

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

CHARLES SCHWAB & CO., INC.,

and

Case 27-CA-184730

MICHELLE HUSTON,

an individual.

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE ALJ'S DECISION**

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I. INTRODUCTION

Pursuant to Section 102.46(b) of the Board's Rules and Regulations, Counsel for the General Counsel submits this Answering Brief in response to Respondent's Exceptions to the ALJ's Decision and Recommended Order.

II. STATEMENT OF THE CASE

A hearing was held in this case on May 9, 2017 before ALJ Jeffrey Wedekind. The ALJ issued his Decision in this case on June 26, 2017.¹ The ALJ found that Schwab violated Section 8(a)(1) of the Act "by maintaining rules in its business conduct policy that broadly prohibit all employees from engaging in 'acts of disrespect. .including making disparaging comments to or about co-workers. ' in their interactions or business dealings with clients, coworkers, vendors and the public." (ALJD, 8:3-6) The ALJ's Order requires Respondent to Cease and Desist from maintaining such a rule; "[r]escind the above rules at its Lone Tree facility and other facilities nationwide; and post a notice at its facilities nationwide. (ALJD 8:18-40).

III. RELEVANT FACTS

Since at least June 1, 2016, Respondent has maintained, and currently maintains, a Business Conduct Policy at its facilities throughout the United States, including its Lone Tree, Colorado facility. The policy is maintained on Respondent's intranet and is available to; and applies to, all employees of Respondent nationwide. (JTX 1). Violations of company policies are considered misconduct and may subject an employee to discipline up to and including termination of employment. (JTX 2, p. 1).

¹ References herein are as follows: "ALJD __. ___" refers to the Administrative Law Judge's Decision and corresponding page and line number; "JTX __" refers to Joint Exhibits; "Tr. __" refers to the hearing transcript; "R. Exceptions __" refers to Respondent's Exceptions to the ALJ's Decision; and R Br. __ refers to Respondent's Brief in Support of Exceptions.

The issues in this case involve the section in the Business Conduct Policy entitled "Misconduct," which appears on page 3 of the overall policy. That section reads, in relevant part, as follows:

Misconduct is any conduct inconsistent with a business conduct rule, standard, procedure or policy, or any act which has or may have a detrimental effect on Schwab, other employees, or the relationships with clients or vendors, or any activity that is illegal.

Examples of misconduct include, but are not limited to:

- **Acts of disrespect or unprofessional or rude conduct, including making disparaging remarks to or about co-workers or clients.**²

(JTX 2, p. 3). The policy goes on to list nearly an entire page of other examples of misconduct; none of which are at issue in this case.³ (JTX 2, p. 3-4).

IV. ISSUES

Respondent filed 7 exceptions to the ALJ's decision on August 24, 2017. The exceptions present the following issues:

- A. Whether the ALJ erred and misapplied Board decisions in finding that Respondent violated Section 8(a)(1) of the Act by maintaining a work rule in its business conduct policy that prohibits employees from engaging in "any acts of disrespect . . . , including making disparaging comments to or about co-workers. " (Exceptions 1-5, 7)
- B. Whether the ALJ erred by relying on the legal standard established by *Lutheran Heritage*, which Respondent urges should be overruled by the Board or repudiated by the Courts. (Exceptions 1-2, 5-7)

² The ALJ found only the bolded text to be unlawful. (ALJD 8:3-6).

³ For the sake of brevity, Counsel for the General Counsel will not list all examples of misconduct in the policy, as the policy is in the record. However, examples therein include numerous personal violations, such as excessive cell phone use during work time, unauthorized absences and excessive absenteeism or tardiness, failure to observe safety regulations, inappropriate use of a company business expense card, and possession of a weapon. (JTX 2, p. 3-4).

C. Whether the ALJ's remedy and order are improper. (Exception 7)

V. ARGUMENT

A. The ALJ did not misapply Board law.

The ALJ did not misapply Board law in finding that Respondent violated Section 8(a)(1) of the Act by maintaining a work rule in its business conduct policy that prohibits employees from engaging in “any acts of disrespect . . . , including making disparaging comments to or about co-workers. ” Respondent claims that the ALJ erroneously cited and misapplied six decisions. The decisions cited by the ALJ are not limited in the manner set forth by Respondent.

1. The ALJ properly applied Board law relating to rules precluding acts of disrespect.

Respondent argues that the decisions in *Component Bar Products, Inc.*, 364 NLRB No. 140 (2016); *Casino San Pablo*, 361 NLRB No. 148 (2014); and *Knauz BMW*, 358 NLRB 1754 (2012), do not apply in the instant case because they involved work rules prohibiting disrespectful conduct toward management. This argument is without merit.

a. *Component Bar Products*

The rule in *Component Bar Products* is not limited in the manner asserted by Respondent. The rule in that case prohibited “insubordination and other disrespectful conduct.” *Component Bar Products, Inc.*, 364 NLRB, slip op. at 1, n.1, 10 (2016). Likening the case to *Casino San Pablo*, the ALJ noted that “rules solely prohibiting ‘insubordination’ are lawful, but the inclusion of ‘other disrespectful conduct’ encompassed Section 7 activity that supervisors may perceive as an affront to their authority. This includes concerted complaints about supervisors or working conditions.”

Id. at 10, *emphasis added*. Accordingly, the determinative factor is not that the prohibited activity is directed toward management. Rather, it is that the rule could be interpreted to apply to concerted complaints about supervisors or working conditions – activities undoubtedly protected by Section 7. The Board affirmed the decision of the ALJ, agreeing that under the *Lutheran Heritage Village-Livonia* standard, 343 NLRB 646 (2004), such language would reasonably be construed to prohibit Section 7 activity. The rule in the instant case specifically includes, as acts of disrespect, “making comments to or about co-workers.” It is reasonable that an employee would construe such language to prohibit commenting to coworkers about management or working conditions. Accordingly, Respondent’s argument on this point fails.

b. Casino San Pablo

As discussed above, the ALJ and Board in *Component Bar Products* relied upon *Casino San Pablo*, 361 NLRB No. 148 (2014). Respondent also disputes the applicability of that case, arguing that the context made clear that the rule was meant to prohibit behavior that could be interpreted as an affront to management’s authority. The Board in *Casino San Pablo* determined that employees would reasonably understand the phrase disrespectful conduct “as encompassing any form of Section 7 activity that might be deemed insufficiently deferential to a person in authority,” but is something less than insubordination. *Id.* at 3. The rule in the instant case is no different. It precludes employees from engaging in “acts of disrespect”, including making disparaging comments to or about co-workers.” This rule is even broader than that in *Casino San Pablo*. As in *Casino San Pablo*, it could reasonably be interpreted to encompass Section 7 activity that might directly be an affront to management. It would

be up to management to determine what is “disrespectful.” This could be anything from expressing disagreement with management or the employer’s policies in general, complaining to coworkers about working conditions, or collectively trying to better those conditions. The problem is, “disrespectful” is not defined. There can be no realistic argument over the fact that employees making negative comments amongst themselves about working conditions is protected Section 7 activity. Such action would be reasonably seen as prohibited under Respondent’s rule.

c. Knauz BMW

Respondent argues that *Knauz BMW*, 358 NLRB 1754 (2012) is inapplicable to the instant case because the language therein expressly refers to a concern not present in the Employer’s rule: that it prohibits disrespectful language “that injures the image or reputation of the company. *Id.* The Board found the rule in *Knauz BMW* unlawful because employees would reasonably construe its language as encompassing employees’ protected statements to coworkers, supervisors or third parties, that object to their working conditions and seek the support of others to improve them. The rule in the instant case is even broader. “Acts of disrespect or unprofessional or rude conduct, including making disparaging remarks to or about co-workers,” would reasonably be interpreted by employees to include a prohibition on any criticism by employees of management or solicitation of employees to engage in protected concerted or union activity, or criticizing employees with different views on unions or workplace conditions. Moreover, the context of this rule as part of an extremely broad “misconduct” section, as outlined above, would lead a reasonable employee to the conclusion that the rule does apply to Section 7 activity. (JTX 2, p. 3-4).

3. The ALJ correctly applied Board law striking down employer rules prohibiting disparaging comments.

Respondent argues that Board decisions cited by the ALJ: *Verizon Wireless*, 365 NLRB No. 38 (2017); *William Beaumont Hospital*, 363 NLRB No. 162 (2016); and *Lily Transportation Corp.*, 362 NLRB No. 54 (2015), are limited to cases in the context of disparaging comments toward or about supervisors or the Employer. This position is unsupported.

a. *Verizon Wireless*

The rule in *Verizon* prohibited “disparaging or misrepresenting the company’s products or services or its employees.” *Verizon Wireless*, 365 NLRB No. 38, slip op. at 4 (2017). The Board in that case affirmed the ALJ’s finding that the rule was unlawful because it was overly broad and would reasonably be understood to mean that employees could not speak to their coworkers and voice criticism of managers, which would tend to chill Section 7 activity. *Id.*, slip op. at 19.

The same is true in the instant case. First, Respondent incorrectly states that its rule is limited to “disparaging comments about co-workers and clients.” (R. Br. 11) In reality, the rule precludes “acts of disrespect. .including making disparaging comments to or about co-workers. ”(ALJD 8:20-23; JTX 2 p. 3) Comments “to co-workers” could reasonably include criticism of managers, or any other protected discussions about working conditions, among co-workers. Accordingly, the ALJ correctly applied the *Verizon* decision to the case at hand.

b. *William Beaumont Hospital*

Respondent argues that the rule in *William Beaumont Hospital*, 363 NLRB No. 162 (2016), cited by the ALJ, was different because of its context. (ALJD 7:22-24) The rule

in that case prohibited “negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.” *William Beaumont Hospital*, 363 NLRB No. 162 (2016). The Board affirmed the ALJ and determined that the rule could reasonably be construed to prohibit expressions of concerns over working conditions. In doing so, the Board cited *Claremont Resort & Spa*, 344 NLRB 832, 832 n.4 (2005), which found a rule prohibiting negative conversations about employees or managers unlawful. As stated above, Respondent’s rule applies to disparaging comments to or about co-workers as well, and could likewise be interpreted to prohibit expressions of concern over working conditions, including criticism of other employees or management. Accordingly, the application of this case by the ALJ was proper.

c. Lily Transportation Corp.

The ALJ properly relied on *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1, 8 (2015), which found unlawful a rule prohibiting disparaging comments about the company or its employees and associates on the internet. Respondent attempts to distinguish that case from this one because it prohibited making disparaging comments about the company, and argues that its rule does not prohibit employees from making disparaging comments about Respondent or its employees, including management. This is a false distinction. As discussed extensively above, Respondent’s rule would clearly encompass employees’ complaints to their co-workers about the company or management, which is undoubtedly protected activity. Thus, the ALJ properly applied it to the instant case.

B. Additional Board Precedent not relied upon by the ALJ further supports a finding that Respondent's rule is unlawful.

In *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), a work rule that prohibited "disrespectful conduct towards a service integrator, service coordinator or other individual" was found to be unlawful because it included no limiting language removing the rule's ambiguity and scope. The Board agreed with the ALJ that employees could reasonably believe that protected activities including concerted employee protest of supervisory activity and solicitation of union support from other employees, would be prohibited by the rule against "insubordination or other disrespectful conduct." The policy in *Chipotle Services LLC*, 364 NLRB No. 72 (August 18, 2016) also prohibited employees from making "disparaging statements," and the Board found that language to be overly broad citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In fact, the Board has consistently found that rules prohibiting negative comments about management and coworkers to be unlawful. See e.g., *Hills and Dales General Hospital*, 360 NLRB 611 (2014)(rule prohibiting negativity and negative comments unlawful); *Claremont Resort & Spa*, 344 NLRB 832 (2005)(rule prohibiting negative conversations about associates or managers unlawful). Such rules "would reasonably be construed by employees to prohibit them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activity." *Id.* at 832.

Respondent cites several cases not considered by the ALJ in support of its position that its rule is lawful. Respondent's discussion of *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (Feb. 28, 2014) is misplaced. Respondent argues that

its rule is lawful because it is similar to the rule in *Copper River* that prohibited “lack of respect” and “required cooperation with fellow employees or guests.” However, Respondent ignores the remaining portions of the rule in *Copper River* that make it lawful. The rule actually prohibits: “Insubordination to a manager or lack of respect and cooperation with fellow employees or guests. This includes displaying a negative attitude that is disruptive to staff or has a negative impact on guests.” The underlying ALJ’s decision which the Board adopted in that case noted that the rule prohibited “displaying at negative attitude.” He differentiated this from a rule that prohibits “conversations,” which he stated would be unlawful. As the ALJ stated: “Prohibiting ‘conversation’ cuts to the very essence of activity which the Act protects because all other actions contemplated by the statutory scheme flow out of employees’ discussions about their wages, hours, and other terms and conditions of employment. Therefore a typical reasonable employee would understand the prohibition of ‘negative conversations’ to ban discussion of work-related complaints, and therefore to restrict the exercise of Section 7 rights.” *Copper River*, 360 NLRB at 471. The rule in the instant case prohibiting “making disparaging comments to or about co-workers” falls squarely within the realm of “conversation” between co-workers. As in *Copper River*, employees would reasonably construe the prohibition to apply to work-related complaints and restrict Section 7 activity.

Further, the ALJ noted that the facts of *National Dance Institute-New Mexico, Inc.*, 364 NLRB No. 35 (2016), cited by Respondent in its brief, is distinguishable on its facts, and that the Board specifically noted that it was adopting the ALJ’s dismissal of the overbroad rule allegation “in the absence of argument on exceptions addressing the

specific language alleged to be unlawful.” (R. Br. 8; ALJD, 7 n. 4) Where the Board does not have occasion to address or pass on the merits of the ALJ’s finding, the holding is non-precedential. *Local Union 370, United Brotherhood of Carpenters and Joiners of America*, 332 NLRB 174, 175 (2000). Accordingly, the case is not precedent for this issue.⁴

Likewise, *Boch Honda*, 362 NLRB No. 83 (2015), cited by Respondent (R. Br. 9) is distinguishable. That rule required employees to be “courteous, polite and friendly to customers and fellow employees,” but went on to say “use of profanity or disrespect to a customer or co-worker. ” was prohibited. Thus, the two sentences read together led the ALJ to find that the rule would not reasonably be read to prohibit Section 7 activity. *Id.* at 10. There is no such language in the instant case. It is an outright prohibition on disrespectful conduct and making disparaging comments to or about co-workers, and does not include references to “profanity” or other language that would indicate it would not apply to Section 7 rights. Finally, the Board did not specifically address the ALJ’s finding on this particular rule, as it does not appear it was the subject of an exception. As such, it is not binding. *National Dance Institute-New Mexico, Inc.*, 364 NLRB No. 35 (2016); (ALJD, 7 n. 4).⁵

Based on the foregoing, the finding that Respondent’s rule is unlawful should be affirmed.

⁴ Respondent additionally cites to *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) for the proposition that an employer in the service may maintain rules requiring employees to maintain a satisfactory attitude and ensure harmony in the work place. However, the rule in that case is not similar to that in the instant case.

⁵ Respondent cites GC Memo 15-04 in support of its position. While the underlying law cited in that memo is precedential, a GC Memo in itself is not. Accordingly, any reliance upon it is misplaced.

C. The ALJ did not err by relying on *Lutheran Heritage*, which is valid current Board precedent that should not be overruled.

“The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a rule is unlawful, the Board must give the rule a reasonable reading and refrain from reading particular phrases in isolation. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Lafayette Park Hotel*, 326 NLRB at 825. A rule that is ambiguous, meaning it could be interpreted to have a coercive meaning, will be construed against the employer. *Casino San Pablo*, 361 NLRB No. 148, slip op. at 2 (Dec. 16, 2014). Under the Board’s decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the mere maintenance of a work rule or policy may violate Section 8(a)(1) if it has a chilling effect on employees’ Section 7 activities. Even if a rule does not explicitly restrict Section 7 activity, it will be found unlawful if (1) employees would reasonably construe its language to prohibit Section 7 activity; (2) it was promulgated in response to union or Section 7 activity; or (3) it was applied to restrict the exercise of Section 7 rights. *Id.* at 647

In *William Beaumont Hospital*, 363 NLRB No. 162 (April 13, 2016), the Board reaffirmed its *Lutheran Heritage* standard and rejected the dissent’s proposal that a balancing test taking into account the employer’s interests should be used for determining whether a rule is unlawful. That case involved a hospital, and a code of conduct with the asserted purpose of ensuring proper patient care. Nonetheless, the Board found that some of the rules in that code were unlawful under the *Lutheran Heritage* standard. In doing so the Board stated:

More broadly, our colleague insists that *Lutheran Heritage Village* takes no account of the “legitimate justifications of particular policies, rules and handbook provisions.” This claim reflects a fundamental misunderstanding of the Board’s task in evaluating rules that are alleged to be unlawfully overbroad. As the *Lutheran Heritage Village* Board explained, quoting the Board’s 1998 decision in *Lafayette Park Hotel*, “to determine whether the mere maintenance of certain work rules violates Section 8(a)(1) of the Act, the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.”¹⁵ The courts have endorsed that proposition.

That a particular rule threatens to have a chilling effect does not mean, however, that an employer may not address the subject matter of the rule and protect his legitimate business interests. Where the Board finds a rule unlawfully overbroad, the employer is free to adopt a more narrowly tailored rule that does not infringe on Section 7 rights. (The courts have recognized this fact - which surely explains why no court has viewed *Lutheran Heritage Village* as our dissenting colleague does.) When, in contrast, the Board finds that a rule is *not* overbroad—that employees would not “reasonably construe the language to prohibit Section 7 activity” (in the *Lutheran Heritage Village* formulation)—it is typically because the rule is tailored such that the employer’s legitimate business interest in maintaining the rule will be sufficiently apparent to a reasonable employee.

William Beaumont Hospital, 363 NLRB, slip op. at 4 (footnotes & citations omitted).

This is not to say an employer’s legitimate concerns and business justifications will be ignored. Rather, the proper inquiry is whether the rules as written would reasonably tend to chill employees in the exercise of their Section 7 rights. This is not a novel concept, but an objective standard that is also used in determining whether statements and other actions may violate Section 8(a)(1). While there is no “balancing test,” an employer is free to adopt and maintain more narrowly tailored rules that would make clear to a reasonable employee that it is not infringing on employees’ Section 7 rights, but to secure an employer’s legitimate business concerns. If rules are written in that manner, no violation will be found. In sum, there is no prohibition against

considering employer interests, as long as the rules are tailored so employees would not in context reasonably construe the rule or policy to prohibit Section 7 activity.

Accordingly, *Lutheran Heritage* is a fair standard and should be followed. The ALJ properly applied it and ruled correctly in finding Respondent's rule against disrespect and making disparaging comments unlawful.⁶

D. The ALJ's remedy and order are appropriate.

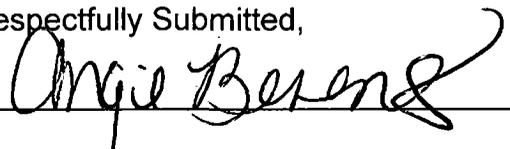
Respondent excepts to the ALJ's remedy and order in their entirety. (R. Exceptions, 7). However, Respondent makes no specific argument in its brief in support of this exception. Based on the arguments made above, Counsel for the General submits that the ALJ's decision, remedy and order are appropriate.

VI. CONCLUSION

The ALJ followed current and relevant Board law in finding that the Respondent's policy against engaging in disrespect and making disparaging comments violates the Act. Accordingly, Counsel for the General Counsel respectfully requests that the Board affirm the decision of the ALJ.

Dated at Denver, Colorado, this 7th day of September, 2017

Respectfully Submitted,



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⁶ Respondent requests oral argument in this case. Counsel for the General maintains such argument is unnecessary, as the ALJ decided the case properly and followed well-established, appropriate Board precedent as discussed herein.

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

CHARLES SCHWAB

and

Case 27-CA-184730

MICHELLE HUSTON, an Individual

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ALJ'S DECISION**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **September 7, 2017**, I served the above-entitled document(s) by **e-file and e-mail** upon the following persons, addressed to them at the following addresses:

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September 7, 2017

Monika Kurschen,
Designated Agent of NLRB

Date

Name

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Signature