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

DATE: March 23, 2017

TO: Charles L. Posner, Regional Director
Region 5

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

SUBJECT: Team Fishel
Case 05-CA-182197

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The Region submitted this case for advice on whether certain rules in the Employer's Social Media Policy and Computer Use Policy are facially unlawful in violation of Section 8(a)(1) of the Act.

Initially, we conclude that the Social Media Policy rule restricting employees from using social media on Employer equipment presents an appropriate vehicle to urge the Board to extend the holding in *Purple Communications*[1] to employees' use of a company-provided internet system and, therefore, the Region should allege the rule to violate Section 8(a)(1). We further conclude that the following Social Media Policy rules are unlawfully overbroad: the rule requiring employees who post hyperlinks to the Employer's website or otherwise communicate about the Employer online to identify themselves as employees of the Employer and state that their views do not represent the Employer; the rule specifying that employees could be disciplined for conduct that "adversely affects" the Employer's managers or interests; and the rule requiring that all media inquiries be directed to specified management officials. We further conclude that the following Computer Use Policy rules are facially overbroad: Item 3's restriction on employees sending "embarrassing" and "intimidating" material; Item 3's restriction on employees transmitting or storing "unwelcome"

[1] 361 NLRB No. 126, slip op. at 1, 14 (Dec. 11, 2014).

content; Item 7's requirement that all emails to or from Employer attorneys include a header specifying that the document is privileged and may not be forwarded without permission; and Item 10's restriction on employees transmitting or storing "solicitations," "political materials," or other "personal use materials."[2] These Computer Use Policy rules are unlawful under *Purple Communications* to the extent their overbroad language restricts employees from using the Employer's email system for Section 7 communications, and also present good vehicles to extend *Purple* to cover restrictions on Section 7 communications using other kinds of company computer systems.

Team Fishel (the "Employer") has offices in thirteen states, including Virginia, and provides utility engineering, construction, installation and maintenance services for gas and electric distribution, and broadband communications. The charge in this case was filed by a union organizer from the International Brotherhood of Electrical Workers, Local 126, alleging that certain of the Employer's handbook rules, including rules in the Social Media Policy and the Computer Use Policy, are facially unlawful. There is no allegation that the Employer has unlawfully enforced any of the rules at issue in this case.

The mere maintenance of an overly broad rule violates Section 8(a)(1) because it "tends to inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline."[3] The Board has developed a two-step inquiry to determine if a work rule would reasonably tend to chill protected activities.[4] First, a rule is clearly unlawful if it explicitly restricts Section 7 activities. Second, if it does not, the rule will violate Section 8(a)(1) only

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[2] The Region has concluded that Items 5 and 6 in the Computer Use Policy were unlawfully overbroad without submitting them to Advice. Item 5 states that use of the computer system and any information on or translated from it is limited to business use. Item 6 prohibits employees from forwarding e-mail without the sender's express permission. The Region also concluded that the first two paragraphs of Section 6.4 of the Employer's Policy Manual dealing with confidential information were unlawful.

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

[4] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[5] In determining how an employee would reasonably construe a rule, particular phrases should not be read in isolation, but rather considered in context.[6] Rules that are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful.[7] Indeed, any ambiguity in an employer's rule is construed against the employer as the promulgator of that rule.[8] In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.[9]

The relevant provisions of the Employer's Social Media Policy and Computer Use Policy, and our conclusions as to whether they violate the Act, are below.

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[5] *Id.* (emphasis added). In *Lutheran Heritage*, the Board expressly warned that it will not conclude that a reasonable employee would read a rule to apply to Section 7 activities "simply because the rule *could* be interpreted that way." *Id.* at 647 (emphasis in original).

[6] *Id.* at 646.

[7] *See 2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011) (finding rule that subjected employees to discipline for "inability or unwillingness to work harmoniously with other employees" unlawful, absent definition of "work harmoniously"); *University Medical Center*, 335 NLRB 1318, 1320-22 (2001) (finding work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no such limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in relevant part sub nom. Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003). *Cf. Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 1 n.3, 13 (Feb. 28, 2014) (adopting ALJ's finding that there was sufficient limiting language to clarify that challenged rule only prohibited unprotected conduct that interfered with employer's legitimate business concerns).

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

[9] *See Tradesmen International*, 338 NLRB 460, 460-62 (2002) (determining that prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given rule's focus on other clearly illegal or egregious activity and absence of any application against protected activity).

I. Social Media Policy Rules

While we found language substantially similar to the social media rules outlined below to be lawful in 2012,[10] as discussed below, more recent Board decisions and Advice memoranda have found substantially similar rules to be unlawful.

A. Use of Social Media on Employer Equipment

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Computer Use Policy.

We conclude that the Region should issue complaint, absent settlement, urging the Board to extend the rationale of *Purple Communications* to allege that this rule violates Section 8(a)(1) by prohibiting employees from accessing social media through the Employer's computer systems on non-working time for Section 7 activities.

In *Purple Communications*, the Board adopted the presumption that "employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time."[11] To justify a total ban on employees' non-work use of email, including Section 7 use on nonworking time, an employer must demonstrate that "special circumstances make the ban necessary to maintain production or discipline."[12] The Board has suggested that it will be the "rare case" where special circumstances justify a total ban,[13] and it has emphasized that in demonstrating special circumstances, an employer's "mere assertion of an interest that could theoretically support a restriction" is insufficient.[14] Finally, "where special circumstances do not justify a total ban, employers may nonetheless apply uniform

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[10] *See Walmart*, Case 11-CA-067171, Advice Memorandum dated May 30, 2012, at pp. 6-8.

[11] 361 NLRB No. 126, slip op. at 14 (overruling *Register Guard*, 351 NLRB 1110 (2007), *enforced in relevant part*, 571 F.3d 53 (D.C. Cir. 2009), to the extent it held that employees can have no statutory right to use their employers' email systems for Section 7 purposes).

[12] *Id.*, slip op. at 1.

[13] *Id.*, slip op. at 14.

[14] *Id.*

and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline."[15]

Although the Board stated that its holding in *Purple Communications* was limited to email, it noted that other forms of electronic communication "may ultimately be subject to a similar analysis."[16] The internet, including social media, shares many of the email-related attributes that were discussed by the Board in *Purple Communications* and that weigh in favor of extending employees' presumptive right to use such means of communication for Section 7 activities on nonworking time.[17] The internet, social media, and blogs have become critical means of communication in modern society, including for Section 7 purposes.[18] Like email, the internet and social media are also passive forms of communication in that employees can wait to respond to messages until they are on nonworking time, and can easily

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[15] *Id.*

[16] *Id.*, slip op. at 14 & n.70.

[17] For example, the internet is one of the most efficient mechanisms for sharing information and opinions, and has changed how individuals communicate in the twenty-first century. *See, e.g.*, Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 274-75 (2008) (discussing the internet's transformative effect on how Americans communicate); Internet/ Broadband Fact Sheet (Jan. 12, 2017), available at http://www.pewinternet.org/fact-sheet/internet-broadband/ (88% of U.S. adults use the internet) (last visited Mar. 22, 2017). Social media is similarly ubiquitous. 69% of Americans use social media, and 76% of Facebook users check the site every day. *See* Social Media Fact Sheet (Jan. 12, 2017), available at http://www.pewinternet.org/fact-sheet/social-media/ (last visited Mar. 22, 2017).

[18] *See, e.g., Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 1-4, 6-8 (discussing employees' protected right to engage in Facebook discussions and finding employer's internet/ blogging policy to be unlawfully overbroad); *Purple Communications*, 361 NLRB No. 126, slip op. at 40-42 (Member Johnson, dissenting) (discussing the role of internet-accessible personal email and online social media networks); Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 274-75 (noting that "[w]idespread Internet availability in the workplace has provided unions with an important tool—which they have actively used—to organize and communicate with employees. . . . [U]nion campaigns frequently rely on employees' ability to use the Internet to instigate or support organizing activity.").

ignore or delete messages.[19] Additionally, like email, not all employees have access to the internet outside of the workplace.[20]

In this case, the Employer provides computers to its employees as part of their work and has cited no special circumstances for refusing to allow employees to access the internet for Section 7 purposes during non-work time.[21] We therefore conclude that the rule is unlawful to the extent that it prohibits use of "equipment we provide"—including to access personal email accounts, social media sites, and blogs via its computer systems—for Section 7 purposes during non-work time.

B. Requirement of Self-Identification

Do not create a link from your blog, website or other social networking site to a Team Fishel website without identifying yourself as a teammate.

Express only your personal opinions. Never represent yourself as a spokesperson for Team Fishel. If Team Fishel is a subject of the

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

[20] *Cf. id.*, slip op. at 6 n.18 (recognizing that, due to costs and other circumstances, "some employees do not privately use any electronic media"). Although the internet may not be the same "natural gathering place" for employees of a particular employer as an employer's email system, *see id.*, workers are increasingly turning to social media while at work to build connections with their co-workers. A recent survey showed that 17% of workers use social media on the job to "build or strengthen personal relationships with coworkers" and the same percentage uses social media "to learn about someone they work with." *See* Kenneth Olmstead, Cliff Lampe & Nicole B. Ellison, *Social Media and the Workplace*, available at http://www.pewinternet.org/2016/06/22/social-media-and-the-workplace/ (last visited Mar. 22, 2017).

[21] The Region should confirm that the employees access the Employer's internet service in the course of their work and, if it has not already done so, specifically ask the Employer whether there are any special circumstances privileging its prohibition on employees' non-business use of the internet. The Region should contact Advice if the Employer asserts either that the computers employees use are not connected to the internet or if special circumstances exist.

content that you are creating, be clear and open about the fact that you are a Teammate and make it clear that your views do not represent those of Team Fishel, fellow Teammates, customers, suppliers or people working on behalf of Team Fishel.

We conclude that this rule's self-identification and disclaimer requirements are unlawful, but that the first two sentences of the second paragraph are lawful.

First, we conclude that the provision's requirements that employees identify themselves as employees of the Employer whenever they post a hyperlink to the Employer's website (rule's first sentence) or otherwise create online content about the Employer (rule's last sentence), are unlawfully overbroad. In *Boch Honda*, for example, the Board held that a social media rule requiring employees to identify themselves by name when posting comments on social media about the company was unlawfully overbroad because "employees would reasonably construe it to cover comments about their terms and conditions of employment. . . ."[22] The Board explained that the self-identification requirement also "reasonably would interfere with [employees'] protected activity in various social media outlets."[23] Similarly, in *Windsor Care*, based on this potential chilling effect on employees' protected Section 7 communications, we found a social media rule requiring employees to identify themselves by name and, in some circumstances, their job titles, to be unlawfully overbroad.[24]

Although the rule in this case requires only a statement that the poster is an employee, rather than requiring identification by name, the same potential chilling effect is present. As we discussed in *Windsor Care*, some popular social media sites like Facebook require authentic self-identification, such that the employee's name is already on the site. Requiring employees who use their real names on social media to also identify themselves as employees of the Employer would put a spotlight on their Section 7 communications for management, who would be able to identify exactly who they are more easily. Even for employees who do not use their real names, requiring

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[22] *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (Apr. 30, 2015), *enforced*, 826 F.3d 558 (1st Cir. 2016).

[23] *Id*. (citing *Farah Manufacturing Co.*, 202 NLRB 666, 675 (1973) (employer unlawfully used color coded name tags to identify and interfere with employees engaged in union activity in other departments during non-work time)).

[24] (b) (7)(A)
(b) (7)(A)

them to identify themselves as employees of the Employer would make it easier for management to identify them, when viewed together with other contextual information.

This is not to say that self-identification rules cannot be narrowly tailored to address a legitimate employer interest without unduly burdening Section 7 rights. Indeed, here, the Employer has a legitimate business interest in ensuring that employees, when discussing job-related subjects via social media, do not purport to be representing the Employer's views. Thus, the first two sentences of the rule's second paragraph, which require only that employees express their own personal opinions and not represent themselves as Employer spokespersons, are narrowly tailored to address this valid Employer interest.[25]

However, the disclaimer requirement, contained in the rule's last sentence, is unlawfully overbroad and places an undue burden on employees' Section 7 rights. The Employer's legitimate business interest in ensuring that employees do not purport to be representing the Employer's views must be balanced against employees' rights to engage in Section 7 activity, which includes using social media to communicate with co-workers and the public to "improve terms and conditions of employment or otherwise improve their lot as employees."[26] The Employer's disclaimer requirement, which employees would reasonably interpret to apply whenever they express themselves on any topic of discussion related to the company or their jobs, would be especially onerous regarding social media platforms that involve discussions or forums, where participants communicate quickly and repeatedly; platforms with character limits;[27] and platforms that are premised on visual communication through photographs.[28] Additionally, it would be particularly burdensome to state such a disclaimer if an employee was posting on Facebook by

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[25] *See, e.g., Pizza Hut*, Case 15-CA-105178, Advice Memorandum dated December 3, 2013, at p. 15 (finding social media rule requiring employees "be clear that your comments are your own views and not those of the Company" to be lawful).

[26] *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 1 (Aug. 22, 2014) (internal citations omitted), *aff'd sub nom. Three D, LLC v. NLRB*, 629 F. App'x 33 (2d Cir. 2015).

[27] (b) (7)(A) ; *Zenith-American Solutions*, Case 05-CA-137182, Advice Memorandum dated April 27, 2015, at p. 13.

[28] (b) (7)(A) *24 Hour Fitness*, Case 27-CA-151288, Advice Memorandum dated October 7, 2015, at p. 6.

"liking" a comment or post.[29] The disclaimer requirement in this case would therefore reasonably tend to chill Section 7 communications. Moreover, the requirement broadly encompasses even communications where it would be obvious from the nature of the medium or communication that the writer is not speaking for the employer.[30] Since the disclaimer requirement is not narrowly tailored to accommodate the Employer's legitimate interests, and it imposes an undue burden on employees' exercise of Section 7 rights, it violates Section 8(a)(1).

C. Conduct "Adversely Affect[ing]" the Employer

Keep in mind that any of your conduct that adversely affects your performance, your fellow Teammates or otherwise adversely affects customers, suppliers, people who work on behalf of Team Fishel or Team Fishel's legitimate business interests may result in disciplinary action up to and including termination.

We conclude that the "adversely affect[]" language is unlawfully overbroad because employees would reasonably construe it to prohibit their protected, public expressions of workplace dissatisfaction, such as criticism of the Employer's labor policies or treatment of employees.[31] Thus, employees would reasonably construe "people who work on behalf of Team Fishel" to include Employer supervisors and managers. Employees also would interpret "Team Fishel's legitimate business

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[29] *Kroger Co.,* Case 07-CA-098566, JD-21-14, at 10 (NLRB Div. of Judges Apr. 22, 2014); (b) (7)(A) *24 Hour Fitness*, at p. 6; *see also Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 5 (holding that a Facebook "like" can constitute protected Section 7 activity).

[30] *See Zenith-American Solutions*, at p. 13.

[31] *See First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2 n.5, 7, 12 (Apr. 2, 2014) (finding rule stating that employees would be disciplined as "disloyal" for "participat[ing] in outside activities that are detrimental to the company's image or reputation" unlawful because employees would reasonably view the rule as restricting protected outside activities); *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 2 (Apr. 1, 2014) (finding rule unlawful that required employees to "represent [the employer] in the community in a positive and professional manner" because it would discourage employees from engaging in protected public protests of unfair labor practices or from making statements protesting terms and conditions of employment to third parties); *Zenith-American Solutions*, at p. 12 (unlawful rule prohibiting social media activity that "adversely affect[s] the [c]ompany").

interests," absent clarifying language or context, to mean something akin to the "best interests" of the company, which the Board has found to be unlawfully overbroad.[32]

D. Handling Media Inquiries

Teammates should not speak to the media on Team Fishel's behalf without proper authorization. All media inquiries should be directed to the Regional Vice President or the Chief Operating Officer.

We conclude that the second sentence of this rule is unlawfully overbroad. For the reasons discussed on p. 8, *supra*, the first sentence of this rule is lawful because employers have a legitimate business interest in ensuring that employees do not represent themselves as speaking on the company's behalf. Thus, it is significant that the second sentence does not connect to the first. It fails to clarify that only media inquiries seeking an official position from the Employer should be referred to the Regional Vice President or Chief Operating Officer. Accordingly, employees would reasonably interpret the second sentence to limit their right to speak about their working conditions when contacted by the media. It is well-settled that employees' Section 7 rights include protections for employee communications with the media regarding labor disputes.[33] Accordingly, the Board has recently found that rules like the one in the instant case which limit employees' contact with the media are overbroad.[34]

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[32] *See Schwan's Home Service*, 364 NLRB No. 20, slip op. at 5 (finding unlawful a rule that prohibited "[c]onduct on or off duty which is detrimental to the best interests of the company or its employees"; noting that a reasonable employee would assume that the company would not consider Section 7 activity, like labor protests or public criticisms of its policies, to be in company's best interests); *see also Swissport USA*, Case 28-CA-179220, Advice Memorandum dated October 26, 2016, at pp. 9-10 (finding unlawful a rule forbidding, inter alia, conduct "contrary to [the employer's] best interests").

[33] *See Valley Hospital Medical Center,* 351 NLRB 1250, 1252 (2007) (Section 7 protections "include[] communications about labor disputes to newspaper reporters"), *enforced sub nom. Nevada Service Employees Union, Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009); *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995) ("[T]he protection of Section 7 of the Act encompasses employee communications about labor disputes with newspaper reporters.").

[34] *See, e.g.*, *DirectTV,* 362 NLRB No. 48, slip op. at 1, 2 (Mar. 31, 2015) (affirming prior two-member Board decision finding "do not contact the media" rule overbroad), *enforcement denied on other grounds*, 650 F. App'x 846 (5th Cir. 2016); *Portola*

Moreover, the fact that the rule merely specifies that employees "should" direct media inquiries to the Employer's chosen representatives, instead of specifying that it is strictly required, does not render the rule lawful. As the Board has explained, a rule's coercive impact on employees is not determined by "mandatory phrasing, subjective impact, or even evidence of enforcement," but rather, on its tendency to inhibit employees from exercising their Section 7 rights.[35] In this regard, we conclude that the Employer's stated preference that employees follow its rule about where to direct media inquiries would reasonably tend to inhibit employees from discussing their workplace grievances with members of the media.

II. Computer Use Policy Rules

A. Item 3: Conduct Towards Others Online

(1) First Paragraph

Fraudulent, harassing, embarrassing, indecent, profane, obscene, intimidating, or other unlawful material may not be sent by e-mail or other form of electronic communication or displayed on or stored in Team Fishel's computers. Users encountering or receiving such material should immediately report the incident to their supervisor and/or the Network Manager and/or the Corporate Help Desk.

We conclude that this paragraph is facially overbroad insofar as it requires employees to refrain from sending, displaying, or storing "embarrassing" or "intimidating" material. The Board has held that restrictions on "embarrassing"

Packaging, Inc., 361 NLRB No. 147, slip op. at 1, 26-27 (Dec. 16, 2014) (affirming ALJ's finding unlawful a handbook rule providing that "[e]mployees should not provide any information regarding the Company to the media," all media requests must be referred to the CFO or president, and all press releases and other documents for release to the media must be approved in advance by the CFO).

[35] *Boeing Co.*, 362 NLRB No. 195, slip op. at 3-4 (finding unlawful, "we recommend that you refrain from discussing this case" with co-workers); *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992) (finding unlawful, "[y]our salary . . . *shouldn't* be discussed with anyone other than your supervisor. . .") (emphasis in original), *enforced*, 987 F.2d 1376 (8th Cir. 1993); *Heck's Inc.*, 293 NLRB 1111, 1114, 1119 (1989) (finding unlawful, "company requests you regard your wage as confidential and do not discuss your salary arrangements with any other [e]mployee").

materials are overbroad, in the absence of limiting context.[36] Moreover, Advice has found a restriction on disseminating "intimidating" material to be unlawfully overbroad when, as here, it is part of a rule that contains other overbroad terms.[37]

Additionally, the rule contains no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights. While the rule includes "or other unlawful material" after "embarrassing" and "intimidating," that phrase does not clarify to employees that the rule *only* restricts unlawful, as opposed to Section 7-protected, material. Because the words embarrassing and intimidating are not normally associated with unlawful practices, employees would reasonably construe "or other unlawful material" to be a catch-all phrase conveying that any additional prohibitions would only be for materials that violate the law, as opposed to giving context to the preceding words. At the very least, the rule is ambiguous in this regard and must be construed against the Employer.[38]

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[36] *See, e.g., Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1 n.4 (June 18, 2015) (rule against behavior that "violates common decency or morality or publicly embarrasses" the employer found unlawful); *see also 24 Hour Fitness*, Case 27-CA-151288, Advice Memorandum dated October 7, 2015, at pp. 4-5 (prohibition on posting anything that is "embarrassing" to another person unlawful because it would reasonably be construed to ban a broad range of Section 7 activity); *U.S. Security Associates, Inc.*, Case 04-CA-066069, Advice Memorandum dated August 13, 2012, at p. 19 (ban on social media posts that are "embarrassing" to another person or the employer unlawful because it would be reasonably construed as barring discussions of work-related complaints).

[37] (b) (7)(A)
(b) (7)(A)
(b) (7)(A) contrasting *Palms Hotel & Casino*, 344 NLRB 1363, 1363 (2005), in which a rule prohibiting "intimidating" conduct was found to be lawful, because other terms in the rule would not reasonably be interpreted to prohibit Section 7 activities).

[38] *Tradesmen International*, 338 NLRB at 461, is distinguishable. There, the Board found a rule prohibiting conduct that is "disruptive, competitive, or damaging to the company," to be lawful because the rule further explained that such activity "also includes any illegal acts in restraint of trade," and defined the phrase "as including . . . employment with another employer or organization while employed by" the employer. *Id.*

This paragraph is unlawful under the Board's holding in *Purple Communications* to the extent its overbroad language prohibits employees' use of the Employer's email system to send certain Section 7 material during non-work time. Further, because this rule's overly broad language would also prohibit employees from sending Section 7 materials through any "other form of electronic communication" over the Employer's systems, it also covers Section 7 communications via the Employer's internet, such as through social media, instant messaging, or personal email accounts accessed online. Therefore, for the reasons set forth in Section I.A., *supra*, this paragraph presents an appropriate vehicle for the Region to urge the Board to extend *Purple Communications* to internet communications.

(2) Second Paragraph

Any information transmitted or stored on the system may not contain content that may be reasonably considered offensive or unwelcome to any other person. Offensive content would include, but would not necessarily be limited to, sexual comments or images, racial slurs, gender-specific comments, or any comments that would reasonably offend someone on the basis of his or her age, sex, religion, national origin, or disability.

We conclude that this paragraph is facially overbroad insofar as it requires employees to refrain from transmitting or storing content that is "unwelcome" to another person. However, the term "offensive" is not overbroad because the listed examples provide sufficient context that employees would not reasonably construe that term to curtail Section 7 communications.

In *Valley Health System LLC*, the Board found the term "offensive" unlawful in an employer handbook, in part, because "it does not appear among a list of serious forms of objectively clear misconduct that would help employees understand its contours."[39] In so holding, the Board contrasted a rule containing the term "offensive" that it had found lawful in *Palms Hotel & Casino*,[40] explaining that, in

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[39] 363 NLRB No. 178, slip op. at 1-2 (May 5, 2016) (finding unlawful a rule providing that "[c]onduct that interferes with System or Facility operations, brings discredit on the System or Facility, or is offensive to patients or fellow employees will not be tolerated").

[40] 344 NLRB at 1367 (finding lawful a rule forbidding employees from engaging in "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons").

Palms Hotel, the text accompanying the term "offensive" "helped to define the type of conduct being targeted, providing sufficient clarity for workers to understand that the object of the rule was to target egregious misconduct, not to encompass conduct protected under the Act."[41]

As in *Palms Hotel*, and unlike in *Valley Health System*, the term "offensive" in this case contains contextual surrounding language clarifying that it applies to egregious conduct not protected by the NLRA. The fact that the list of "offensive" content is explicitly non-exclusive does not negate this contextual clarification. An employee would reasonably construe the phrase "not necessarily . . . limited to" to mean that any additional examples would be of the same type as the listed lawful examples.[42]

In contrast, we conclude that the term "unwelcome" is facially overbroad. "Unwelcome" is a term that employees would reasonably understand that their Employer would use to describe its negative response to protected concerted activities, particularly during a union organizing campaign.[43] Accordingly, we have found the

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[41] *Valley Health System LLC*, 363 NLRB No. 178, slip op. at 1-2.

[42] Thus, we have concluded that rules restricting "offensive" communications were lawful because the rules also listed contextual examples, even though, as here, the lists began with the phrase "including but . . . not limited to." *See Grange Cooperative Supply Association*, Case 36-CA-10871, Advice Memorandum dated December 27, 2011, at pp. 2, 5 (concluding that rule restricting "offensive" content was lawful because rule specified that "[o]ffensive content includes, but is not limited to, sexual comments or images, racial [missing word], or anything that might be construed as harassment or disparagement on the basis of his or her race, color, age, sex, . . . or other protected status"); *Advantage Truck Center*, Case 10-CA-104696, Advice Memorandum dated August 19, 2013, at pp. 2, 7 (finding rule prohibiting misuse of email and computers in ways that are "disruptive, offensive to others, or harmful to morale" lawful, inter alia, because of the listed examples, which "includes but is not limited to" items including ethnic slurs, racial comments, and off-color jokes).

[43] *See, e.g., Beretta U.S.A. Corp.*, 298 NLRB 232, 236 (April 18, 1990) (General Manager signed, posted, and distributed a notice saying that the union is "a notoriously strike-happy union [that] is especially unwelcome"), *enforced*, 943 F.2d 49 (4th Cir. 1991); *Station Casinos*, 358 NLRB 1556**,** 1583 (2012) (characterizing the employer's message to its employees as that "they were wasting their time with the union organizing campaign" and "their efforts to organize were unwelcome"); *Aldworth Co.*, 338 NLRB 137, 143 (2002) (executive vice president's "consistent aim" during his frequent communications to employees during organizing campaign "was

similar term "unwanted" to be unlawfully overbroad.[44] Moreover, in contrast to its treatment of "offensive" in the same rule, the Employer has provided no contextual surrounding language to clarify what is meant by the term "unwelcome."

This paragraph is unlawful under *Purple Communications* to the extent its overbroad language prohibits employees from "transmitt[ing]" certain Section 7 material using the Employer's email system during non-work time. Moreover, employees would also reasonably construe this rule's reference to transmissions "on the system" to cover employees sending online messages using the Employer's internet, particularly when read in context with Item 3's first paragraph, which expressly references both email and "other form of electronic communication." Accordingly, the Region should argue, for the reasons set forth in Section I.A., *supra*, that Item 3's second paragraph also presents an appropriate vehicle to urge the Board to extend *Purple Communications* to internet communications.

B. Item 7: Restriction on Forwarding Communications with Attorneys

Email from or to in house counsel or attorney representing the company must include the following header on each page: "ATTORNEY-CLIENT PRIVILEGED/ DO NOT FORWARD WITHOUT PERMISSION"

This rule is facially overbroad. As the Board has explained, an employer has a "strong confidentiality interest" in a communication that is subject to the attorney-client privilege, which generally protects from disclosure "confidential communications between attorneys and their clients for the purpose of obtaining or providing legal advice."[45] However, any restriction on employee Section 7 rights must be "narrowly tailored" to address the employer's legitimate interest.[46]

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to alert employees to the unwelcome and potentially disastrous consequences of unionizing"), *enforced sub nom. Dunkin' Donuts Mid-Atlantic Distribution Ctr., Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004).

[44] *Public Service Co. of New Mexico*, Case 28-CA-105845, Advice Memorandum dated November 14, 2013, at pp. 7-8 (finding unlawful a rule warning employees to "not send unwanted, offensive, or inappropriate" electronic messages).

[45] *BP Exploration, Inc.*, 337 NLRB 887, 889 (2002) (citation omitted).

[46] *See, e.g., T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 3-5 (Apr. 26, 2016) (restriction on recordings implemented to maintain employee privacy, ensure

Thus, in *Boeing Co.*,[47] the Board struck down a confidentiality notice restricting employees from discussing HR investigations in which they were involved because the law department may direct HR to gather "sensitive information." The Board found this blanket confidentiality directive to be overbroad, explaining that, "[w]hile an employer may legitimately require confidentiality in appropriate circumstances, it must also attempt to minimize the impact of such a policy on protected activity."[48]

The rule in this case likewise is not narrowly tailored. It requires that the restrictive heading be placed on top of all communications with the Employer's attorney, regardless of their content. Thus, it would cover non-privileged attorney communications that touch upon employees' terms and conditions of employment, such as: Employer policies (e.g., wage information, handbooks, etc.) emailed by the attorney to employees; anti-union propaganda emailed by the attorney to the employees during an organizing campaign; or attorney emails concerning class action lawsuits employees may consider filing against the Employer. Accordingly, the Employer's blanket restriction is facially overbroad.

This rule is unlawful under *Purple Communications* to the extent its overbroad language prohibits employees from forwarding certain Section 7 communications using the Employer's email system during non-work time. Because the rule applies to all email, it prohibits, for instance, employees from sending such communications from their company email address to their own internet private email account or social media page and distributing it further from those locations. Thus, the Region should also argue, for the reasons set forth in Section I.A., *supra*, that this rule presents an appropriate vehicle to urge the Board to extend *Purple Communications* to internet communications.

C. Item 10: Restriction on Use and Transmission of Solicitations, Political Material, or other Unauthorized Personal Use

Without prior written permission, the computer and telecommunication resources and services of Team Fishel may not be

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confidentiality, and promote other communication not narrowly tailored to justify the broad restriction on Section 7 activity); *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 7 (Aug. 27, 2016) (total ban on wearing union insignia unlawful because such a rule must be narrowly tailored).

[47] 362 NLRB No. 195, slip op. at 2-3 (Aug. 27, 2015).

[48] *Id.*, slip op. at 2.

used for the transmission or storage of commercial or personal advertisements, solicitations, promotions, destructive programs (viruses and/or self-replicating code), political material, or any other unauthorized personal use.

This rule is facially overbroad. The Board has found that employees would understand the terms "solicitations,"[49] "political material,"[50] and "personal use"[51] to encompass Section 7 protected material. Since the prohibitions are not limited to working time, they are overly broad. Further, the rule requires "prior written permission" and "authoriza[tion]" to engage in these Section 7 activities. The Board has repeatedly explained that "any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in non-work areas is unlawful."[52]

This rule is unlawful under *Purple Communications* to the extent its overbroad language prohibits employees from transmitting certain Section 7 material using the Employer's email system during non-work time. Because this rule's overbroad language also covers employees sending online messages using the Employer's internet, the Region should argue, for the reasons set forth in Section I.A., *supra*, that

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[49] *See, e.g., UPMC*, 362 NLRB No. 191, slip op. at 2-4 (Aug. 27, 2016) (finding unlawful a solicitation policy that prohibits employees from using the employer's email system "to engage in solicitation" and mandates that all "unauthorized solicitation" be reported to a supervisor or manager); *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3-4 (Dec. 16, 2014) (finding unlawful a rule providing that employees "may not solicit or distribute literature in the workplace at any time, for any purpose").

[50] *See Chipotle Services, LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72, slip op. at 1, 2, 14 (Aug. 18, 2016) (affirming the ALJ's finding that, because "[t]he exercise of Section 7 rights often involves political activity," the employer's "prohibition on discussing politics in the workplace would prevent employees from engaging in a wide variety of protected activities") (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)).

[51] *See Purple Communications*, 361 NLRB No. 126, slip op. at 14 (finding rule that prohibited all personal use of the employer's business email network to be presumptively unlawful).

[52] *Schwan's Home Service,* 364 NLRB No. 20, slip op. at 4 (June 10, 2016) (collecting cases).

it also presents an appropriate vehicle to urge the Board to extend *Purple Communications* to internet communications.[53]

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

/s/
B.J.K.

ADV.05-CA-182197.Response.TeamFishel.(b) (6), (b)

[53] Similarly, because Computer Use Policy Items 5 and 6, discussed in n.2, *supra*, would prohibit employees from sending Section 7 communications on non-work time through both the Employer's email system and other aspects of the Employer's computer systems, the Region should allege that Items 5 and 6 are unlawful both under *Purple Communications* and through an extension of that holding, as set forth in Section I.A., *supra*.