UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

NIGEL HOBBS, an Individual Petitioner, and WINCO FOODS, LLC and WINCO HOLDINGS, INC., a single employer Respondents.	Cases: 28-CA-181651 28-CA-190617 28-CA-190624

RESPONDENTS' RESPONSE BRIEF TO THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL ANALYSIS 2

A. There Is No Actual Injury or Violation of the Act 2

B. There Is No Evidence Of Any Union Animus; The CBA Adopted And Incorporated The Very Rules Challenged By The General Counsel 3

C. Respondents' Work Performance Rule Is Lawful; The Cases Cited By The General Counsel Are Distinguishable 4

D. Respondents' Policy Regarding Offensive Tattoos Is Lawful 6

E. Respondents' No Solicitation Rule Is Lawful; The General Counsel Has Not Met Its Burden Of Proof 8

F. The General Counsel Has Not Met Its Burden Of Proof To Show That Respondents' Telephone and Computer Use Policy Is Unlawful 9

G. Respondents' Prohibition of Handheld Devices While Working Is Lawful 10

H. Respondents' No Recording Policy Is Lawful; The General Counsel Disregards Respondents' Property Rights 11

I. Item 3 of Respondents' Electronic Communication and Recording Devices Rule Is Lawful 12

J. Respondents' Rules Against Fraudulent Statements and Fighting Are Lawful 13

K. Both of Respondents' Confidentiality Policies Are Lawful 14

L. Respondents' Remaining Policies Are Also Lawful 15

TABLE OF AUTHORITIES

Page(s)

Cases

Ador Corp.,
150 N.L.R.B. 1658 (1965) 7

Andronaco, Inc.,
364 NLRB No. 142 (2016) 11

Copper River of Boiling Springs,
360 NLRB No. 60 (2014) 17

First Transit, Inc.,
360 NLRB 619 (2014) 11

Flex Frac,
358 NLRB 1131 18

Food Lion, Inc. v. Capital Cities/ABC, Inc.,
194 F.3d 505 (4th Cir. 1999) 15

Ford Motor Co. (Jacksonville, Fla.),
57 NLRB 1814 (1944) 9

Fresh & Easy Neighborhood Mkt.,
361 NLRB No. 8 (2014) 18

Guardsmark, LLC,
344 NLRB 809 (2005) 17

Gulf Envelope Co.,
256 NLRB 320 (1981) 12

Hills & Dales Gen. Hosp.,
2012 NLRB LEXIS 79 (Feb. 17, 2012) (Carter, ALJ) 8

Jefferson Lake Oil Co., Inc.,
16 NLRB 355 (1939) 9

Lafayette Park Hotel,
326 NLRB 824 (1998) 18

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992).....5

Lytton Rancheria of Cal.,
361 NLRB No. 148 (2014) 18

Mediaone of Greater Florida, Inc.,
340 NLRB 277 (2003) 18

Mfrs. Woodworking Ass'n of Greater N.Y.,
345 N.L.R.B. 538 (2005) 7

New Passages Behavioral Health and Rehab. Servs.,
362 NLRB No. 55 (2015) 12

Palms Hotel & Casino,
344 NLRB 1363 (2005) 8

Prudential Insurance Co.,
275 N.L.R.B. 208 (1985) 8

Purple Commc'ns, Inc.,
361 NLRB No. 126 (Dec. 11, 2014) (Miscimarra dissenting).....13, 14, 15

Rocky Mountain Eye Ctr.,
P.C., 363 NLRB No. 34 (2015) 16

Singer Co.,
153 NLRB 922 (1965) 12

Super K-Mart,
330 NLRB 263 (1999) 18

Triple Play Sports Bar and Grille,
361 NLRB No. 31 (2014) 11

Va. Elec. & Power Co.,
44 NLRB 404 (1042) 9

W. Steel Casting Co.,
233 N.L.R.B. 870 (1977) 7

Statutes

18 U.S.C. § 2511(2)(d) 15

Cal Penal Code § 632.....15

Wash. Rev. Code Ann. § 9.73.030(1)(a).....15

I. INTRODUCTION

The General Counsel's brief relies on a flawed standard that focuses on hypothetical interpretations, hypothetical harms, and strained scenarios rather than a common-sense test that properly evaluates (1) whether any harm actually occurred (2) the potential adverse impact of a particular rule on NLRA-protected activity and (4) the legitimate business justifications an employer has for maintaining a rule in issue. The potential result in relying on an unreliable standard such as the one in *Lutheran Heritage* is one that interferes with Respondents' property rights and their right to run their business. Such a standard is also inconsistent with the basic notion that to assert a claim for violation of federal law you need to show an actual injury in fact, that is real, based on evidence from the party allegedly harmed, and not hypothetical. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) ("First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical") (internal citations omitted). Although the standing requirements set forth in *Lujan* and its progeny may not apply to the Board's enforcement actions, the policy behind those requirements are sound and should apply—speculation does not amount to a Section 8(a)(1) violation.

Even under the *Lutheran Hospital* standard, given the undisputed facts of this case, the hypothetical interpretations asserted by the General Counsel are unreasonable and are not likely to be construed by reasonable employees in a similar manner. For example, a reasonable person would not interpret a policy that prohibits the use of fax machines and copiers for personal use as restricting Section 7 activity, especially in a day and age where union campaigns are run utilizing cell phones and text messaging. Nor would a reasonable person interpret a policy that prohibits offensive tattoos as prohibiting union insignia or slogans. The hypothetical interpretations in the General Counsel's brief are not interpretations a reasonable employee would make.

The cases cited by the General Counsel are also distinguishable. All of the cases cited by the General Counsel contained facts where the Board found that there was anti-union animus or enforcement of a policy held to be unlawful. In several instances, the General Counsel cited to cases where the policies at issue were far broader than Respondents' policies.

Regardless of the standard applied, Respondents' polices are lawful. All of the policies were

negotiated and agreed to between Respondents and the bargaining unit. Additionally, Respondents' policies are facially neutral, none of the polices were created in response to any Section 7 activity, and none of the policies have been applied to restrict any employee's Section 7 activity. At least with respect to the employees under the applicable CBA, there is no evidence that anyone challenged the rules as unreasonable. A reasonable employee applying common sense would not, and could not, interpret any of the policies as restricting any Section 7 activity.

Finally, Respondents have a right to protect its property and restrict certain conduct, such as audio and video recordings, on its property. Respondents' property rights clearly outweigh its employees' hypothetical Section 7 rights.

II. LEGAL ANALYSIS

A. There Is No Actual Injury or Violation of the Act

Section 8(a)(1) of the Act states that it shall be an unfair labor practice for an employer to interfere, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7. It does not say that any "hypothetical" or "possible" attempt to restrain, interfere or coerce is a violation.

With respect to the rules at issue, the following is not in dispute: (1) the rules are neutral on their face—they do not expressly prohibit any rights protected by Section 7 of the Act; (2) there is no evidence that any employee interpreted the rules in a way that would chill their rights; (3) there is no evidence to suggest the rules were ever applied in an illegal way; (4) there is no evidence to show an intent by the employer to apply the rules in an improper manner; (5) there was no ongoing union activities, labor unrest, labor negotiations or an election related to the rules; (6) employees are required to understand the "meaning" of the rules and there is no testimony from any employees suggesting they understood the rules to chill or in any affect their union rights; and (7) the CBA in evidence specifically states the Rules at issue will be applied, strongly suggesting that the rules were not created for an improper purpose and will not be applied illegally. There simply is no evidence that the handbook provisions have, or are reasonably likely to, ever interfere, restrain, or coerce employees in the exercise of their Section 7 rights. For this reason, the General Counsel's charge should fail.

"[A]any 'nexus' between the Respondent's [handbook provisions] and the 'likely impact on employee protected rights is simply too attenuated to remove it from the realm of pure speculation."

Mfrs. Woodworking Ass'n of Greater N.Y., 345 N.L.R.B. 538, 541 (2005) quoting *Slate Workers Local 66*, 267 N.L.R.B. 601, 602-03 fn. 10 (1983). Therefore, "[w]hile some future interference with employee Section 7 rights is theoretically possible . . ., it is far too speculative to warrant a finding that [the handbook], standing alone, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." *Id.* at 541-42. Indeed, to protect against such unfounded claims, the Board should require the General Counsel to show some type of actual or reasonably imminent harm to get relief under the Act.

B. There Is No Evidence Of Any Union Animus; The CBA Adopted And Incorporated The Very Rules Challenged By The General Counsel

The instant case is starkly different than all the cases cited by the General Counsel in its brief because there is no evidence in the record of any anti-union animus. Specifically, there are no allegations that Respondents created any of the policies at issue in response to any union activity, applied any of the policies to restrict the exercise of anyone's Section 7 rights, or that Respondents engaged in any other unlawful conduct against any of its employees for engaging in protected concerted activities. Each of the cases cited by the General Counsel contained some finding of union animus, whether it was in the form of a termination, the unlawful creation of a rule to curb union activity or discipline. None of those facts are present here.

Moreover, the General Counsel cannot avoid the undisputed fact that by incorporating and adopting the provisions of the WinCo Employee Handbook in the Collective Bargaining Agreement ("CBA"), the company and the bargaining unit agreed to specific wording of the workplace rules, such as a basic dress code, the types of tattoos employees can display at work, the use of foul language, and access to company computers. (Jt Exh. 1(p) at pp. 2, 10.) There is no evidence that WinCo, the Bargaining Committee, or any employee construed the policies to chill any protected rights. It is unreasonable to view the rules as illegal given that the rules are part of the CBA. Indeed, the reasonable inference to draw is that the parties agreed to the wording of the rules and saw such wording as reasonable. Unions routinely waive rights to bargain over changes to the terms and conditions of their employment and fundamental rights like the right to strike. *See Ador Corp.*, 150 N.L.R.B. 1658, 1660 (1965) (bargaining units can waive right to bargain over changes in the terms and conditions of employment such as right to eliminate productions lines and lay off employees); *W. Steel Casting Co.*,

233 N.L.R.B. 870 (1977) (strike rights may be waived); *Prudential Insurance Co.*, 275 N.L.R.B. 208 (1985) (Wiengarten rights may be waived). Here, it is unreasonable to view Respondents' rules as unlawful when the bargaining unit agreed to the rules in question.

C. Respondents' Work Performance Rule Is Lawful; The Cases Cited By The General Counsel Are Distinguishable

The General Counsel admits that rules must be read in context, and not in isolation. *See* General Counsel's Brief ("GC Brief"), at p. 7. Nevertheless, the General Counsel argues that Respondents' work performance rule is unlawful because the rule does not contain any "limiting language or context" and bars employees from "caus[ing] unrest among employees." *Id.* at 8. The General Counsel's arguments are without merit for several reasons.

First, the General Counsel incorrectly interprets Respondents' rules in isolation. When read in context, it is clear that Respondents' rule lawfully reflects its expectation that employees "comport themselves with general notions of civility and decorum in the workplace." *See Palms Hotel & Casino*, 344 NLRB 1363, 1367-68 (2005). Specifically, the two sentences that precede the challenged portion of the rule encourages employees to "[c]ontribute to a positive work environment through cooperative and professional interactions with co-workers, customers and vendors." (JF 5(s).) The rule lawfully instructs employees to behave in a way that promotes "courtesy" and "cooperat[ion]" towards customers and workers with respect to work. *Id.*

Moreover, the other rules in the "Work Performance" section, all of which the General Counsel concedes are lawful, mandate that employees do not engage in horseplay, do not distract workers, and greet customers when passing customers on the sales floor. These are all rules regarding civility and decorum in the workplace. In other words, read in context of the other rules, Respondent's rule that "[e]mployees are not to use abusive, foul, or offensive language, engage in gossip, or otherwise cause unrest amongst employees, customers or vendors" is lawful. *See Hills & Dales Gen. Hosp.*, 2012 NLRB LEXIS 79, *16-18 (Feb. 17, 2012) (Carter, ALJ) (work rule providing "[w]e will represent Hills & Dales in the community in a positive and professional manner in every opportunity" not unlawful).

The General Counsel's claim that Respondents' policy is unlawful because it bars employees from causing "unrest" amongst employees, customers or vendors is also unpersuasive. The General Counsel cites to three cases where the NLRB used the word "unrest" to refer to Section 7 activities to

support its argument that Respondents' policy is unlawful. All of the cases, however, are distinguishable. First, none of the cases stand for the proposition that a rule prohibiting employees from causing unrest amongst employees, customers or vendors is unlawful. In fact, none of the cases cited by the General Counsel—*Ford Motor Co. (Jacksonville, Fla.)*, 57 NLRB 1814 (1944), *Va. Elec. & Power Co.*, 44 NLRB 404 (1042) or *Jefferson Lake Oil Co., Inc.*, 16 NLRB 355 (1939)—deal with unlawful policies. In all three cases, the employer engaged in unlawful anti-union conduct.

For example, in *Ford Motor Co. (Jacksonville, Fla.)*, 57 NLRB 1814 (1944), the Board used the term "unrest" to describe how an employee's demotion had caused "much discussion and unrest among office employees." *Id.* at 1816. There, the Board held that the employer had terminated an employee and made specific anti-union statements in violation of Section 8(1) of the Act. *Id.* at 115. In *Va. Elec. & Power Co.*, 44 NLRB 404 (1042), the terms "strikes and unrest" were used in an employer's memorandum to employee in response to "recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court." The Board concluded that the employer had engaged in unfair labor practices by not only distributing the memorandum, but by terminating employees due to their union affiliations, engaging in unlawful surveillance and discouraging membership of its employees to the union.

Finally, in *Jefferson Lake Oil Co., Inc.*, 16 NLRB 355 (1939), the Board held that the employer had engaged in unlawful conduct by, among other things, discharging over 51 employees for joining and assisting the union, threatening employees, engaging in espionage and refusing to bargain with the union. In the 55-page decision, the Board used the word "unrest" on a single occasion to describe how the employer had unlawfully asked employees to influence other employees to "smooth out employee unrest and dissatisfaction." The Board's use of one word that happens to also appear in Respondents' work performance policy, taken completely out of context, is hardly supportive of a finding that Respondents' policy is unlawful. In addition, all three of the cases cited by the General Counsel were decided more than 60 years ago and during the last century. The Board's use of the term "unrest" in three cases from the 1930s and the 1940s hardly proves that Respondents' policy could reasonably construed by employees in the year 2017 as encompassing protected activities.

Respondents have a legitimate right to establish a civil and decent workplace. This is

especially true when they are involved in the business of selling food items to the general public. Consequently, the request that Respondents' employees avoid such behavior is not unlawful.

D. Respondents' Policy Regarding Offensive Tattoos Is Lawful

The General Counsel's arguments with respect to Respondents' Dress, Hygiene, and Appearance Standards also fail to meet its burden of proof for a number of reasons. First, the General Counsel claims that Respondents' policy is unlawful based on "court precedent protecting the rights of employees to wear union insignia and other messages related their mutual interests as employees." *See* GC Brief at 11. The General Counsel, however, fails to recognize that Respondents' policy neither prohibits employees from wearing union insignia, nor prohibits messages pertaining to working conditions displayed for the "purposes of mutual aid an [*sic*] protection." As with the other policies at issue, Respondents' dress code policy does not explicitly restrict Section 7 activity, was not created in response to any such activity, and has not been applied to restrict the exercise of any employee's Section 7 rights. The representation that Respondents' policy prohibits insignia or other messages is misleading and patently false.

Even if Respondents' policy prohibited union insignia like the General Counsel claims, which it does not, Respondents have demonstrated that there are special circumstances for restricting such insignia. Respondents are in the retail grocery business. (JF 5(w).) Their policy about proper dress, hygiene and appearance in a retail environment with exposure to food products. Respondents' have a legitimate rationale and business purpose—to ensure that its employees are practicing the requisite hygiene (hands must be washed, nails trimmed, facial hair must be clean) in an environment where food and other products are being sold and maintaining the appropriate attire in a retail setting where children are present. A review of the entire policy demonstrates that the rule is for legitimate business purposes; there is no any anti-union animus.

The cases cited by the General Counsel are also unpersuasive. None of the cases cited held that an employer's policy against inappropriate tattoos was unlawful. Instead, the General Counsel again focuses on a single term within Respondents' policy, regardless of context, and cites to cases finding that the employer violated the Act for using the term in a different manner. Once again, all of the cases involve a finding of union animus by the employer, when there is no such evidence here.

For example, the General Counsel cited to *First Transit, Inc.*, 360 NLRB 619 (2014) because the Board held that a rule "prohibiting 'inappropriate attitude or behavior'" unlawful. In *First Transit*, however, the employer promulgated an oral rule and enforced its written rules in response to union activities by its employees. *Id.* at 619, 620. A similar fact pattern is also present in *Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014). There, the Board held that a rule against "inappropriate discussions about the company, management and/or coworkers" on the Internet was unlawful. The employer terminated an employee for posting "inappropriate discussions" on Facebook in violation of its policy. Finally, in *Andronaco, Inc.*, 364 NLRB No. 142 (2016), the Board held that the employer's dress code policy, which prohibited "words, slogans and/or pictures that may be offensive," was unlawful. In that case, while the policies were not promulgated or enforced in response to any union activities, the Board held that the employer had also violated Section 8(a)(1) of the Act for terminating an employee and making statements.

Here, in contrast to the cases cited by the General Counsel above, there is no evidence of any indirect or direct anti-union animus. More importantly, Respondents do not maintain a dress code that prohibits "words, slogans and/or pictures that *may* be offensive." In fact, Respondents' maintenance of a policy that allows tattoos demonstrates that their dress code is broader and less stringent than the policy held unlawful in *Andronaco, Inc.* because allowing tattoos at work means that Respondents allow words, slogans and pictures that reasonably include union insignia or slogans. It is unreasonable to conclude that Respondents' tattoo policy chills employees' Section 7 rights without any evidence of union animus or other conduct. The only reasonable interpretation of Respondents' policy indicating that tattoos that are inappropriate is the interpretation that the General Counsel admits is logical—tattoos that are racist, sexually explicit or involve gang symbols are reasonably deemed offensive. *See* GC Brief, p. 14.

Finally, Respondents' property rights outweigh employees' Section 7 rights. As discussed in Respondents' brief, the General Counsel completely disregards Respondents' right to control its property, and certainly makes no attempt to accommodate competing interests with as little destruction to Respondents' property interests as is consistent with the maintenance of its employees' Section 7 rights. The General Counsel improperly challenges the policy that provides that tattoos may be visible

provided they are professional looking and in good taste. This policy implicates Respondents' property right to control the use of its premises and to maintain discipline on its property. Respondents have a legitimate right to establish a dress code that is professional and presentable to the public. Respondents' dress code policy is lawful.

E. Respondents' No Solicitation Rule Is Lawful; The General Counsel Has Not Met Its Burden Of Proof

The General Counsel has not met its burden of proof to show that Respondents' No Solicitation rule is unlawful. In its brief, the General Counsel focuses on the term "personal business" and cites to cases where the Board held that the employer had engaged in conduct that violated the Act. Once again, the General Counsel takes terms out of context in an attempt to fit a square peg into a round hole.

First, none of the cases cited by the General Counsel involved policies similar to Respondents' where the employer prohibited "personal business *opportunities*" and provided examples of such opportunities that were prohibited. For example, in *New Passages Behavioral Health and Rehab. Servs.*, 362 NLRB No. 55 (2015), *Gulf Envelope Co.*, 256 NLRB 320 (1981) and *Singer Co.*, 153 NLRB 922 (1965), the Board held that rules prohibiting "personal business" were unlawful because of the overly broad nature and use of the term. Each case, however, is in stark contrast to the facts of the instant matter. In *New Passages Behavioral Health & Rehab*, the employer prohibited "solicitation and distribution of materials or conducting personal business of **<u>any kind</u>** by any Employee during work time." *See* 362 NLRB No. 55 at slip op. 17 (2015) (emphasis added). There, the prohibition against the solicitation and distribution of materials of any kind was deemed overly broad and could reasonably be interpreted as including Section 7 materials or activity. In *Gulf Envelope*, the employer had terminated employees for violating its rule against engaging in "personal business." The Board determined that the personal business that the employees were terminated for was protected concerted activity protected by the Act. Finally, in *Singer Co.*, the Board held that a rule against "personal or outside" business and the distribution of printed matter was unlawful, particularly where the employer unlawfully enforced the rule against an employee who was securing a union authorization card during his lunch hour. 153 NLRB 922, 929 (1965).

None of the facts in the cases cited by the General Counsel apply here. Respondents did not enforce its rule against any employees, nor does their policy reference any Section 7 activity or restrict

employees from distributing materials. Moreover, Respondents' policy does not broadly restrict all "personal business," but "personal business *opportunities*." A reasonable interpretation of "personal business opportunities" includes opportunities for one's personal gain (the exact opposite of protected concerted activity or Section 7 activity).

Respondents even provide examples of what could constitute personal business opportunities (e.g. home party sales and fundraisers) to further narrow the scope of the activities not permitted. The General Counsel's claims that the inclusion of "fundraisers" adds further ambiguity to the policy is illogical and unreasonable. Personal business opportunities does not strictly refer to financial gain as the General Counsel alleges. It is common knowledge that employees often use their employers' place of business to sell girl scout cookies, raise money for a sports team, or market personal businesses that sell clothes or jewelry. A reasonable employees would understand Respondents' policy as referencing such fundraisers. Such an interpretation is much more reasonable than the General Counsel's unreasonable assertion that an employee would interpret the policy as encompassing "solicitation in an attempt to secure a representational relationship with a labor organization and solicitation to seek improvements in wages, hours, or other terms and conditions of employment."

F. The General Counsel Has Not Met Its Burden Of Proof To Show That Respondents' Telephone and Computer Use Policy Is Unlawful

The General Counsel has not met its burden of proof to show that Respondents' Telephone and Computer Use Policy is unlawful. In its brief, the General Counsel admits that the Board declined to extend its finding in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014) to communications systems other than e-mail. In any event, the General Counsel has insufficient evidence to show that Respondents' employees have access similar to the employees in *Purple Communications* to even extend the *Purple Communications* standard set by the Board to telephones, computer systems or fax machines. While the evidentiary record acknowledges that Respondents' had "regular access" to Respondents' telephones, computer systems and fax machines, there is no evidence that employees had access similar to the employees in *Purple Communications*. In *Purple Communications*, all of the employees at issue had "individual accounts on its email system" and used "those accounts every day that they are at work." *Purple Commc'ns, Inc.*, 361 NLRB No. 126, slip op. at 3 (2014) Further, employees accessed their company email on the computers at their work stations, computers in other

areas of the facility, and were even able to access their work emails from their personal computers smartphones. *Id.*

Here, there is no evidence in the Joint Motion and Stipulation of Facts that any of Respondents' employees, all of whom work in a grocery market setting, have any routine or regular access to Respondents' internet or an assigned e-mail address. The record is devoid of any evidence that employees (comprised of meat cutters and grocery clerks) have any e-mail access at all. Nor is there any evidence that employees had assigned work phones, dedicated work telephone extensions, assigned fax numbers or individual work email accounts. *See* Joint Motion and Stipulation of Facts.

Given that the General Counsel cannot show that employees have such access, there is no reasonable scenario where employees would interpret the policy to chill Section 7 activity. This conclusion is further magnified by the fact that in this day and age, employees simply do not engage in Section 7 activity by using or communicating with landline telephones, "copiers" or "fax machines"—they communicate by text message and cell phones. No reasonable employee would interpret Respondents' policy as chilling Section 7 activity because individuals simply do not use fax machines, copiers or computer systems to engage in such activity in this present day and age, especially where there is no evidence that employees have dedicated e-mail addresses or telephone extensions. Respondents have not interfered with any employees' Section 7 rights or Section 8(a)(1) of the Act.

G. Respondents' Prohibition of Handheld Devices While Working Is Lawful

The General Counsel's arguments that Respondents' prohibition of all handheld devices during work time is also unpersuasive and without merit. The General Counsel claims, incorrectly, that Respondents' rule is unlawful because it might hypothetically interfere with the right of employees to take photographs or make recordings in furtherance of Section 7 activities. The General Counsel's assertion, however, is illogical and misguided because employees have ample opportunity the engage in Section 7 activities while on their rest breaks or meal breaks—all occur during business hours and while other employees are working.

Respondents' policy is legitimate and seeks to ensure that its employees, all of whom again work in a grocery store retail setting, are working, assisting customers and are not distracted by a personal cell phone. Such an implication is logical, reasonable and evident given the context of the

policy where the language rests. Respondents' policy is also legitimate for safety reasons—to ensure that employees are not injured while working by being distracted by doing non-work related tasks on their phones such as looking at Facebook on Instagram, or text messaging friends instead of working. Respondents' policy only restricts the possession of personal devices during work time, it does not restrict communications between employees, or personal devices during non-work times. An employee could not reasonably conclude that this particular portion of the policy chills Section 7 activity.

H. Respondents' No Recording Policy Is Lawful; The General Counsel Disregards Respondents' Property Rights[1]

Like with Respondents' Telephone and Computer Use Policy discussed above, the General Counsel's argument with respect to the no-recording policy should also be rejected as an unwarranted invasion of Respondents' property rights. "An owner of property is normally entitled to permit its use while imposing conditions or restrictions, based on the mere fact that he or she is *the owner* [of the property]." *Purple Commc'ns, Inc.*, 361 NLRB No. 126, at *17 (Miscimarra dissenting) (emphasis in original). This includes the right to restrict the types of activities that occur on a premises, like making video and audio recordings thereon. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518 (4th Cir. 1999) (employees' acts of secretly videotaping within a store constituted trespass because it exceeded the scope of the invitation to work at the site). Thus, to invalidate a recording policy such as Respondents', the Board must balance Respondents' property rights against the employees' rights.

Here, any reasonable balancing test favors the employer. In the retail setting, Respondents have a substantial business interest in making its customers welcome and comfortable while on its private property. Ensuring that employees are not taping customers or filming them while shopping would seem to be a common sense restriction in achieving this end. If customers had to worry about every employee recording them, customers would shop elsewhere and the value of the business would diminish. Moreover, under some circumstances, it is illegal to tape record individuals without their consent under federal law and in many states in which Respondents do business. *See, e.g.* 18 U.S.C. § 2511(2)(d); Cal Penal Code § 632; Ore. Revised Statutes Ann. § 9.73.030(1) (a); Wash. Rev. Code

[1] In Respondent's opening brief, Respondent's heading referenced Fifth Amendment property rights. Respondents would like to clarify its headings and argument in that Respondent's general property rights are being infringed upon.

Ann. § 9.73.030(1)(a). Thus, Respondents' policy exists to both preserve its business and prohibit unlawful conduct on its property.

I. Item 3 of Respondents' Electronic Communication and Recording Devices Rule Is Lawful

The General Counsel's claim that Item 3 of Respondents' Electronic and Recording Devices rule amounts to an unlawful "prohibition of non-business use of computers" is unreasonable and illogical. The policy is self-explanatory and states:

> 3. Employees are not to access or use any Company computers, records, files, etc. without express permission and authorization pertaining to their current title/position with the Company. Employees are not to access private employee or customer information. Employees are not to provide access to any Company information to any individual not otherwise authorized to access such information.

A reasonable individual reading the above policy would logically conclude that Respondents' policy means what it says—the policy clearly seeks to prohibit employees who do not have access to private employee or customer information due to their job titles from accessing such information without authorization. For example, a store clerk who does not have the same access to information about customers or other employees as manager or a human resources representative, should not be accessing such information without authorization. The General Counsel cannot reasonably require an employer to allow all employee to have unfettered access to private and confidential customer and employee records. Moreover, Respondents have the right to safeguard private employee and customer information, and take the appropriate steps to ensure that such confidential information is not accessed by individuals who are not authorized to obtain such information.

The case cited by the General Counsel, *Rocky Mountain Eye Ctr., P.C.*, 363 NLRB No. 34 (2015), is also distinguishable. In *Rocky Mountain*, the policy at issue broadly deemed employee information confidential and warned employees that a breach of the confidentiality could lead to immediate dismissal. *Id.* at slip op. 25. In addition, the employer terminated an employee for breaching its confidentiality policy. *Id.* at 33, 34.

None of the facts in *Rocky Mountain* are present here. Respondents' rule reasonably prohibits employees from giving unauthorized access to confidential information without authorization. The rule does not prohibit employees from disclosing information such as their own personnel records or

files related to terms and conditions of their employment. The policy is only about access. An employee would not reasonably understand the rule to bar them from disclosing information about employees or terms and conditions of employment.

J. Respondents' Rules Against Fraudulent Statements and Fighting Are Lawful

The General Counsel's claims that Respondents' gross misconduct rule prohibiting fraudulent and false statements is unlawful because it fails to use the phrase "maliciously false statements" is without merit. The General Counsel fails to cite to any case law finding an employer's policy against providing fraudulent or false information unlawful. Moreover, the policy cannot be read in isolation. *See Guardsmark, LLC*, 344 NLRB 809, 809 (2005) (Board holding that it will "refrain from reading particular phrases in isolation or presuming improper interference with employee rights."). The policy at issue is part of a sequence of rules that prohibit egregious acts such as theft (Part 2), conviction of a crime that impacts the workplace (Part 4) and drinking or inhaling intoxicants, or the use, possession, or sale of any illegal substance (Part 5). Read in context, a reasonable person could not interpret Part 1 to prohibit Section 7 activities. It is clear from a review of the policy as a whole that Respondents have a legitimate business reason to prohibit employees from falsifying Company records, making false statements, and/or engaging in fraudulent conduct that could affect Respondents' business. A reasonable employee could not interpret such a policy as restricting their Section 7 rights—employees do not have a protected right to engage in fraudulent conduct or falsify records.

Equally unpersuasive is the General Counsel's assertions that Respondents' rules against fighting and threats or similar altercations is unlawful. Engaging in physical violence, threats or similar altercations is not protected activity. The rule and/or specific words and phrases of the rule cannot be read in isolation. The policy clearly prohibits altercations that include fighting and violence. Engaging in violence or fighting, or an act of intimidation that borderlines on fighting and violence towards a manager, is not a protected Section 7 right. Respondents have a legitimate business interest in protecting all of its employees, including those in management, from acts of violence, fighting, and any intimidation. In addition, the Board has generally found that rules that clearly apply to prohibiting insubordination do not restrict protected activities. *See, e.g., Copper River of Boiling Springs*, 360 NLRB No. 60 (2014) (finding lawful employer's maintenance of a rule prohibiting "[i]nsubordination

to a manager or lack of respect and cooperation with fellow employees or guests," which "includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests"). *See also Lytton Rancheria of Cal.*, 361 NLRB No. 148, at*4 (2014) ("If the prohibition . . . were limited to 'insubordination,' which connotes defiance of a workplace superior's job-related directive, we would agree . . . that the allegation should be dismissed."). Respondents' policies are lawful.

K. Both of Respondents' Confidentiality Policies Are Lawful

1. Respondents' Gross Misconduct Rule Prohibiting Disclosure of "Employee Legally Protected Information" Is Lawful

The General Counsel's claims that Respondents' rule prohibiting the disclosure of "employee legally protected information" is unlawful is without merit. The Board has specifically recognized that employers must protect the unauthorized disclosure of confidential and proprietary information, including its customer's information. *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 278 (2003). The Board has also repeatedly recognized that employers have the right to adopt sensible policies that address legitimate confidentiality concerns. *See Super K-Mart*, 330 NLRB 263, 263 (1999); *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). Respondents' policy does that—it prohibits the disclosure of "confidential information, including but not limited to confidential Company financial, security, or trade secret information or employee legally protected information." Even if taken out of context, the policy could not be read broadly to include terms and conditions of employment. The policy is narrowly tailored and includes words such as "trade secret" and "employee legally protected information."

The General Counsel's allegation that "employee legally protected information" is too vague and ambiguous, and as a result unlawful, is also unsupported by the evidence or the case law. Common sense would certainly lead an individual to conclude that the phrase refers to information protected by HIPPAA, social security numbers, or medical information. The policy makes no reference, indirect or direct, to general personnel information.

In addition, the cases cited by the General Counsel are unpersuasive. None of the cases cited by the General Counsel deal with the phrase "employee legally protected information." The policies in the cases cited by the General Counsel were much broader and deal with the disclosure of general employee "personnel information and documents." *See Flex Frac*, 358 NLRB 1131 (rule prohibiting "disclosure of 'personnel information and documents' to persons 'outside the organization'"); *Fresh &*

Easy Neighborhood Mkt., 361 NLRB No. 8 (2014)(rule requiring employees to "[k]eep customer and employee information secure"); and (rule prohibiting "[a]ny unauthorized disclosure from an employee's personnel file"). An employee reviewing Respondents' policy could not reasonably interpret Respondents to be restricting their rights under the Act. Respondents' policies are lawful.

2. Respondent's Confidentiality Provision in Their Non-Discriminatory and Anti-Harassment Policy Is Lawful.

The General Counsel alleges that Respondents' confidentiality provision in their non-discriminatory and anti-harassment policy bars employees from discussing investigations of workplace issues. The General Counsel, however, misreads and misrepresents Respondents' policy. The policy does not bar employees from discussing investigations—it specifically states that employees are "discouraged from talking about Company investigations with other employees." There is no language in the policy that bars employees from disclosing information given during investigations, nor is there any threat of discipline for any disclosure. The cases cited by the General Counsel are distinguishable in that Respondents have not banned the disclosure of any confidential information and have not enforced the policy by disciplining employees for disclosing any information about investigations.

The General Counsel's claim that Respondents' policy does not cite to any "business justification" is also unpersuasive. The confidentiality provision is embedded in Respondents' non-discriminatory and anti-harassment policy. There is no better justification than to protect the integrity of an investigation into a claim of harassment or discrimination, whether it is the protect the accuser, the accused, witnesses involved and the investigation's integrity into possibly unlawful conduct.

Respondents' policy does not prohibit employees from discussing or disclosing information related to discrimination or harassment investigations. A reasonable employee reviewing the policy would not interpret the policy as violating any Section 7 rights.

L. Respondents' Remaining Policies Are Also Lawful

The General Counsel's arguments to Respondents' remaining policies not addressed in detail in Respondents' response are also without merit. Respondents re-assert and incorporate by reference its arguments from its brief here.

RESPECTFULLY SUBMITTED this 24th day of August, 2017.

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CERTIFICATE OF SERVICE

I, Candice T. Zee, do hereby certify that I have caused a true and correct copy of the foregoing **RESPONDENTS' RESPONSE BRIEF TO THE NATIONAL LABOR RELATIONS BOARD** to be served on all parties of record in the manner listed below on this 24th day of August, 2017:

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