SHORT RECORD
NO. 19-1136
FILED 01/17/2019

No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TINLEY PARK HOTEL AND CONVENTION CENTER, LLC,	)	
Petitioner,	)	**Petition for Review of the Order of the National Labor Relations Board**
v.	)	**Case: 13-CA-141609**
NATIONAL LABOR RELATIONS BOARD and AUDELIA SANTIAGO,	)	
Respondent.	)	

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioner, Tinley Park Hotel and Convention Center, LLC ("Tinley Park") petitions this court for review of the attached order of the National Labor Relations Board ("Board") dated January 8, 2019, in *Tinley Park Hotel and Convention Center, LLC* ***and*** *Audelia Santiago*, Case No. 13-CA-141609.

For the reasons that will be established in Tinley Park's brief (to be filed in accordance with, and within the time prescribed by the Federal Rules of Appellate Procedure, the Circuit Rules of the Seventh Circuit, and the court's forthcoming scheduling order) the court should grant this petition, reverse the Board's order, and award any other relief to which Tinley Park may be entitled.

Respectfully submitted this 17th day of January, 2019

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CERTIFICATE OF SERVICE

I certify that, pursuant to 29 U.S.C. §160(f), copies of the attached Petition for Review were mailed on January 18, 2019, by certified mail, postage prepaid, return receipt requested to Respondents as follows:

National Labor Relations Board
Region 13, Chicago, Illinois
Dirksen Federal Building
219 South Dearborn Street, Suite 808
Chicago, Illinois 60604

Audelia Santiago
4230 West 79th Place
Chicago, Illinois 60652

I further certify that pursuant to Rule 15, Federal Rules of Appellate Procedure, copies of the attached Petition for Review were also mailed on January 18, 2019, by certified mail, postage prepaid, return receipt requested, to the following individuals who were admitted to participate in the proceeding before the National Labor Relations Board.

R. Jason Patterson, Esq.
Andrea James, Esq.
Counsel for the General Counsel
NLRB – Region 13
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Chicago, Illinois 60604

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Dated: January 18, 2019

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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Tinley Park Hotel and Convention Center, LLC *and* Audelia Santiago. Case 13–CA–141609

January 8, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

On June 16, 2015, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed limited exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Tinley Park Hotel and Convention Center, LLC, Tinley Park, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any rule that prohibits employees from discussing their wages and other terms and conditions of employment with employees and nonemployees.

(b) Maintaining an overly broad rule that prohibits discourteous or disrespectful treatment of guests, visitors, supervisors, or fellow associates.

(c) Maintaining an overly broad rule that prohibits disloyalty, including disparaging or denigrating the food, beverages, or services of the Respondent, its guests, associates, or supervisors by making or publishing false or malicious statements.

(d) Maintaining an overly broad rule that prohibits any other conduct that the Respondent believes has created, or may lead to the creation of, a situation that may disrupt or interfere with the amicable, profitable and safe operation of the Respondent.

(e) Discharging or disciplining employees for violating an overly broad and unlawful rule.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind rules 2, 8, 9, and 29 from the Respondent's personal conduct and work rules policy.

(b) Furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provisions have been rescinded or (2) provides lawfully worded provisions on adhesive backing that will cover the unlawful provision or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions or (2) provide lawfully worded provisions.

(c) Within 14 days from the date of this Order, offer Audelia Santiago full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

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[1] The Respondent did not except to the judge's finding that it violated Sec. 8(a)(1) by promulgating and maintaining rules 2, 8, 9, and 29 in its Personal Conduct and Work Rules policy. In the absence of exceptions, we adopt these findings. We note, however, that the judge found the rules unlawful under the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004), which was relevantly overruled, subsequent to the judge's decision, in *The Boeing Company*, 365 NLRB No. 154 (2017).

The Respondent discharged employee Audelia Santiago at least in part because she violated its rule 9 by posting certain comments on Facebook on June 27, 2014. As noted above, there are no exceptions to the judge's finding that Rule 9 is unlawfully overbroad. Applying *Continental Group, Inc.*, 357 NLRB 409 (2011), and *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), the judge found that Santiago's discharge was unlawful because the termination was imposed pursuant to an overly broad rule, and the conduct for which Santiago was discharged touched the concerns animating Sec. 7 of the Act.

Chairman Ring and Member Emanuel note that no party contends that Santiago's Facebook comments on June 27, 2014, were concerted. They adopt, however, the judge's finding that Santiago's July 3, 2014 discharge violated Sec. 8(a)(1) under *Continental Group* and *Double Eagle*, which they apply here in the absence of a request by any party to reconsider those decisions. However, they would be willing to revisit that precedent in a future appropriate case.

[2] We shall modify the judge's recommended Order in accordance with *Guardsmark, LLC*, 344 NLRB 809 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall amend the judge's recommended tax compensation and Social Security reporting remedy. In addition, in accordance with *King Soopers*, 364 NLRB No. 93 (2016), we amend the remedy to provide that the Respondent shall compensate Santiago for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall substitute a new notice to conform to the Order as modified.

(d) Make Audelia Santiago whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as modified by this decision.

(e) Compensate Audelia Santiago for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(f) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of Audelia Santiago, and, within 3 days thereafter, notify her in writing that this has been done and that her unlawful discharge will not be used against her in any way.

(g) Within 14 days after service by the Region, post at its facility in Tinley Park, Illinois, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 3, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Date, Washington, D.C. January 8, 2019

John F. Ring, Chairman

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain any rule that prohibits employees from discussing their wages and other terms and conditions of employment with employees and nonemployees.

WE WILL NOT maintain an overly broad rule that prohibits discourteous or disrespectful treatment of guests, visitors, supervisors, or fellow associates.

WE WILL NOT maintain an overly broad rule that prohibits disloyalty, including disparaging or denigrating the food, beverages, or services of the Company, its guests, associates, or supervisors by making or publishing false or malicious statements.

WE WILL NOT maintain an overly broad rule that prohibits any other conduct that we believe has created, or may lead to the creation of, a situation that may disrupt or interfere with the amicable, profitable, and safe operation of the Company.

WE WILL NOT discharge or discipline employees for violating an overly broad and unlawful rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind rules 2, 8, 9, and 29 from our personal conduct and work rules policy.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL furnish you with an insert for the current employee handbook that (1) advises that the unlawful provisions have been rescinded or (2) provides lawfully worded provisions on adhesive backing that will cover the unlawful provision, or WE WILL publish and distribute to you revised employee handbooks that (1) do not contain the unlawful provisions or (2) provide lawfully worded provisions.

WE WILL, within 14 days from the date of the Board's Order, offer Audelia Santiago full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

WE WILL make Audelia Santiago whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Audelia Santiago for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharge of Audelia Santiago, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that her discharge will not be used against her in any way.

TINLEY PARK HOTEL AND CONVENTION CENTER, LLC

The Board's decision can be found at http://www.nlrb.gov/case/13-CA-141609 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

R. Jason Patterson, Esq., for the General Counsel.
Laura A. Balson, Esq. and *Brianna L. Golan, Esq. (Golan & Christie),* of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

CHARLES J. MUHL, Administrative Law Judge. The General Counsel's complaint in this case alleges that Tinley Park Hotel and Convention Center, LLC (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by discharging banquet server Audelia Santiago for a violation of an overly broad handbook rule prohibiting disloyalty. In addition, the General Counsel alleges that three other rules in the Respondent's employee handbook are facially unlawful and constitute independent violations of Section 8(a)(1). The Respondent denies that it violated the Act and asserts that it discharged Santiago due to her violation of its lawful cell phone use policy.

I conducted a trial on the complaint on April 27, 2015, in Chicago, Illinois. Counsel for the parties filed posthearing briefs on June 1, 2015, which I have considered. Based upon the Board's *Double Eagle* rule, I conclude that the Respondent's discharge of Santiago violated the Act, because it was imposed, at least in part, on an unlawfully overbroad disloyalty rule and because Santiago violated the rule by engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. *Continental Group, Inc.*, 357 NLRB 409 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004). The Respondent did not establish that Santiago's conduct actually interfered with her own work or that of other employees or otherwise actually interfered with the Respondent's operations, nor did it establish that such interference, rather than Santiago's violation of the disloyalty rule, was the reason for her discharge. On the entire record, including my observation of the demeanor of witnesses, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent provides hotel, meeting, and convention center services at its facility in Tinley Park, Illinois. In conducting its business operations in the last past calendar year, the Respondent derived gross revenues in excess of $500,000 and purchased and received goods, products, and materials in excess of $5000 directly from points located outside the State of Illinois. Accordingly, and at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction, as the Respondent admits in its answer to the complaint.

II. ALLEGED UNFAIR LABOR PRACTICES AND ANALYSIS

The Respondent operates a Holiday Inn hotel attached to the Tinley Park Convention Center. Pursuant to an agreement with Tinley Park, the Respondent runs and manages the convention center. Audelia Santiago began working for the Respondent as a banquet server on a part-time basis in September 2007. The Respondent promoted her to full time, or core, status on January

8, 2014.[1] As a banquet server, Santiago's responsibilities included setting up and serving meals and snacks in banquet rooms, as well as occasionally to operate concession stands. Santiago's superiors were Senior Operations Manager Tim Gourley and Junior Operations Manager Emily Balis.[2]

A. The Discharge of Audelia Santiago

1. The Respondent's "Personal Conduct & Work Rules"

In August 2011, the Respondent issued and, at all times material to this case, maintained an employee handbook containing its personal conduct and work rules, a nonexhaustive list of examples of employee misconduct. Violations of the rules subjected employees to discipline, including discharge, even for a first offense. The examples of misconduct at issue in Santiago's discharge are:

> 9. Disloyalty, including disparaging or denigrating the food, beverages, or services of the company, its guests, associates, or supervisors by making or publishing false or malicious statements.
>
> 26. Unauthorized use of telephone or frequent and unnecessary use of the telephone for personal business.
>
> 30. Cellular phone usage during work hours is prohibited. Cell phones must be turned off and used only during breaks.

(GC Exh. 2, pp. 23–24 of handbook.) Effective March 30, 2012, the Respondent also issued a "Standard Operating Procedure" (SOP) as to cell phone usage, which stated:

- The use of cell phones during your shift is prohibited
- The use of [p]ods and other personal music devices during your shift is prohibited
- Usage of the above devices is only allowed during your scheduled 30 min lunch break
- Usage is not allowed during any paid break times
- A manager may issue exceptions on the use of cell phones for certain positions if their use is necessary for effective communication

(R. Exh. 1.) Santiago signed a copy of this SOP stating she had read, been trained, and understood the policy.

2. The events of June 27

The Respondent's level of business varies significantly during the year, with its busiest period from May until the beginning of November. During this period, core employees such as Santiago may be expected to work for an extended number of hours, covering breakfast, lunch, dinner, and perhaps a wedding thereafter on a single workday. During each workday, banquet servers are provided one, unpaid, half-hour lunch break and two, paid, 15-minute breaks. Lunchbreaks are recorded in the Respondent's timekeeping system, but paid breaks are not. Breaks during the workday are unscheduled. Employees take them when they have time to do so, such as after a meal service is finished.

On June 27, Santiago arrived for work at 5:30 a.m. That day, she had seven banquet rooms to cover from breakfast through lunch service, or 4 p.m., as well as a dinner in the evening. Santiago worked continuously without taking a break until she finished setting up for dinner at 7:30 p.m. At that point, Santiago and other banquet servers, both core and temporary employees, gathered in a non-public hallway between the kitchen and banquet rooms and took a break until 8 p.m. Although this hallway was not designated by the Respondent as a break area, the employees frequently took breaks there. During this break, some of the employees were sitting down, some were talking, and some were using their cell phones.

Santiago was with employees Xaverie Benedict, Cody Bridges, and Sandra Sana.[3] Santiago had her cell phone in her hand and told Bridges, why don't you take a selfie like you always do?[4] Bridges grabbed Santiago's phone and took a picture of himself, Benedict, and Sana, then immediately posted it to Santiago's Facebook page with the comment, "No phones at work – with Xaverie Benedict and 2 others."[5] (GC Exh. 3, p. 2.) After Bridges gave Santiago her cell phone back, she posted the comment, "Reinita you are scary," under this picture. Santiago also took two additional pictures. However, she did not post them to her Facebook page or make any further comments about the photos until after she finished working that day.

Multiple people commented on the photo posted by Bridges on Santiago's Facebook page. Nick Leyva, a former employee, posted "tell Cody to do some work for once," to which Bridges responded with "its not required to work for anyone at tpcc." Santiago responded to that post with: "Yea Cody you are right cause while I was the only one working like an (sic) slave you guys were taking selfies with my own phone and posting them on my wall lol." Bridges responded, "Oh Silvia You were standing next to us telling us to take a selfie Lol."

One of the pictures Santiago posted on Facebook after work was of the banquet servers congregated in the hallway. (GC Exh. 3, p. 1.) Santiago included the comment, "That's how we work at TPCC," when posting the photo. Santiago testified that this comment was a joke because, although the picture made it appear as if the banquet servers were not working, they actually all had worked too hard that day.

After she posted it, multiple people commented on that photo. The first comment, from Santiago's cousin, Mercedes Rodriguez, was in Spanish and translated to "Oh, how hard you work, you look tired, you guys look tired." A former employee, Joyce Kobiernicki Bussema, commented, "unbelievable! Let Reva [one of the Respondent's owners] keep paying all these people for doing nothing." Bridges responded: "Well technically they get paid by the client's gratuity that is broken up among the servers. Plus standing to pose for a team building photo for one

[1] All dates hereinafter are in 2014, unless otherwise specified.

[2] At the hearing, the Respondent stipulated only to the 2(13) status of Gourley and Balis, as well as of Nancy Reed, the Respondent's director of human resources.

[3] Bridges, like Balis, was identified as a junior banquet manager, but was not alleged as a supervisor or agent in the General Counsel's complaint.

[4] A "selfie" is defined as a photograph that one takes of oneself with a digital camera or front-facing smartphone, tablet, or webcam, especially for posting on a social-networking or photo-sharing website. See, e.g., www.dictionary.com and www.merriam-webster.com, visited June 9, 2015.

[5] Santiago's Facebook username is "Delia S Santiago." Santiago also is referred to as "Sylvia" in some of the Facebook comments.

minute is never a bad thing especially since they have done all that could be done for the next two days!" Santiago later added, "Hi Joyce I still remember the game we use to play in the lunch room for hours it was fun I miss you guys. Now we don't have time for that."

Santiago's Facebook page only can be seen by her Facebook friends, 10 of whom are coworkers of hers.

3. The discharge of Santiago on July 3

On July 3, Gourley and Balis met with Santiago shortly after her shift began. Gourley said he was sorry, but he had to terminate her. Gourley provided Santiago with a discharge letter, stating:

> On 6-27-14, Sylvia was using her cell phone while on duty. She posted pictures on Facebook that depict the company in an unfavorable light. In addition derogatory comments were made in regards to the pictures that further compromise the public perception of the Convention Center and MidCon Hospitality.[6] This violated several "Personal Conduct & Work Rules" (page 24) as listed in the company's Employee Handbook. Sylvia violated rules 9, 26, 30[.] Due to the severity and multitude of rule violations, Sylvia will be terminated effective Thursday, July 3rd, 2014.

Fearful that she would lose her job, Santiago told Gourley that she did not take those pictures and was not using her phone while she was working, even though both statements were inaccurate. Gourley again said he was sorry and she would have to go to human resources if she had something else to say. Neither Gourley nor Balis provided any additional details in this meeting concerning the basis for Santiago's discharge.

Santiago then went to see Nancy Reed, the Respondent's director of human resources. At that point, Reed had not seen the discharge letter and did not have a lot of details about what happened. Reed told Santiago that she understood both good and bad comments had been made on Facebook. When Santiago denied making any bad or derogatory comments, Reed responded that maybe she did not, but Bridges did and it gave a bad image to the Company because clients could see the comments. Santiago also told Reed that they were trying to depict all of the people standing in the banquet hallway, many of whom were temporary employees. Santiago told her they wanted to show how the Respondent used way too many temps and they were all standing there doing nothing.

As to cell phones, Santiago told Reed, again inaccurately, that she did not take the posted pictures and was not using her phone while she was working. She stated it was her cell phone, she had given it to Bridges, and Bridges posted the information on Facebook. Reed told her she should not give her cell phone to anybody. Santiago also asked Reed about the rules on cell phone usage, saying employees always used them to communicate with managers because the banquet rooms were far away. Reed responded they could only be used for work.[7]

4. Legal framework

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. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Where the rule is likely to have a chilling effect on Section 7 rights, the maintenance of the rule is an unfair labor practice, even absent evidence of enforcement. In determining whether a challenged rule is unlawful, the rule must be given a reasonable reading, particular phrases must not be read in isolation, and improper interference with employee rights must not be presumed.

In evaluating a rule's lawfulness, the first area of inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, the rule is unlawful only upon the showing of one of the following: (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.

Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. *Continental Group, Inc.*, 357 NLRB 409, 411–416 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004). An employer can avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. The employer bears the burden of asserting this affirmative defense and establishing that the employee's interference with production was the actual reason for the discipline. That burden only can be met when an employer demonstrates that it contemporaneously cited the employee's interference with production as a reason for the discipline, not simply the violation of the overbroad rule.

5. Analysis of the Respondent's rule 9 prohibiting disloyalty

The General Counsel alleges that rule 9 violates Section 8(a)(1), because it reasonably could be construed to prohibit Section 7 activity. As previously noted, that rule gives as an example of misconduct: "disloyalty, including disparaging or denigrating the food, beverages, or services of the company, its guests, associates, or supervisors by making or publishing false or malicious statements." The Board repeatedly has found similar language to be unlawful. In *Lily Transportation Corp.*, 362 NLRB 406 (2015), the Board ruled unlawful a ban on electronic

[6] MidCon Hospitality is the management company for the Tinley Park Hotel and Convention Center. (Tr. 137–138.)

[7] The findings of fact concerning the conversation between Santiago and Reed are based on the credited testimony of both individuals. By and large, their accounts are consistent as to the content of the conversation, even when their specific recollections of the statements made were not exact matches. Each person also remembered, and testified credibly to, different statements made during the conversation that are not conflicting. By either account, the two discussed both the comments made in the Facebook postings, as well as Santiago's use of her cell phone.

posting of "disparaging, negative, false, or misleading information or comments" about the employer or employees. In *Lafayette Park Hotel*, supra, 326 NLRB at 828, the Board concluded that a prohibition on "false, vicious, profane, or malicious statements towards or concerning [the employer] or any of its employees" likewise was unlawful. Rule 9 reasonably could be construed to prohibit protected activity, such as coworkers discussing with one another the complaints they have about their supervisors.

While the Respondent contends that it only sought to ban false and malicious statements, its use of the disjunctive in the rule language negates that argument. The Board has drawn a distinction between statements that are both false and malicious, which are not protected, and statements that are merely false, which retain protection. *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252 (2007) (mere fact that statements are false, misleading, or inaccurate is insufficient to demonstrate that they are maliciously untrue and unprotected). By prohibiting "false *or* malicious" statements, the Respondent has banned merely false statements, an overly broad prohibition. *First Transit, Inc.*, 360 NLRB 619, 636 fn. 2 (2014) (disloyalty rule which prohibited "false, vicious, or malicious statements concerning the Company or its services, a client, or another employee" overly broad and unlawful).

Thus, rule 9 violates Section 8(a)(1).

6. Analysis of the Respondent's discharge of Santiago

In the complaint and brief, the General Counsel alleges and argues that Santiago's discharge violates Section 8(a)(1), because the termination was imposed pursuant to overly broad and unlawful rule 9 and the conduct for which Santiago was discharged implicates the concerns underlying Section 7 of the Act.

Applying the *Double Eagle* rule to this case, I conclude that the General Counsel has demonstrated that Santiago's Facebook comments on June 27 were protected, even if not concerted, and thus otherwise implicate the concerns underlying Section 7. Part of the back and forth between Santiago and her Facebook friends centered on their terms and conditions of employment that day, in particular how hard Santiago and other employees had been working. Santiago stated she had been working like a "slave" and noted that she had no time to play games like she used to do. These comments came after Santiago began work at 5:30 a.m. but did not take her first break until 14 hours later at 7:30 p.m. that day. Employees' complaints about their hours of work, including heavy workloads, long have constituted protected activity. See, e.g., *MCPC, Inc.*, 360 NLRB 216, 216 (2014); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1039 (1992).

Santiago's discharge was imposed, at least in part, due to her violation of the Respondent's unlawful disloyalty rule. Santiago's termination form explicitly cites to a violation of rule 9. The text therein notes that the pictures Santiago posted depicted the Company in an unfavorable light and the derogatory comments made as to the pictures compromised the public perception of the Company. Although her discharge also was justified by violations of the Respondent's cell phone rules, an employer does not escape liability for an unlawful discharge because it asserts other, lawful reasons for the same disciplinary action. *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436, 436 (1978). The fact that one reason for a disciplinary action is lawful in no way diminishes the fact that the other reason was unlawful.[8]

While the Respondent contends that Santiago was discharged solely due to her violation of the rules regarding cell phone use, the Respondent's own termination form directly contradicts that claim. Beyond the form, Reed testified that a portion of the conversation she had with Santiago on July 3 dealt with the derogatory comments made on Facebook, which likewise is inconsistent with the Respondent's contention. Finally, neither Gourley nor Balis, the two supervisors who actually made the decision to discharge Santiago, testified at the hearing. Thus, no record testimony supports the Respondent's argument. Santiago's violation of the Respondent's cell phone rules was a factor in her discharge, but it was not the sole basis for it.

In its brief, the Respondent also argues that Santiago was not engaged in protected, concerted activity through her Facebook postings. That simply is not the legal question presented in this case. The Board has made clear that the *Double Eagle* rule applies to situations where an employee is discharged due to conduct that is protected, but not concerted. *Continental Group*, supra, 357 NLRB 409, 413. The potential chilling effect on employees' exercise of their Section 7 rights is even greater in these situations.

Given the General Counsel's evidentiary showing, the Respondent bears the burden of establishing that Santiago's interference with production or operations was the actual reason for her discharge. In its answer, the Respondent did not assert this as an affirmative defense. At the hearing, the Respondent also did not present evidence that Santiago's interference with production was contemporaneously cited as the reason for her discharge. In any event, the record establishes that Santiago took pictures during her break and posted the pictures and comments on Facebook either while still on break or after she was done working on June 27. Thus, her actions could not have interfered with her or other employees' work responsibilities, or the Respondent's operations. Accordingly, the Respondent has not met its *Double Eagle* burden.

For all these reasons, I conclude that the Respondent's discharge of Santiago violated Section 8(a)(1) of the Act.

B. The Remaining Allegations of Unlawful Handbook Rules

In addition to rule 9, the General Counsel's complaint alleges that three other rules in the Respondent's employee handbook independently violate Section 8(a)(1).[9]

1. The Respondent's rule 8

The General Counsel alleges that rule 8 violates Section 8(a)(1), because it explicitly restricts employees' Section 7

[8] At the hearing, both sides presented evidence on the question of whether the Respondent's past discipline of Santiago played a role in her discharge, as well as whether the Respondent previously had disciplined employees for violations of its cell phone use policy. (Tr. 58–62, 82–83, 108–109; GC Exhs. 6, 10–13.) Because at least one of the Respondent's reasons for discharging Santiago was unlawful, I do not find this evidence relevant to the analysis of the *Double Eagle* burdens.

[9] The General Counsel made an oral motion at the hearing, which I granted, to withdraw complaint par. IV(a)(4). That paragraph had alleged that personal conduct rule 18 also was unlawful.

activity. Rule 8 defines as another example of employee misconduct:

> Unauthorized disclosure of confidential information relating to guests, visitors, clients or other associates (including wage and salary information to another associate) to anyone (including outside sources and all news media) except company personnel who have an authorized need to know or discussing confidential company information in public areas where guests can overhear conversation

This rule forbids employees from disclosing confidential information, including wages, to other employees without the Respondent's authorization. This rule is a textbook example of one which explicitly prohibits employees from engaging in the protected activity of discussing their wages and other working conditions with one another or members of the public. *Parexel International*, 356 NLRB 516, 519 (2011); *Double Eagle Hotel & Casino*, supra, 341 NLRB at 113–115. The Respondent essentially conceded that the rule was unlawful during the General Counsel's investigation of the underlying charge in this case. (GC Exh. 8, p. 2.) The maintenance of this rule plainly violates Section 8(a)(1).[10]

2. The Respondent's rule 2

The General Counsel alleges that rule 2 violates Section 8(a)(1), because it reasonably could be construed to prohibit Section 7 activity. Rule 2 states that "discourteous or disrespectful treatment of guests, visitors, supervisors, or fellow associates" is another form of misconduct subjecting employees to discipline. The meaning of "discourteous or disrespectful treatment," without further clarification or examples, is ambiguous. The language could be construed to include protected conduct, such as group protests to management concerning their working conditions. The Board repeatedly has found similar language to be overly broad and encompassing employees' protected activity. *First Transit, Inc.*, 360 NLRB 619, supra, 621 (rule prohibiting "[d]iscourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public" unlawfully overbroad); *University Medical Center*, 335 NLRB 1318, 1320–1321 (2001) (rule against "disrespectful conduct" unlawful). Accordingly, this rule likewise violates Section 8(a)(1) of the Act.

3. The Respondent's rule 29

The General Counsel alleges that rule 29 violates Section 8(a)(1), because it reasonably could be construed to prohibit Section 7 activity. Rule 29 subjects an employee to discipline for engaging in "[a]ny other conduct that the company believes has created or may lead to the creation of a situation that may disrupt or interfere with the amicable, profitable and safe operation of the company." This rule is the Respondent's catch-all provision, where it attempts to cast as wide a net as possible to cover any conceivable act of employee misconduct. The language is so broad and all encompassing, without any specific examples of misconduct which might limit its scope, that it could engulf a multitude of protected activities. Some examples include concerted protests of working conditions; lawful solicitations of other employees to union activity; or publicizing any labor disputes to the public or the media. As with rule 8, the Respondent essentially admitted that this rule violated the Act during the Board's investigation of the charge in this case. For all these reasons, this rule also violates Section 8(a)(1). *Purple Communications, Inc.*, 361 NLRB 575, 575, 580 (2014) ("no disruptions" rule prohibiting employees from causing, creating, or participating in a disruption of any kind during working hours on company property unlawful).

To summarize then, I conclude, as alleged, that the Respondent's personal conduct and work rules 2, 8, 9, and 29 all violate Section 8(a)(1) of the Act.[11]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has violated Section 8(a)(1) by:

(a) Since August 1, 2011, promulgating and maintaining an overly broad rule prohibiting employees from discussing wages or other terms and conditions of employment with employees or non-employees.

(b) Since August 1, 2011, promulgating and maintaining an overly broad rule prohibiting employees from "[d]iscourteous or disrespectful treatment of guests, visitors, supervisors, or fellow associates."

(c) Since August 1, 2011, promulgating and maintaining an overly broad rule prohibiting employees from "[d]isloyalty, including disparaging or denigrating the food, beverages, or

[10] Other bases exist for finding rule 8 unlawful, given that multiple provisions reasonably could be construed to restrict Sec. 7 activities. The ban on discussing "confidential information" could reasonably be construed to include employee conversations about labor disputes or other terms and conditions of employment. Like discussions concerning wages, those conversations are protected. The rule also impermissibly restricts employees from discussing the same topics with "outside sources and all news media." *Valley Hospital Medical Center, Inc.*, supra, 351 NLRB at 1252; *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990). Finally, prohibiting discussion of confidential information and wages where customers might overhear the conversation is overly broad, because employees have a protected right to speak to customers concerning their working conditions when not on work time. *Guardsmark, Inc.*, 344 NLRB 809, 809 (2005).

[11] At the hearing, the Respondent presented testimony from MidCon Human Resource and Risk Manager Beverly Carli indicating that the Respondent had revised its employee handbook in August and September 2014, as a result of a prior Board charge not a part of this case. (Tr. 140.) However, Carli did not identify the specific changes that were made, other than to say three items were amended and one new item was added. (Tr. 141–142.) In addition, Carli testified that the Respondent distributed the changes to employees in written form, with a letter of explanation, and had employees sign an acknowledgement that they had read the changes. However, these documents were not offered or received into the record. (Tr. 141–142.) This evidence is not nearly sufficient to meet the requirements of a proper rule rescission, as established in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978). See also *Boch Honda*, 362 NLRB 706 (2015). For a repudiation to be effective, the Board requires that it be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. The repudiation also must be adequately published to the employees involved, while giving them assurances that, in the future, the employer will not interfere with the exercise of their Sec. 7 rights.

services of the company, its guests, associates, or supervisors by making or publishing false or malicious statements."

(d) Since August 1, 2011, promulgating and maintaining an overly broad rule prohibiting employees from engaging in any other conduct that the Respondent believes has created, or may lead to the creation of, a situation that may disrupt or interfere with the amicable, profitable and safe operation of the Company.

(e) Discharging Audelia Santiago on July 3, 2014, for violating its overly broad and unlawful rule 9 prohibiting disloyalty.

3. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I shall order the Respondent to offer Audelia Santiago full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the Respondent must compensate Santiago for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). I also shall order the Respondent to remove from its files any references to the unlawful discharge of Santiago and to notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way.[12]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13][12]

ORDER

The Respondent, Tinley Park Hotel and Convention Center, LLC, Tinley Park, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any rule that prohibits employees from discussing their wages and other terms and conditions of employment with employees and non-employees.

(b) Maintaining an overly broad rule that prohibits discourteous or disrespectful treatment of guests, visitors, supervisors, or fellow associates.

(c) Maintaining an overly broad rule that prohibits disloyalty, including disparaging or denigrating the food, beverages, or services of the Respondent, its guests, associates, or supervisors by making or publishing false or malicious statements.

(d) Maintaining an overly broad rule that prohibits any other conduct that the Respondent believes has created or may lead to the creation of a situation that may disrupt or interfere with the amicable, profitable and safe operation of the Respondent.

(e) Discharge or discipline employees due to a violation of overly broad and unlawful rule 9 prohibiting disloyalty.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind rules 2, 8, 9, and 29 from the Respondent's Personal Conduct and Work Rules policy.

(b) Within 14 days from the date of this Order, offer Audelia Santiago full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

(c) Make Audelia Santiago whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(d) Compensate Audelia Santiago for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(e) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of Audelia Santiago, and, within 3 days thereafter, notify her in writing that this had been done and that her unlawful discharge will not be used against her in any way.

(f) Within 14 days after service by the Region, post at its facility in Tinley Park, Illinois, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places were notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of

[12] The General Counsel's complaint sought a requirement, as part of the remedy, that Santiago be reimbursed for search-for-work and work-related expenses, without regard to whether interim earnings are in excess of these expenses. Under extant Board law, those expenses are considered an offset to interim earnings. In this case and others, the General Counsel is seeking a change in Board law. Such a change must come from the Board, not an administrative law judge. Accordingly, I decline to include the requested remedy in my recommended Order.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent in the position employed by the Respondent at any time since August 1, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. June 16, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain any rule that prohibits employees from discussing their wages and other terms and conditions of employment with employees and nonemployees.

WE WILL NOT maintain an overly broad rule that prohibits discourteous or disrespectful treatment of guests, visitors, supervisors, or fellow associates.

WE WILL NOT maintain an overly broad rule that prohibits disloyalty, including disparaging or denigrating the food, beverages, or services of the Company, its guests, associates, or supervisors by making or publishing false or malicious statements.

WE WILL NOT maintain an overly broad rule that prohibits any other conduct that we believe has created or may lead to the creation of a situation that may disrupt or interfere with the amicable, profitable, and safe operation of the Company.

WE WILL NOT discharge or discipline employees due to a violation of the overly broad disloyalty rule described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, rescind rules 2, 8, 9, and 29 from our personal conduct and work rules policy in the employee handbook.

WE WILL, within 14 days from the date of this Order, offer Audelia Santiago full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

WE WILL make Audelia Santiago whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL compensate Audelia Santiago for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful discharge of Santiago, and WE WILL, within 3 days thereafter, notify her in writing that this had been done and that her discharge will not be used against her in any way.

TINLEY PARK HOTEL AND CONVENTION CENTER, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-141609 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.