

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

DATE: August 10, 2018

TO: John D. Doyle, Jr., Regional Director
Region 10

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Blue Cross Blue Shield of Tennessee, Inc. 506-0170
Case 10-CA-207362 506-4067-1000-0000
512-5006-5044-0000
512-5030-0100-0000
512-5072-7700-0000
737-7096

The Region submitted this case for advice as to: whether the Employer's Inappropriate Work Behavior Policy prohibiting audio recordings is lawful under *The Boeing Company*,¹ whether an employee ("Employee #1") was engaged in protected concerted activity when (b) (6), (b) (7)(C) shared an audio recording of a meeting between (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) (the (b) (6), (b) (7)(C)) with a co-worker ("Employee #2"), and whether the Employer lawfully discharged Employee #1 for lying in response to an interrogation about whether (b) (6), (b) (7)(C) had shared the tape.

We conclude that the no-recording rule in the Inappropriate Work Behavior Policy is a lawful Category 1 rule. Moreover, because Employee #1 did not engage in protected concerted activity when (b) (6), (b) (7)(C) made or shared the audio recording, the Employer lawfully discharged (b) (6), (b) (7)(C) for lying about having shared the tape.

FACTS

Blue Cross Blue Shield of Tennessee, Inc. (the "Employer") provides healthcare insurance and insurance administration services. Employee #1 worked for the Employer from 2002 until (b) (6), (b) (7)(C) discharge on (b) (6), (b) (7)(C) 2017, most recently as a (b) (6), (b) (7)(C).² (b) (6), (b) (7)(C) employees process and prepare contracts for

¹ 365 NLRB No. 154 (Dec. 14, 2017) ("*Boeing*").

² All dates hereinafter are in 2017.

healthcare providers and practitioners for enrollment into the Employer's insurance network, among other things. The (b) (6), (b) (7)(C) employees reported to a supervisor (the "Supervisor"), who reported to the Manager.

The (b) (6), (b) (7)(C) employees shared a concern that their work was constantly backlogged, resulting in mandatory overtime. They agreed that it was caused, in part, by management directives on work processes and the Employer's communication failures. For example, management began requiring that (b) (6), (b) (7)(C) employees create separate spreadsheets based on enrollee information and submit them for management approval before they could build and submit a provider contract for approval. The (b) (6), (b) (7)(C) employees shared their concerns with each other at least once per week and voiced their concerns directly to management during their individual monthly meetings with the Supervisor and during monthly team meetings conducted by the Supervisor or Manager.

In early May, Employee #1 worked with Employee #2 to draft an anonymous complaint to upper management about the (b) (6), (b) (7)(C) employees' shared concerns. As a result, HR investigated the matter and issued a detailed report on June 5, finding, *inter alia*, low morale, late contracts, and slow management responses.

In mid-August, a (b) (6), (b) (7)(C) employee ("Employee #3") attended a work meeting with the Supervisor and other supervisors and managers. The purpose was for management to discuss the HR report and to better understand what was causing the backlog. During the meeting, Employee #3 stated that (b) (6), (b) (7)(C) believed the backlog was due to the managers' spreadsheet requirement.

A few days later, on August 17, the Manager (who was not present at the meeting with Employee #3) sent an email to a few of those present at the meeting stating that (b) (6), (b) (7)(C) found out what Employee #3 had said in the meeting and (b) (6), (b) (7)(C) wanted the opportunity to clarify what (b) (6), (b) (7)(C) believed contributed to the backlog. (b) (6), (b) (7)(C) wrote that (b) (6), (b) (7)(C) did not believe that the spreadsheet procedure caused the backlog and asserted that employees were empowered to send contracts out without management approval. By mistake, (b) (6), (b) (7)(C) cc'd Employee #1 rather than Employee #3. Employee #1 hit "reply all" and emailed everyone that (b) (6), (b) (7)(C) was "sorry to contradict" the Manager but that the spreadsheets procedure slowed down the process and (b) (6), (b) (7)(C) employees were not allowed to send out contracts without management approval.

Shortly thereafter, the Manager called Employee #1 into (b) (6), (b) (7)(C) office and each defended (b) (6), (b) (7)(C) position about what caused the backlog. Unbeknownst to the Manager, Employee #1 surreptitiously tape recorded the meeting.

After the meeting, Employee #1 told Employee #2 that (b) (6), (b) (7)(C) was worried that the Manager might discipline (b) (6), (b) (7)(C) for insubordination, particularly because (b) (6), (b) (7)(C) had been

written up for something else not long ago. Employee #1 sent the tape to Employee #2. After listening to the recording, Employee #2 reassured Employee #1 that it was [REDACTED] view that [REDACTED] did not do anything wrong, adding that [REDACTED] agreed with what Employee #1 had said.

On August 18, Employee #2 shared the audio recording with the Supervisor and asked [REDACTED] not to tell anyone else about it. On August 21, the Supervisor told HR about the recording and, at the Supervisor's direction, Employee #2 sent a copy of the recording to HR.

On August 28, HR met with Employee #1 to ask about the audio recording. Employee #1 surreptitiously tape recorded this meeting as well. Employee #1 explained that [REDACTED] thought the Manager's email was "a reflection on me." According to Employee #1, the Manager's assertion that the employees were allowed to send out contracts without management approval would lead the other managers to question Employee #1's version of events: Employee #1 had told management that [REDACTED] was told not to send the contracts without management approval. Managers would then wonder why Employee #1 held up the process by waiting for management review. Employee #1 said that "I need my name protected," in reference to [REDACTED] reason for sending the email. Later in the meeting, [REDACTED] explained that [REDACTED] made the audio recording of [REDACTED] meeting with the Manager "just to protect myself."

During the meeting, HR asked Employee #1 questions including "have you talked to anyone else about this conversation that you had with [the Manager]," and whether [REDACTED] had made and shared an audio recording of [REDACTED] meeting with the Manager on August 18. Employee #1 responded truthfully to most of the questions but untruthfully stated that [REDACTED] had not shared the audio recording.

On August 30, the Employer discharged Employee #1 for lying about not having shared the tape with other employees. The Employer stated that it would not have discharged Employee #1 but for [REDACTED] lying, despite the Employer's position that the audio recording violated the Inappropriate Behavior Policy. The Employer has provided evidence of having terminated other employees for lying in response to HR questioning.

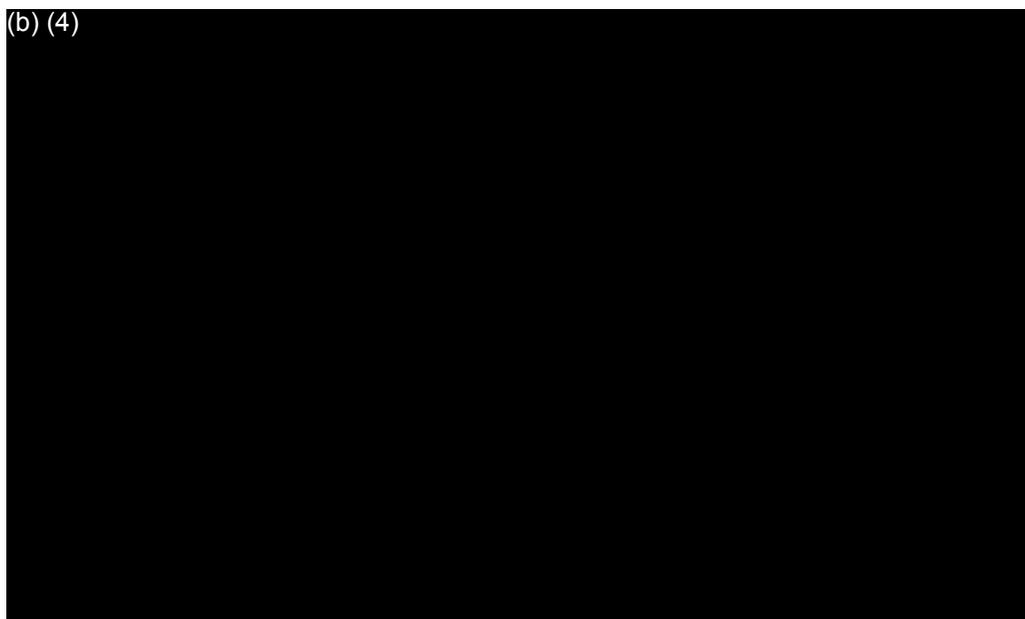
ACTION

We conclude that the no-recording rule in the Inappropriate Work Behavior Policy is a lawful Category 1 rule. Further, because Employee #1 did not engage in protected concerted activity when [REDACTED] made or shared the audio recording, the Employer lawfully discharged [REDACTED] for lying about having shared the tape.

A. No-Recording Rule is Facially Lawful

Boeing set out the Board’s new test for determining the lawfulness of work rules. Under *Boeing*, if a rule would be reasonably interpreted to interfere with the exercise of NLRA rights, the Board must consider not only the rule’s potential impact on NLRA rights but must also balance those interests against the employer’s legitimate justifications for maintaining the rule.³ If the rule would not reasonably be interpreted as restricting NLRA rights, the rule is lawful without any need for a balancing of employee rights and employer business interests.⁴

The Employer’s Inappropriate Work Behavior Policy states in part that:



The instant rule would not reasonably be interpreted as restricting NLRA rights under *Boeing*. In *Boeing Co.*, the Board held that the respondent’s no-camera rule was a lawful Category 1 rule.⁵ In GC Memorandum 18-04, “Guidance on

³ *Id.*, slip op. at 5 (“Since *Lutheran Heritage*, the Board has far too often failed to give adequate consideration and weight to employer interests in its analysis of work rules. Accordingly, we find that the Board must replace the *Lutheran Heritage* test with an analysis that will ensure a meaningful balancing of employee rights and employer interests.”).

⁴ *Id.*, slip op. at 3.

⁵ *See id.*, slip op. at 15, 19 (the rule at issue was “use of [camera-enabled devices] to capture images or video is prohibited. . . .”). By placing “no camera” rules in

Handbook Rules Post-*Boeing*,” at 5 (June 6, 2018), the General Counsel concluded that no-recording rules should similarly be classified as Category 1.⁶ The memorandum explains that, like no-photography rules, no-recording rules advance substantial legitimate management interests.⁷ And, although no-recording rules may occasionally chill employees from engaging in Section 7 activity, they do not significantly impact the ability to engage in such activity and may even promote such activity “by encouraging open discussion and exchange of ideas.”⁸

B. Because Employee #1 Was Not Engaged in Protected Concerted Activity, the Employer Lawfully Discharged [REDACTED]

For employee conduct to be protected under Section 7, it must be both concerted and pursued either for collective-bargaining purposes or for other “mutual aid or protection.”⁹ Because we conclude that Employee #1 did not make or share the tape for mutual aid or protection, we need not determine whether Employee #1 engaged in concerted activity.

The focus of the “mutual aid or protection” inquiry is on the goal of the concerted activity, primarily “whether the employee or employees involved are seeking to ‘improve terms and conditions of employment or otherwise improve their

Category 1, the Board found that such rules are generally lawful, without the need for case-by-case balancing, because the legitimate business interests in having these kinds of rules outweigh their limited impact on Section 7 rights.

⁶ That memorandum cites two examples of similar no-recording Category 1 rules: (1) “Employees may not record conversations, phone calls, images or company meetings with any recording device without prior approval”(citation omitted); and (2) “Employees may not record telephone or other conversation[s] they have with their coworker[s], managers or third parties unless such recordings are approved in advance.”

⁷ *Id.* at 6.

⁸ *Id.*

⁹ See, e.g., *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 152 (2014).

lot as employees”¹⁰ or whether the activity was in furtherance of a solely individual goal.¹¹

Here, although Employee #1 and the other [REDACTED] employees had engaged in protected concerted activities regarding the backl [REDACTED] and related mandatory overtime, the evidence shows that Employee #1’s purpose in recording [REDACTED] meeting with the Manager and sharing the recording was to protect only [REDACTED] interests. Employee #1 asked Employee #2 to review the recording to see whether [REDACTED] had crossed a line in how [REDACTED] spoke to the Manager and could be subjected to discipline, not to fill Employee #2 in on the substance of the discussion with the Manager or even ask for assistance regarding the potential repercussions. Employee #1 explained that [REDACTED] had recently been disciplined for similar conduct and was worried about being written up again. After hearing the audio recording, Employee #2 reassured [REDACTED] that [REDACTED] did not think [REDACTED] would be disciplined for the way [REDACTED] handled [REDACTED] in the meeting.

Employee #1’s statements to HR on August 28 further show that [REDACTED] recorded the meeting with the Manager to protect [REDACTED] own interests. Employee #1 repeatedly told HR that [REDACTED] taped the meeting because [REDACTED] worried that the Manager’s email would be seen by others as “a reflection on me.” [REDACTED] worried that it would lead the other managers to question Employee #1’s version of events and wonder why Employee #1 delayed the process by waiting for management’s contract review without just sending the contracts out [REDACTED]. Employee #1 said that “I need my name protected,” in reference to [REDACTED] reason for sending the email. Later in the meeting, [REDACTED] explained that [REDACTED] recorded [REDACTED] meeting with the Manager “just to protect myself.” These statements paint a picture of an employee who used the audio recording to make sure that [REDACTED] personally wouldn’t get in trouble, not as a leader trying to protect [REDACTED] status as spokesperson so as to prevent the employees’ shared workplace concerns from being undermined.

The Board’s decisions in *UniQue Personnel Consultants*¹² and *Fresh & Easy*,¹³ with which the General Counsel does not fully agree, are not implicated here, because

¹⁰ *Id.* (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

¹¹ *Cf. National Wax Co.*, 251 NLRB 1064, 1064-65 (1980) (employee who sought merit wage increase solely for himself was not engaged in protected concerted activity).

¹² 364 NLRB No. 112, slip op. at 4 (Aug. 26, 2016) (employee who asked a co-worker for advice about whether she should raise to management her unfair treatment with respect to the employer’s dress code was acting for mutual aid or protection, even

Employee #1 did not share the recording with Employee #2 in order to seek advice about how to handle the Employer's perceived unjust policies or in order to address a situation that might affect other employees as well. Rather, [REDACTED] was asking whether [REDACTED] own conduct was disrespectful or had crossed the line during the meeting. Since the answer to that question could be helpful to no other employee but Employee #1, [REDACTED] conduct was not for mutual aid or protection. Thus, even assuming that *UniQue Personnel* and *Fresh & Easy* were correctly decided, they do not support finding a violation here.

Because Employee #1 was not engaged in protected concerted activity when [REDACTED] made or shared the audio recording, the Employer's questioning about the tape was not an unlawful interrogation and it lawfully terminated [REDACTED] for lying.¹⁴

though the advice she sought benefitted only herself, because the dress code policy also applied to her co-workers).

¹³ 361 NLRB at 156 (in raising her individual sexual harassment concerns with her co-workers, employee was engaged in concerted activity for mutual aid or protection because the "next time it could be [another employee] who is the victim.").

¹⁴ Compare *Fresenius USA Mfg., Inc.*, 362 NLRB No. 130, slip op. at 1 (June 24, 2015) (finding no violation where the employer discharged an employee for lying during questioning about his unprotected activity—"vulgar, offensive, and, in isolation, arguably threatening statements" that he scribbled on union newsletters in the breakroom), with *Paragon Sys., Inc.*, 362 NLRB No. 182, slip op. at 5 (Aug. 26, 2015) (holding that "[a]n employer may not discharge an employee for lying in response to . . . questions [concerning protected concerted activity]"), *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 93, slip op. at 1 n.2, 25 (June 9, 2017) (same), *enforcement denied on other grounds*, --F.3d--, 2018 WL 3028842 (D.C. Cir. June 19, 2018), and *United Services Automobile Assn.*, 340 NLRB 784, 786 (2003), *enforced*, 387 F.3d 908 (D.C. Cir. 2004) (same).

Accordingly, the Region should dismiss the charge, absent withdrawal.¹⁵

/s/
J.L.S.

ADV.10-CA-207362.Response.BlueCrossBlueShieldofTennessee [REDACTED]

¹⁵ One question posed in the HR interview—“have you talked to anyone else about this conversation that you had with [the Manager]”—constituted unlawful interrogation. However, Employee #1’s response to that question was not the basis for [REDACTED] discharge, that question was not posed to any employee other than Employee #1, and there is no evidence indicating that other employees knew that Employee #1 was asked this question or that this type of question had been asked of other employees. In these circumstances, it would not effectuate the policies and purposes of the Act to issue complaint alleging that this one question was unlawful.