowly tailored to the employer's compelling interest. Indeed, the Board has repeatedly distinguished cases involving photography or recording rules because the rules in question were not narrowly

tailored to the employer's interest. *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 6–7 (2016); *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 4–5 (2016).

1. Respondent's Does Not Have An Overriding Interest in the Rule As Drafted Because the Privacy of Communications Rule is Not Narrowly Tailored to Protect Respondent's Interest

At hearing, Respondent presented testimony and introduced several exhibits regarding what it argues as the justification for its Privacy of Communication rule. (*See* Tr. 79:5–111:7; R. Exh. 2; R. Exh. 3; R. Exh. 4; R. Exh. 5; R. Exh. 6; R. Exh. 7; R. Exh. 8; R. Exh. 9.) Although the ALJ's decision found that Respondent had a pervasive and compelling interest in protecting customer information, the ALJ nonetheless concluded that Respondent's Privacy of Communications rule violated Section 8(a)(1) because it was overly broad. (ALJD at 4:20–25.)

Respondent disputes the ALJ's conclusion that the Privacy of Communication rule violates Section 8(a)(1). (Exceptions Brief at 23–36; *see also* Exceptions 1, 3, 5, 6, 16.).[9] Specifically, Respondent contends that its interest in protecting customer information justifies its Privacy of Communication rule under *Flagstaff*. (Exceptions Brief at 23–32.)[10] Respondent also claims that the ALJ erred in finding that a narrower policy could protect its interest in protecting customer data. (Exceptions Brief at 32–36; *see also* Exceptions 5, 7–12.) As explained below, the ALJ properly found, in agreement with Board law and the substantial evidence adduced at hearing, that Respondent's interest in protecting customer information does not justify the Privacy of Communication rule.

[9] Respondent's exceptions will be cited as "Exceptions," and its Brief in Support of Exceptions will be cited as "Exceptions Brief."

[10] Respondent's Brief in Support of Exceptions also tries to differentiate its interests from other recent Board cases examining Section 7-protected recordings. (Exceptions Brief at 30–32.) Regardless, Respondent's attempt to differentiate is inapposite because the Board's standard remains the same: whether the restriction in question is narrowly tailored to the employer's interest. Simply because Respondent's interests may differ from the employer's interests examined in other cases does not mean that it has narrowly tailored its own rule to its interests in this case.

Respondent's Privacy of Communications rule prohibits employees from recording telephone or other conversations with their co-workers, managers, or *third parties* unless Respondent's legal department approves the recording, the needs of the Respondent's business require the recording, *and* the recording fully complies with the law and with any applicable company policy. Regardless of the rule's generic references to law and company policy, it prohibits an employee from recording *any* conversation with *anyone* at *any time* in *any place* in Respondent's facility unless Respondent's business required the recording *and* the Respondent's legal department first approved the recording. Illustrating its broad scope, under Respondent's rule, an employee could not record any instructions or discipline from a managers unless Respondent's business required the recording *and* Respondent's legal department first approved the recording; an employee could not record a grievance, disciplinary, or union meetings unless the Respondent's business required the recording *and* Respondent's legal department first approved the recording; and an employee could not record any conversation with government health or safety inspectors at the store unless Respondent's business required the recording and Respondent's legal department first approved the recording.

In Respondent's Brief in Support of Exceptions, it compares its interest in protecting customer information to the hospital's interest in patient privacy in *Flagstaff* to conclude that its interest justifies its Privacy of Communications rule. (Exceptions Brief at 26–30.) However, Respondent overlooks a critical distinction: the unlawful Privacy of Communications rule makes *no* reference to customers. Instead, Respondent's rule identifies *only* co-workers, managers, and unspecified third parties—potentially including non-employee union officials, government inspectors, or any Respondent human resources or non-managerial personnel visiting the store.

Respondent implicitly acknowledges the omission of customers from the Privacy of Communications rule and the breadth of the rule, and it tries in vain to paper over its shortcomings by arguing that the rule must be read in context. (*Id.* at 22–23, 29–30.) According to Respondent, the Privacy of the Communications rule is part of the larger Privacy in the Workplace policy. (*Id.* at 17.) Because the Privacy in the Workplace policy includes an isolated statement that prevention of identity theft is important for employees as well as customers, Respondent somehow concludes that the "the ban on recordings of working place conversations with 'third parties' literally means *customer communications*." (*Ibid.* (emphasis in original).) Given the substantial differences in meaning between "customers" and "third parties," Respondent's effort to narrow the scope of "third parties" is understandable. But no matter how much Respondent may wish it referenced customers or the protection of customer data in its Privacy of Communications rule, it cannot ignore the actual text of the rule it maintains, and "third parties" does *not* "literally" mean "customer communications."

Yet even Respondent's hoped-for "context" indicates that the Privacy of Communications rule is overly broad. The record demonstrates that Respondent recognizes the distinction between Respondent's rules protecting the customer information and the Privacy of Communications rule at issue in this case. In fact, Respondent maintains several *separate* rules requiring employees to maintain the privacy of customer information. (*See* R. Exh. 6; R. Exh. 7; R. Exh. 8.) At the hearing, Respondent's own witness specifically acknowledged that language in the broader Privacy in the Workplace policy was *intended* to "raise the level of awareness and importance of protecting employee information to the same height that we have the need to protect customer information." (Tr. 109:8–15.) Respondent does not explain why it omitted explicit language regarding its legal duties to protect customer information from the Privacy of

Communications rule. Nevertheless, it is the text of the rule that matters in an analysis of whether an employee would reasonably construe the actual language of the Privacy of Communications rule to prohibit Section 7 activity—not what Respondent hoped to write.

Respondent's claim that it cannot permit *any* recordings at its workplace is similarly spurious. Respondent contends that limiting the Privacy of Communications rule to working time or working areas would not protect its interest because employees might discuss sensitive customer information, including during breaks or in non-work area discussions of working conditions.[11] (Exceptions Brief at 33–34.) Thus, Respondent appears to view its interest in protecting customer information as mutually exclusive of the employee rights protected by the Act. But Respondent provided only passing and conclusionary evidence for such a reductive position. To the extent Respondent claims it could not permit recording in any context because

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[11] In support of Respondent's claim that *Flagstaff* permits Respondent to ban all recordings based on the potential that workplace recordings could involve sensitive customer information, Respondent repeatedly misrepresents the Board's holding in *Flagstaff*. Respondent claims the Board held the hospital was justified in maintaining its policy "as it was 'designed to assure [the hospital] never had a picture taken that had a patient inadvertently or consciously walking by and included in that picture.'" *See* Exceptions Brief at 28, 36–37 (citing 357 NLRB 659, 683 (2011)). Respondent presents the above quotation as though it appeared in the Board's analysis. It did not. Instead, the quotation is from the administrative law judge's recitation of testimony from an employer witness. 357 NLRB 659, 683. Although the Board agreed with the judge's conclusion that the rule was not overly broad, the judge highlighted the above testimony simply to conclude that the employer had not adopted the rule in response to protected union activities. *Id*. at 663, 683. The Board did not rely on the witness' testimony in its analysis of whether employees would reasonably interpret the rule as a restriction on Section 7 activity; accordingly, Respondent misreads the Board's holding. *See ibid.*

But even if Respondent contends that the Board implicitly adopted the judge's decision in its entirety, the judge also concluded:

> "[I]t is clear that [the hospital] may not utilize this policy, specifically designed to protect patient privacy, for purposes inimical to the Act. Thus, [the hospital] may not interpret the policy to prohibit employees from engaging in legitimate union-related activities, such as, for example, taking photos of hospital bulletin boards, or unsafe working conditions, or a gathering of employees at the union table in the cafeteria, unless patient privacy is compromised."

357 NLRB at 683. Notwithstanding any interest Respondent has in protecting customer information, in this regard *Flagstaff* therefore also prohibits Respondent from interpreting its recording policies to prevent employees from engaging in legitimate union activities like grievance or termination meetings—precisely the activity Davis engaged in when he recorded the meeting with Throyer.

protected customer information might arise, *see* Tr. 109:8–15, Respondent neither presented evidence that an employee ever captured or disclosed customer information in a protected Section 7 recording, nor demonstrated why discussions of working conditions among co-workers would include specific customer data rather than generalized discussions of the work process.

Moreover, Respondent maintains separate Privacy of Customer Information, Information Security Breach, and Access to Customer Accounts policies that specifically address the protection of customer information. Respondent also repeatedly elicited testimony showing it trains its employees annually regarding the need to protect customer information. (Tr. 86:19–87:6,100:17–19, 110:6–14.) Thus, Respondent has provided no basis to conclude that an employee engaged in protected Section 7 recording would inadvertently capture or disclose private customer information. On the contrary, Respondent's other policies regarding customer information suggest Respondent might have crafted any number of alternative Privacy of Communication rules which specifically protect customer information without interfering with employee rights under the National Labor Relations Act. Accordingly, Respondent's claim that it cannot permit any recording in the workplace under any circumstance is an overstatement of its obligations to preserve and protect customer information.

Regardless of Respondent's legal obligations to protect customer information, it cannot simply adopt an overly broad rule restricting all Section 7 recordings—particularly where the unlawful rule itself fails to identify any customer privacy interest at all. Respondent's rule omits any reference to customer interests in favor of "third parties." The record does not support Respondent's claim that it cannot permit any recordings at its facilities; in fact, it suggests the opposite. In this regard, the Privacy of Communications rule is not narrowly tailored and does not demonstrate a customer privacy interest comparably explicit to the patient privacy interest in

Flagstaff. Respondent's interest in protecting customer data therefore does not justify its overly broad Privacy of Communications rule. The Board should therefore overrule Respondent's exceptions.

2. Respondent's Claim That Davis Was Not Engaged in Protected Activity When He Recorded Throyer's Meeting Is A Red Herring

Respondent also claims that the ALJ erred in finding that Respondent restricted Davis' Section 7 Activity. (Exceptions Brief at 37–39; *see also* Exceptions 5, 13, 15, 16.) In support of this claim, Respondent relies on a number of dubious arguments, which are addressed in turn.

Respondent first claims that its interest in protecting customer information leaves recordings of disciplinary meetings unprotected because the Board has not found employees to have an unqualified right to record in the workplace. (Exceptions Brief at 37–38.) As explained above, *supra* Section IV.A.1, Respondent misreads the Board's precedent regarding the interests that may justify a recording restriction if the restriction is narrowly tailored to the compelling interest in question.

Respondent does not stop there. Relying on the Board's rationale that some restrictions on recording have been overly broad because they did not differentiate working time and areas from nonworking time and areas, Respondent contends that the Board has therefore implicitly authorized all work rules prohibiting recording during working time and in work areas. (*Id.* at 38.) Respondent apparently therefore concludes that Section 7 does not protect any recording during working time and in work areas. (*Ibid.*) Extending this misreading further, Respondent also concludes that it may enforce a rule restricting workplace recordings that encompass disciplinary discussions during working time and in work areas. (*Ibid.*) As Throyer's meeting occurred in an office in Respondent's store and Davis was on-the-clock, Respondent therefore

argues that it could have prohibited Davis from recording without violating Section 8(a)(1). (*Id.* at 38–39.)

Nevertheless, Respondent again overreads the Board's decisions in *Whole Foods* and *T-Mobile*. Although the Board suggested an employer's recording policy is overbroad if it fails to distinguish working and nonworking time and areas, it does not follow that all recording restrictions during working time and in working areas are *per se* lawful. Instead, the Board's rationale highlights the central holding of this line of cases: to restrict recordings protected under Section 7, an employer's interest must be compelling, and the restriction must be narrowly-tailored to that interest.

Next, Respondent claims it did not restrict Davis' recording because Respondent's agents did not immediately ask him to stop recording at the time. (Exceptions Brief at 39.) However, Respondent ignores Yu's demand that Davis turn over his Company phone, as well as Yu's instruction to erase the recording the next day. The act of recording a workplace meeting is worthless if employers require employees to delete recordings after the fact. As the Board has observed, and the ALJ acknowledged, covert recordings are often an essential element of vindicating Section 7 rights. (ALJD at 4:9–14 (citing *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. 3 at fn. 8.) Respondent therefore restricted Davis' Section 7 activity when it requested his company phone and erased the recording.

Finally, Respondent also claims there is "no evidence Davis made the recording for the mutual aid and protection of fellow employees." (Exceptions Brief at 39.) Respondent again disregards the record in this case. Davis attended Throyer's meeting as a Union representative—the very essence of union activity. (*See* ALJD at 5, fn. 7 (citing *Thor Power Tool Co.*, 148 NLRB 1379, enfd. 351 F.3d 584 (7th Cir. 1965). In addition, Article 17, Section 3 of

Respondent's collective-bargaining agreement with the Union permits a Union representative to be present for any meeting in which discipline (including discharge) may be announced. (Jt. Exh. 1 at 26.) The collective-bargaining agreement also provides that "[t]ime spent in such a meeting shall be considered work time." In this regard, Respondent's argument that Davis was not engaged in protected activity is not credible.

B. A Reasonable Employee Would Interpret the Privacy of Communication Rule to Restrict Section 7 Activity

Respondent's Privacy of Communications rule is overbroad and unlawfully restricts Section 7 activity. Under *Lutheran Heritage Village-Livonia*, an employer's rule violates Section 8(a)(1) when an employee would reasonably construe the language to prohibit Section 7 activity. 343 NLRB 646, 647 (2004). Regardless of whether a rule prohibits unprotected behavior, an employer's rule is unlawful when its prohibitions are broad enough that an employee would reasonably understand the rule also to encompass protected activity. *See, e.g.*, *Flamingo Hilton–Laughlin*, 330 NLRB 287, 288 fn. 4, 294 (1999). In addition, rules that require employees to obtain permission from an employee to engage in protected concerted activities on their free time and in non-work areas are also overbroad. *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 4 (2016).

As stated above, employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity when no overriding employer interest is present. *See, e.g.*, *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 3 (2015). The Board has repeatedly found rules prohibiting employees from recording conversations, phone calls, images or company meetings with a camera or recording device without prior approval from management to be overbroad because an employee would reasonably interpret the rule to restrict Section 7 rights. *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3–5 (2015); *T-Mobile*

USA, Inc., 363 NLRB No. 171, slip op. at 4–5 (2016); *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 5 (2016).

Applying these standards to the instant case, Respondent's Privacy of Communications rule is overbroad and violates Section 8(a)(1). Indeed, Respondent's rule is more broad than the rule at issue in *Whole Foods Market, Inc.* There, the Board found an employer's rule prohibiting employees from recording conversations, phone calls, images, or company meetings with a camera or recording device without prior approval from management to be overbroad. 363 NLRB No. 87, slip op. at 3–5. Since the rule did not differentiate between protected and unprotected activities, the Board concluded that the rule would reasonably chill employees in the exercise of their rights. Id. at 4.

Here, Respondent's overly broad Privacy of Communications rule adds additional restrictions beyond those found unlawful in *Whole Foods Market, Inc*. Under Respondent's rule, employees cannot record telephone or other conversations with co-workers, managers, or any "third party." As explained above, *supra* Section IV.A.1, the explicit reference to "third parties" is extraordinarily broad—including union representatives and government health and safety inspectors. Considered together with the rule's reference to co-workers and managers, the phrase "third parties" removes any doubt as to whether employees can record any person in any context—they cannot. Further, Respondent's Privacy of Communications rule also includes a clause conditioning employee recordings on Respondent's business interest. Further still, Respondent's rule also conditions employee recording on prior approval from Respondent's legal department. Given the scope of Respondent's explicit reference to third parties and the additional, broad conditions placed on employees' ability to record anywhere in

the workplace at any time, an employee therefore would construe such restrictions to encompass protected Section 7 activity.

Accordingly, Respondent's overbroad Privacy of Communications rule would also reasonably chill employees in the exercise of Section 7 rights,[12] and the Board should overrule Respondent's exceptions.

C. Respondent Violated Section 8(a)(1) When Collings Threatened to Fire Davis

Respondent also excepts to the ALJ's determination that Respondent unlawfully threatened Davis with discipline for violating Respondent's rule prohibiting recording. (Exceptions Brief at 40; *see also* Exceptions 12–15.)

The ALJ correctly concluded that Respondent violated Section 8(a)(1) when Collings threatened to hold Davis and other employees accountable if they did not adhere to the unlawful Privacy of Communications rule. The Board examines the totality of the circumstances to determine whether an employer's statement reasonably tended to interfere with employee's rights guaranteed under the Act. *See, e.g.*, *Mediplex of Danbury*, 314 NLRB 470, 470–72 (1994). An employer violates Section 8(a)(1) when it threatens to terminate employees if they do not adhere to an overbroad rule. *See, e.g.*, *Cy-Fair Volunteer Fire Department*, 364 NLRB No. 49, slip op. at 1, 13 (2016); *Wexler Meat Co.*, 331 NLRB 240, 240, 242 (2000) (approving administrative law judge determination that a threat to enforce an overbroad rule is a separate Section 8(a)(1) violation); *Jet Spray Corp.*, 271 NLRB 127, 128 & fn. 12, 141 (1984)

[12] At hearing, Respondent presented testimony and introduced several exhibits regarding what it argues as the justification for its Privacy of Communication rule. (*See* Tr. 79:5–111:7; R. Exh. 2; R. Exh. 3; R. Exh. 4; R. Exh. 5; R. Exh. 6; R. Exh. 7; R. Exh. 8; R. Exh. 9.) Yet Respondent's evidence ignores the over breadth of its Privacy of Communications rule and the applicable legal standard in this case: whether an employee would reasonably construe the rule to restrict Section 7 activity. The Privacy of Communication rules explicitly—and without qualification—restricts employees from recording *any* co-worker or manager or third party in *any* context unless the Respondent's legal department approves the rule *and* the needs of Respondent's business require the recording. In this regard, Respondent's evidence is therefore irrelevant.

(concluding that a threat to terminate for violations of an unlawful rule "plainly tended to restrain and coerce employees in the exercise of their statutory rights to engage in union and protected concerted activity, and violated Section 8(a)(1) of the Act.").

The circumstances of this case demonstrate that Collings' statement reasonably tended to interfere with employees' Section 7 rights. One day after Davis recorded Throyer's grievance and discharge meeting, Yu requested Davis' Respondent-owned cell phone and repeatedly instructed Davis that his recording violated Respondent's rule. Just a day later, the next level supervisor, Collings, also spoke with Davis about the Privacy of Communications rule. The ALJ credited Collings' testimony that he told Davis that he (Collings) did not want to see anyone held accountable for not following the policy. During Collings' conversation with Davis, Collings also told Davis that he would provide a copy of the Privacy of Communications rule. As promised, Collings forwarded a copy of the rule within approximately a week.

In view of these facts, Collings' threat would reasonably tend to chill Davis in the exercise of his Section 7 right to record grievance meetings. As the ALJ correctly concluded, Collings' statement that he did not want to see employees held accountable for violating the Privacy of Communications rule "obviously implies that future violations of the rule may be grounds for discipline" and was "made in response to Davis' violation of Respondent's rule in the course of his protected activities as a union steward." (ALJD at 5:22–24, 5:31–33.) In the span of two days, Davis had four separate conversations with Respondent's management regarding the Privacy of Communications rule—including direct instructions from the Area Retail Sales Manager for the entire Washington D.C. region. Each time, either Yu or Collings specifically instructed Davis that his recording violated the rule. Collings also told Davis that employee could be held accountable for failing to follow the unlawful policy. Moreover, when

Collings later forwarded a copy of the rule to Davis, he demonstrated that his instructions were not optional; instead, Davis was to adhere to the rule. *See e.g.*, *Yale New Haven Hospital*, 309 NLRB 363, 368 (1992) (approving administrative law judge conclusion that supervisor unlawfully threatened employee with reprisal by telling an employee that if he did not stop protected activities he would "talk" to him again because remark implies that the talk will not be mere conversation but will concern the employment of the offending employee). Given these specific instructions and Collings' authority to discipline employees, Davis would reasonably conclude that he could be fired if he recorded in the future, in violation of Section 8(a)(1) of the Act. Accordingly, the Board should overrule Respondent's exceptions.

IV. CONCLUSION

For the foregoing reasons, counsel for the General Counsel respectfully requests that the Board overrule Respondent's exceptions.[13]

Dated at Washington, D.C., on July 6, 2017, and respectfully submitted by:

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[13] Section 102.46(a)(2) requires that any brief in support of exceptions contain "[a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate." Respondent's Brief in Support of Exceptions does not specifically address Exception No. 14 of its exceptions to the ALJ's findings and conclusions, its exceptions to the ALJ's conclusions of law, or its exceptions to the ALJ's failure to find, but the text of these exceptions, standing alone, at least imply the questions involved and factual record relied upon.

Respondent's Brief in Support of Exceptions likewise omits reference to its exceptions to the Proposed Order. Yet in contrast the exceptions addressed above, Respondent's exceptions to the proposed order provide no detailed basis for Respondent's suggestion that relief in this case must be limited to the Charging Party. Given Respondent's failure to explain the basis and rationale for these exceptions in its brief and absence of support in the exceptions themselves, counsel for the General Counsel contends Respondent's exceptions as to the ALJ's Proposed Order should be disregarded in their entirety.

CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was filed electronically on July 6, 2017, and, on the same day, copies were electronically served on the following individuals by e-mail:

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