

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

ADT, LLC

and

Case 19-CA-216379

**INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCALS 46 AND 76**

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

Submitted by,

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Counsel for the General Counsel (“General Counsel”) respectfully submits this Answering Brief in response to Respondent’s Exceptions to the Administrative Law Judge’s July 9, 2019, Decision.

This matter was heard in Seattle, Washington, on August 22 to 24, 2018, before Administrative Law Judge John T. Giannopoulos (the “ALJ”), based upon a Complaint alleging that ADT, LLC (“Respondent”), violated the National Labor Relations Act (the “Act”), 29 U.S.C. 151 *et seq.*, by: selectively and discriminatorily enforcing a rule regarding recordings against employees who had assisted the International Brotherhood of Electrical Workers’ (“IBEW”) Locals 46 and 76 (collectively, the “Locals” or “Union”) and engaged in protected concerted activities; and by suspending and discharging employees Patrick Cuff (“Cuff”) and Mohamed Mansour (“Mansour”) because they assisted the Union and/or engaged in concerted activities, and to discourage employees from engaging in these or other union and/or protected concerted activities. The ALJ issued his decision on the matter on July 9, 2019 (“ALJD”), correctly finding that Respondent violated §§ 8(a)(1) and (3), as alleged.

I. BACKGROUND FACTS¹

As all facts set forth correctly in the ALJD,² Respondent operates a commercial and residential security installation and service business with numerous locations across

¹ References to the ALJ’s July 9, 2019, Decision appear as (D –:–), which shows the page and line, respectively. References to the Transcript of the proceedings before the ALJ appear as (TR –:–), which shows the Transcript page and line, respectively. References to General Counsel Exhibits appear as (GCX –). References to Respondent’s Exhibits appear as (RX –). References to Charging Party’s Exhibits appear as (UX –). References to Joint Exhibits appear as (JTX –). References to Respondent’s Exceptions and Brief in Support are respectively referred to as (R Exc –) and (R Brf –), with the number inserted to reflect the page number.

² Respondent agrees that the ALJ properly distilled the facts with one exception: “With one contrary example discussed below (regarding Respondent’s knowledge of another ADT employee’s termination), Respondent agrees with the ALJ’s factual background in his Decision” (R Brf 2). To the extent the General Counsel in this Answering Brief proffers additional record citations, it is done simply to provide foundation

the country, including one in Bothell, Washington and one in Tacoma, Washington (D 2:30-32). The Locals have represented a unit of approximately 90 alarm installer employees from Respondent's Bothell and Tacoma facilities since approximately 1979, when the facilities were owned by a predecessor (JTX 1 and 2, D 2:37-38). The Locals are parties to a collective bargaining agreement with Respondent that expired on May 31, 2017 (JTX 2, D 3:1-2). Subsequent to a decertification petition ("Petition") being filed by installer Jason Achberger on September 20, 2017, charges were filed, and a representation hearing was held over a group of previously acquired employees being eligible to vote (D 3:9-12).

An election took place on January 31, 2018, with the Union winning 49-37 (D 7:28-29).³ Leading up to the election, Respondent held a number of captive audience meetings at its Bothell and Tacoma locations and informed employees by email which meeting they needed to attend (D 3:14-19). The sequence of events among employees preceding, during and subsequent to these meetings, are adequately detailed in the ALJ decision (D 3:14-8:8) and only discussed below and as to each of Respondent's points in enough detail so as to address that raised by Respondent in its Exceptions and Brief in Support.

In summary, at the Bothell site, Respondent held two mandatory meetings on January 9.⁴ Based on the meeting assignments, it appeared to Union stewards Patrick Cuff ("Cuff"), a discriminatee, and James Wilson ("Wilson") that Respondent had assigned

or address that raised in Respondent's Exceptions and/or Brief in Support; it is not meant to contradict any fact found by the ALJ.

³ Hereinafter, all dates are 2018 unless otherwise indicated.

⁴ The ALJD makes one reference to the second meeting as the "11:00 a.m. meeting" (D 14:33); however, the record reveals that the meetings on this date took place at 7 a.m. and at 9 a.m. (TR 23:11, 143:1-15). Moreover, the ALJ initially notes the meetings were scheduled from 7 a.m. to 9 a.m., and another from 9 a.m. to 11 a.m. (D 3:15-17).

the employees to the meetings based on Union support: one meeting would contain Union supporters and the other would contain anti-union and undecided employees (D 3:20-24). Cuff and Wilson requested of management that they be split up so that a shop steward would be present at each meeting, but were denied this request (D 3:20-36).

Installation technician Jeremiah Dunn (“Dunn”) also expressed concern about the meetings being “stacked” and pressed both Cuff and Willson to ensure a shop steward would be at each of the meetings (D 3:38-4:6). Dunn is an open Union supporter and later took over Cuff’s position as shop steward at Bothell in about early July 2018.⁵ (TR 258:3-8, 22). Consequently, Cuff decided to record the meeting through the video recorder on his personal cellular phone in order to be able to go back and review the meeting with the thought of comparing it with the other meeting he did not attend if he could somehow find somebody who made a recording of the other meeting (D 5:20-24). Cuff watched the recording later that night and transferred it from his phone to a flash drive (D 5:25-26).

Field technician and discriminatee Mohamed Mansour (“Mansour”) attended his assigned mandatory meeting at 7 a.m. along with about 15 employees, but no shop stewards (D 4:25-32). James Nixdorf (“Nixdorf”), Respondent’s Director of Labor Relations, ran the meeting and when it became apparent that the meeting was about the Union decertification petition and what the Union did and did not do for workers, Mansour began recording the meeting (D 4:34-5:2). Mansour did this because he wanted to ensure he understood everything Nixdorf was saying as English is his second language, he is dyslexic, and he was unfamiliar with unions (D 5:1-5).

⁵ Dunn pushed back during the captive audience meeting he attended and challenged management in such a way on issues that they reflected his pro-Union stance (D 5:29-31, TR 274:12-18, TR 276:7-277:1).

Both meetings that day concerned the Union decertification petition and election, with the aid of a PowerPoint presentation but differed in the questions asked and discussion by employees (D 5:28-32). At no point in the two-hour long meetings or PowerPoint presentations, was there any discussion or mention of proprietary, customer or confidential information (D 5:33-34).

Immediately following the January 9 meetings, Mansour and employee Dunn, who were working together, discussed the meetings they each attended in person and by phone, during which Mansour shared his thoughts about the meeting, including the fact that there was no shop steward present at the meeting he attended and that he recorded the meeting so he could make sure he could later listen to it and have a clear understanding of what was discussed (D 6:3-6, TR 45:1-5). Dunn likewise shared his disappointment and irritation by Respondent's refusal to allow a shop steward to be present in his meeting, when the meeting related entirely to the decertification election and the Union (TR 298:7-11). Dunn told Cuff that Mansour recorded the meeting they did not attend, and Cuff asked Dunn if he could get a copy of that recording for him from Mansour (D 6:7-9).

Dunn called Mansour that evening and explained to Mansour that he told Cuff that somebody recorded the meeting and that Cuff asked for a copy (D 6:8-10). Dunn further explained that he was going to listen to the recording to understand what was said differently at the two meetings and that he would give the recording to Union shop steward Cuff to also listen to it (TR 47:25-48:2, 49:8-11). Mansour said that he would make a copy once he got home, which he did and provided to Dunn the next day; Dunn, in turn, provided it to Cuff (D 6:9-10). Cuff copied Mansour's recording to his own flash drive and

at some point, Cuff provided his flash drive with copies of both recordings, to Union representative Mark Samuelson (“Samuelson”) (D 6:13-14).

In the following weeks, in an email exchange and in separate conversations, it became evident to certain employees that recordings were made at the January 9 meeting (GCX 8, D 7:31-42). On January 26, employee Nick Rutter (“Rutter”) sent an email to Nixdorf and Respondent’s attorney, Daniel Adlong (“Adlong”), copying Terry, regarding a recording and also informed other management personnel, including Chief Security Officer Ed McDonough (“McDonough”), about it (RX 11). On February 2, Mansour saw Rutter at work and shared that he recorded the meeting he attended and his reasons for doing so, and Rutter insisted Mansour inform manager Jim Terry (“Terry”), which he did (D 7:35-8:8). At some point in late January or the first two weeks of February, Nixdorf directed McDonough to investigate (D 9:20-10:43). After McDonough conducted investigatory interviews on February 16, Respondent suspended both Cuff and Mansour pending the outcome of an investigation regarding the recordings (D 10:43-45).⁶

On February 22, McDonough drafted a report with a summary of his interviews and final findings, which he sent to Nixdorf, Ross, and Respondent’s legal representatives (D 11:3-44, RX 8). Nixdorf testified that when he received the “Interview Summary” from McDonough regarding the investigation, he believed it was clear that Cuff and Mansour violated Respondent’s policy on recordings because the recordings were made without consent and it was in a state where there was a “two-party consent law” (D 12:3-14). He said he then contacted Vice President of Human Resources Amelia Pullman to ask if

⁶ Interestingly, Ross’ notes reflect that during Respondent’s interview with Achberger, Achberger shared that he carries mace with him (TR 423:20-25). Respondent does not allow employees to carry mace and McDonough testified that there is a policy regarding this on its intranet (TR 424:20-25). A violation of this policy would result in discipline, including termination (TR 425:1-5).

there were any other similar types of cases involving employees who were not unionized, and that she told him of a situation in a New York call center where an employee was ultimately discharged for recording without permission, which Nixdorf learned had a one party consent law (D 12:17-21, TR 445:16:16-29, 468:2-13). Nixdorf testified that after speaking with Pullman, he decided to fire Cuff and Mansour (D 12:21-13:14). Respondent fired Cuff and Mansour on February 23, but neither received any termination paperwork from the company (D 13:17-21).

Respondent's policy on recordings provides the following as an example of behavior that would be considered unacceptable in the workplace and a violation of the Code of Conduct, and may result in disciplinary action, up to and including termination of employment:

Audio or video recording of coworkers or managers is prohibited where (1) such recording occurs without explicit permission from all parties involved in those states with laws prohibiting nonconsensual recording; (2) such recording violates company policies prohibiting threats, acts of physical violence, intimidation, discrimination, harassment, stalking and/or coercion; (3) the recording occurs in areas where employees have a reasonable expectation of privacy such as restrooms or changing rooms; (4) such recording creates a safety hazard; and/or (5) such recording otherwise violates applicable law.

(GCX 9, D 8:33-40). As the ALJ correctly noted, both Cuff and Mansour were never made aware during their onboarding process, or at any point during their employment, of Respondent's policy on recordings, let alone the "Standards of Conduct" in which the policy was contained (D 9:4-12).⁷

⁷ The Board has held that an employer cannot rely upon a rule in disciplining employees that it did not sufficiently bring to the attention of employees. *Hammary Mfg. Corp.* 258 NLRB 1319 (1981) (finding discharge of employee unlawful for solicitation because posting of a no-solicitation, no-distribution rule was insufficient notice to employees of the existence of such a rule). *See also Domsey Trading Corp.*, 310 NLRB at 803 (finding no just reason for discharge when employer relied on a rule forbidding tape recorders in the workplace, which was not made known to employees, despite such rule being in existence for sixteen years).

II. THE ALJ CORRECTLY FOUND THAT CUFF AND MANSOUR WERE UNLAWFULLY DISCHARGED FOR ENGAGING IN § 7 ACTIVITY

The unlawful conduct in this matter is the enforcement, not maintenance, of Respondent's No Recording policy. Stated plainly, and as the ALJ properly found, Respondent incorrectly and discriminatorily enforced its policy against two Union supporters under circumstances where the disciplined employees were engaged in § 7 activity (D 16:41-17:2). As also properly found by the ALJ, that is unlawful (D 16:43-17:2).

Here, as the ALJ properly found, there is no question that both Cuff and Mansour were engaged in protected activity of which Respondent was aware when they recorded the captive audience meetings; it was part of the *res gestae* of their Union and protected concerted activity (D 15:22-24). Indeed, there is ample precedent to support such a finding, given that the recordings were made during mandatory anti-Union meetings called by Respondent at which a high-level official from the company spoke and Union representatives were not always allowed. The management representatives set forth the Respondent's anti-union position, including that unions create divisions, do not want employees to understand what is going on, and will do anything possible to block votes to stop the (decertification) election. In this context, the recordings could have been used to document what the discriminatees perceived to be potential unfair labor practices, such as statements of futility, promises of benefits, or threats, and to document management's responses to specific workplace complaints for purposes of supporting the Union campaign (D 14:18-27, 14:37-41). See also *Whole Foods Markets, Inc.*, 363 NLRB No. 87 (2015); *White Oak Manor*, 353 NLRB 795, 795 n.2 (2009) (employee's use of cell phone to take unauthorized pictures of coworkers to document disparate enforcement of dress code policy to induce group action to compel employer to fairly enforce policy "was

part of the *res gestae*” of protected concerted activity), *adopted and affirmed* 355 NLRB 1280 (2010), *enfd.* 452 Fed. Appx. 374, 380 (4th Cir. 2011) (unpublished decision); *Roadmaster Corp.*, 288 NLRB 1195, 1197 (1988) (union official “signing other individuals’ names to grievance forms was part of the *res gestae* of the grievance procedure” and remained protected where he sought to preserve employee’s grievance and protect union from liability), *enfd.* 874 F.2d 448, 453 (7th Cir. 1989). *See also Domsey Trading Corp.*, 310 NLRB 777, 804 (1993) (employer violated § 8(a)(1) by promulgating post-strike rule that prohibited employees from carrying tape recorders at work because “the rule was intended to prevent the returning strikers from recording the harassment and the obscenities that they were being subjected to” and its sole purpose “to hide Respondent’s unfair labor practices”), 16 F.3d 517 (2d Cir. 1994).

Cuff was an active Union shop steward, filed grievances, participated in negotiations and served as Union observer for the January 31 election (D 3:20-21, 4:12-14, TR 140:1-142:6). Based upon the composition of the two meetings, employees, including Cuff, concertedly discussed with one another the need to obtain permission for a shop steward to attend each meeting (D 3:20-24, 3:38-4:6, 14:30-34). In fact, Cuff’s decision to record his meeting was the direct outcome of the conversations he had with fellow steward Wilson and pro-Union Dunn as well as management’s denial that a shop steward be permitted to attend each meeting, rather than be grouped together. Before the meetings on January 9 started, they discussed their concerns that different information might be shared at each of the meetings given the apparent division of employees into pro-union and anti-union (or undecided) camps. Dunn insisted that the shop stewards continue to drive the point to get one of them to attend each of the

meetings. When Wilson's and Cuff's efforts to secure permission to attend the two separate meetings proved unfruitful, Cuff recorded the meeting he attended to document what would be stated at his meeting in comparison to the meeting at which no Union representative would be present – this was preparation for group action at its core.

As the ALJ also correctly found, Cuff then took concerted action when Respondent refused to split up the two shop stewards, and recorded the meeting he attended in order to later compare what was said at his meeting with the other meeting, where the employees had been denied a Union representative's presence (D 14:29-41). Fortunately for him and the Union, Mansour also recorded his meeting as soon as it became clear that the topic of the meeting was about the Union and the upcoming decertification election and no shop steward was present. Due to his language barrier and dyslexia, Mansour made the decision to record this meeting so he would not miss anything important, much like the ALJ's illustration of protected conduct when an employee checks out a library book about unions to study issues and make an informed choice of an upcoming representation/decertification election. (D 14:12-19). That employee would not need to first solicit other employees' views to borrow library books in the same way he might take notes at a captive audience meeting, which would both be protected activity. (D 14:13-22). *Cf. Great Dane Trailers*, 293 NLRB 384, 392 (1989) (employer engaged in unlawful surveillance of employee engaged in protected activity where the employee was taking notes at a captive audience meeting). Thus, Mansour did not need to first solicit other employees' views for his activity to be protected. *See, e.g., Whittaker Corp.*, 289 NLRB 933, 933-34 (1988).

In fact, it is irrelevant whether Mansour *intended* for his recording to initiate group action or to be concerted or for the mutual aid or protection of employees. Not only is the concertedness of his actions inferred by the nature of the captive audience meeting, but it is, by its very nature, protected concerted and union activity because Mansour discussed with Dunn the lack of a shop steward present at his meeting and then shared a copy of his recording with Dunn. In so doing, Mansour voluntarily assisted the Union, enabling both Dunn and Cuff to review the recordings and compare Respondent's statements at the two meetings. These actions were in addition to and went far beyond passing along the recordings to Union business representative Samuelsen.

Respondent's attempt at distinguishing the facts in *Commerce Concrete Co., Inc.*, 197 NLRB 658, 660 (1972), merely by stating that violation of rules was not involved there, is not the point. *Commerce Concrete Co.* is relevant to illustrate how union activity can first be established, as it certainly is here given both employees and shop stewards shared the same concern about the composition of the meetings and facilitated the sharing of recordings made.

Mansour had no reservations about sharing the fact of his recording with manager Terry. Mansour also informed Terry (and other management representatives during the February 16 investigatory interview) that he passed on a copy of his recording to Dunn, a known Union supporter, because Cuff had requested the recording (D 10:20-25). Thus, Mansour made it clear to all those he spoke with about the recording that he recorded the meeting because he wanted to understand unions better. Since his recording was related to working conditions and benefits and/or disadvantages of voting to keep the Union, it

was, without question, § 7 activity. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (2014).

As the ALJ properly identified (D 13:42-46), employees have a statutory right to engage in union and protected concerted activities, or to refrain from any and all such activities. Cf. *Stanton Industries, Inc.*, 313 NLRB 838, 848 (1994) (noting the Board has “pointed out over and over again that employees have the right to engage in union activities, as well as the right to refrain from engaging in union activities, which rights are guaranteed by Section 7 of the National Labor Relations Act.). Further, conduct is concerted when it is “engaged in with or on the authority of other employees,” or when an individual employee seeks “to initiate or to induce or to prepare for group action” or to bring group complaints to management’s attention. *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 885, 887 (1986), *enforced sub nom.*; *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Moreover, “the objective of inducing group action need not be express” and an employee need not first solicit other employees’ views for his or her activity to be concerted. See, e.g., *Whittaker Corp.*, 289 NLRB at 933-34 (employee engaged in protected concerted activity where, not having had prior opportunity to meet with coworkers, he made comment in protest as spontaneous reaction to employer’s announcement of no annual wage increase).

Employees act for their mutual aid or protection when they seek to improve their terms and conditions of employment, or otherwise improve their lot as employees, and the improvements sought would inure to the benefit of employees generally. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3-5. Moreover, “both the concertedness element and the ‘mutual aid or protection’ element are analyzed under an objective standard ... the motives of the participants are irrelevant ... what is crucial is

that the purpose of the conduct relate[s] to collective bargaining, working conditions, or other matters of ‘mutual aid or protection’ of employees.” *Id.* Thus, the Board repeatedly has held that an employee who raises questions or makes comments regarding working conditions at a group meeting called by an employer is engaged in concerted activity. *See Neff-Perkins Co.*, 315 NLRB 1229, 1229 n.1 (1994). *See also UPS Supply Chain Solutions*, 357 NLRB No. 106, slip op. at 3 n.11, 16-17 (2011) (employee who spoke about need for union due to employees’ unhappiness and employer’s lack of response to his prior complaints was engaged in protected concerted activity during employer’s anti-union meeting); *Cibao Meat Products*, 338 NLRB 934 (2003) (employee sought to initiate group action where, at group meeting during which employer announced that employees were now required to help open plant gate before work, he protested that it was not his job stating, “we are the workers, the employees, after you open the factory”). This is based on the understanding that such questions and comments intend to implicitly elicit support from fellow employees. *See, e.g., Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000), *enfd.* 262 F.3d 184 (2d Cir. 2001); *Whittaker Corp.*, 289 NLRB at 934 (employee questioning why employees were not receiving pay raises during meeting called by employer’s president was engaged in protected concerted activity because “[p]articularly in a group-meeting context, a concerted objective can be inferred from the circumstances”).

In light of these principles, Respondent’s employees’ participation in the January 9 meetings clearly constituted *de facto* protected concerted activity given the nature of precisely what the meetings were about – whether they would continue to have Union

representation in their workplace.⁸ See *Neff-Perkins Co.*, 315 NLRB 1229, citing *United Enviro Systems*, 301 NLRB 942 (1991), *enf'd. mem.* 958 F.2d 364 (3d Cir. 1992); and *Whittaker Corp.*, 289 NLRB 933. In addition, the fact that the gatherings were conducted as captive audience meetings infers a concerted objective. *Chromalloy Gas Turbine Corp.*, 331 NLRB at 863.

Unlike in *Boeing Co.*, 365 NLRB No. 154 (2018), Respondent did not call the January 9 captive audience meetings to solicit its employees' feedback on how to improve its operations. Nor did it discuss any proprietary information, employee personal identifying information, or anything remotely related to national security or the prevention of terrorist attacks. Rather, Respondent held the meetings to discourage its employees from supporting the Union in the then-upcoming decertification vote (D 14:2-4).

Despite being a "security" company, the devices used to record these captive audience meetings were the personal cellular phones of Cuff and Mansour and not connected in any way to alarm systems or devices in customers' homes such that employees could access their information in their homes or "surveil" them, which both McDonough and Nixdorf stated was the overarching concern for customers (TR 393:23-

⁸ An inference of concert is not necessary given that: the management representatives were presenting Respondent's anti-Union views; employees like Dunn confronted Nixdorf by raising group complaints about not having a Union shop steward present at both meetings that day and about the Protection One employees casting a vote in the election despite not being active members; Dunn and Cuff spoke in the presence of their coworkers about the benefits of Union representation; Achberger and Rutter shared their views about why the Union was ineffective, including when it comes to wages; and Cuff and Wilson had advocated for representatives to attend different meetings (TR 274:12-15, TR 276:7-21, JTX 1, GCX 7 at pp. 17-21, GCX 10 at 23:14). These comments dealt with core terms and conditions of employment. See, e.g., *Parexel Intl., LLC*, 356 NLRB No. 82, slip op. at 3 (2011) ("wage discussions among employees are considered to be at the core of § 7 rights because wages, 'probably the most critical element in employment,' are 'the grist on which concerted activity feeds' . . . Discussions about wages are often the precursor to organizing and seeking union assistance"); *Marsak Leasing*, 313 NLRB 817, 825 (1994) ("Concerted activity is intimately related to union activity and is often its precursor. The perception of employees that their working conditions are unsatisfactory is a prime motivator for seeking outside assistance from a union"). The ALJ, therefore, was correct in finding employees who both attended and participated in the January 9 meetings engaged in union and protected concerted activity (D 14:2-41).

394:16, 437:12-438:3). No such concern existed here (D 5:32-34). In fact, there is no contention that, at the meetings on January 9, any customers' alarm devices or systems were at issue or accessed (TR 27:23-28-5, 155:19-156:6). Moreover, as the ALJ indicated, the January 9 meetings were only for technicians; no customers were present. (D 5:17-18). Therefore, its reasons for discharging Cuff and Mansour could not have been based on any actual property or management interests.

Even if Respondent could justify the rule, which it argues is lawful on exception, its application in this case does not trump the adverse impact on its employees' protected rights. For, recording § 7 conversations in the workplace remains a protected right when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present (D 14:2-41). *See also Whole Foods Markets, Inc.*, 363 NLRB No. 87; *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015). Since there is no business justification that can justify Respondent's invasion of its employees' § 7 rights in light of the Act and its policy, Respondent violated § 8(a)(1) by applying a rule to interfere with Cuff's and Mansour's protected activity.

III. THE ALJ CORRECTLY CONCLUDED THAT CUFF AND MANSOUR DID NOT LOSE THE ACT'S PROTECTION

As discussed above, the ALJ correctly concluded that both Cuff and Mansour were engaged in protected, concerted and union activity when they recorded the meetings on January 9, and they were each disciplined and discharged for conduct that is part of the *res gestae* of protected concerted activities. The ALJ also concluded that their conduct was not sufficiently egregious to remove it from the Act's protection or render them unfit for service (D 16:41-17:2). Respondent disagrees.

Respondent claims the ALJ inappropriately relies on *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) in coming to this conclusion. As an initial matter, where protected concerted activity is the basis for an employee's discipline, the normal *Wright Line* analysis is not required. *Chromalloy Gas Turbine Corp.*, 331 NLRB at 864. See also *Allied Aviation Fueling of Dallas, LP*, 347 NLRB 248, 254 n.2 (2006), *enfd.* 490 F.3d 374 (5th Cir. 2007) (“[t]he Board has consistently held that, where an employer admits that it discharged an employee for engaging in protected activity, a *Wright Line* analysis is inapplicable”). The ALJ properly recognized this and, instead, relied on *Desert Cab, Inc.*, 367 NLRB No. 87, slip op. at 1, n.1 (2019), for the framework to examine whether an employee has lost the Act's protection in the course of activity that is part of the *res gestae* of activity protected by Section 7 of the Act.

In that case, the Board held that the employee's private Facebook postings to his fellow drivers and other employees were not so egregious as to cause them to lose the protection of the Act, as the posts were a continuation of the drivers' ongoing complaints to improve work wage conditions, which were protected concerted activities. The Board considered that the posts were nonpublic, contained no profanity, and did not cause a loss of reputation or business for the Respondent; and there was no disruption of Respondent's business. See also *Dickens, Inc.*, 352 NLRB 667, 672 (2008); *Caval Tool Div., Chromalloy Gas Turbine Corp.*, 331 NLRB at 863; *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *Fitch Baking Co.*, 232 NLRB 772 (1977).

Moreover, as the ALJ recognized, the Board repeatedly held that employees who use electronic equipment to document what they perceive to be potential violations of employee statutory rights do not engage in conduct that is sufficiently egregious to

remove it from the Act's protection (D 15:13-20). See, e.g., *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (2011) (employee who made audio recording of disciplinary meeting to document perceived violation of *Weingarten* rights did not lose Act's protection), *enfd. sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1255-56 (D.C. Cir. 2012); *White Oak Manor*, 353 NLRB at 795 n.2 (employee photographing other employees without their permission to document employer's disparate enforcement of dress code policy did not lose Act's protection), *adopted and affirmed* 355 NLRB 1280 (2010), *enfd.* 452 Fed. Appx. 374 (4th Cir. 2011) (unpublished decision); *Opryland Hotel*, 323 NLRB 723, 723 n.3, 732-33 (1997) (employee who secretly recorded, during organizing campaign, conversations with supervisors about union and captive audience meeting did not engage in conduct that disqualified him from reinstatement under Board order). Cf. *Sullivan, Long & Hagerty*, 303 NLRB 1007 (1991), *enfd. mem.* 976 F.2d 743 (11th Cir. 1992).

In each case where the Board has made that determination, however, it has noted that the employer did not have a work rule prohibiting the disputed employee's conduct and that the conduct was not unlawful under state law. See *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1; *White Oak Manor*, 353 NLRB at 795, n.2; *Opryland Hotel*, 323 NLRB at 723 n.3, 732-33. Thus, Respondent asserts that, despite any protected conduct, based on its rule on recordings and Washington State's two-party consent law, Cuff and Mansour were lawfully disciplined (R Brf 7). Respondent's reasoning cannot withstand scrutiny.

In none of the cases cited above did the Board state that an employee necessarily loses the Act's protection by making a secret electronic recording at work when there is

either a work rule or state law prohibiting such conduct. Rather, the most logical reading of those cases is that, because no such prohibitions were present, there was no basis whatsoever for finding a loss of protection and the Board did not have to further analyze whether the employees' conduct remained protected. See, e.g., *Crowne Plaza LaGuardia*, 357 NLRB 1097 (2011) ("employees engaged in protected activity 'generally do not lose the protective mantle of the Act simply because their activity contravenes an employer's rules or policies'"); *Roadway Express*, 271 NLRB 1238, 1239 (1984) ("The presence or absence of a specific company rule is a factor in deciding whether an employee's conduct is protected by the Act, but it is not the controlling factor"). See also *E.R. Carpenter Co.*, 284 NLRB 273, 273 n.1 (1987) (rejecting employer's defense that employee lost Act's protection because state criminal statute made it illegal for him to place union literature on windshields of coworkers' parked cars; because employee was engaged in protected activity under § 7, preemption doctrine precluded application of state statute).

In the present case, the ALJ correctly decided that Cuff's and Mansour's actions in recording the captive audience meetings did not lose the protection of the Act in part because the nature of the conversations recorded did not fit the definition of "private conversation" based on the State courts' application of RCW 9.73.030 (D 16:21-17:2). In *Washington State v. Slemmer*, 48 Wn. App. 48, 52-53, 738 P.2d 281 (1987), the court held that there is no reasonable expectation of privacy in a conversation that takes place at a meeting where one who attended could reveal what transpired to others. State courts established a general principal of interpreting the phrase "private conversation" to mean "private" in the sense of a conversation in which the participants would not ordinarily

expect that they will be overheard or that the details of their conversation will be broadcast to the general public.⁹ *Id.* at 52-53. See also *Washington State v. Flora*, 68 Wn. App. 802, 845 P.2d 1355 (1992); *Washington State v. Bonilla*, 23 Wn. App. 869, 598 P.2d 783 (1979). As that Court has also found, the law does not apply to company meetings, as the meetings are not private. *Slemmer*, 48 Wn. App. at 52-53. Under these circumstances, not only were Respondent's meetings not "private," but all-party consent may not be possible given the group nature of the meeting. Accordingly, Respondent cannot avoid liability for its violation of § 8(a)(1) by invoking application of RCW 9.73.030.

Furthermore, the discriminatees' conduct was not disruptive or in any way a threat to Respondent's actual overriding interest (*i.e.*, security). As discussed earlier, not only is the record devoid of any evidence that the January 9 meetings covered topics such as proprietary concerns, security information, or customer information, but Respondent's own manager testified there was no such concern. Simply put, those matters were never actually raised or discussed (D 5:32-34).

Rather, as the ALJ noted, the recordings captured the discussions of workplace concerns and potential unlawful statements Respondent representatives made in an effort to garner employee support for the decertification effort (D 4:19-21, 4:34-41, 5:28-34). To the extent anyone felt "uncomfortable" about the recordings, such expressed concern is obviously disingenuous and unsupportable given that no personal information was ever shared during these meetings.¹⁰ Given these circumstances, Cuff's and

⁹ The *Slemmer* decision was cited with approval by the State Supreme Court in *Washington State v. Clark*, 129 Wn.2d 211 (1996), which came after that Court's decision in *Kandorian v. Bellingham Police Department*, 119 Wn.2d 178 (1992), wherein the *Webster's Third New International Dictionary* definition of "private" was adopted: "belonging to oneself, a secret message, not open to the public," etc.

¹⁰ Nick Rutter, the only employee who informed Respondent that he personally was uncomfortable about his own opinions about the Union being recorded, had expressed those opinions in a room full of people. (D 6:18-23, 6:32-34). As such, Cuff's recording and actions cannot rise to the level of "harassment" or

Mansour's recordings of the January 9 meetings did not cost them the protection of the Act, and their suspensions and discharges violated the Act as alleged.

IV. THE ALJ CORRECTLY CONCLUDED THAT CUFF AND MANSOUR DID NOT VIOLATE RESPONDENT'S POLICY BECAUSE THEY DID NOT VIOLATE THE REFERENCED STATE LAW

Respondent asserts that it was justified in discharging Cuff and Mansour based on its own interpretation of its policies and state law, and that a technical violation of its own policy was not required (R Brf 7). Respondent essentially posits it has free reign to implement its own policies on the premise of using its own "business judgment," regardless of however flawed and discriminatory it may be (R Brf 12). This is unsupportable because, even assuming Respondent believed that Cuff and Mansour were required to obtain consent before recording the January 9 meetings based on a superficial reading of RCW 9.73.030, it was clearly mistaken as to the application of this statute.

Apart from determining which rule exactly they were going to rely on, which Respondent has still not been able to articulate clearly (TR 79:7-9, 81:20-83-25, 202:6-8, TR 363:21-361:11, 506:14-512:10, 513:20-515:22, 514:6-9, 521:5-25), to support such a determination, it would have had to research and find precedent contrary to how Washington has interpreted the statute on recordings and specifically defines a "private" conversation. As set forth above, Washington courts have been clear that there is no reasonable expectation of privacy in a conversation that takes place at a meeting. See

"intimidation" as Respondent describes (R Brf 8-9), as Rutter conceded to sharing the same opinions openly with other employees even prior to the January 9 meeting as well as subsequently with thirteen other employees in a group email chain (TR 361:1-362:1, GCX 8). Interestingly, Rutter was promoted to manager a week before the unfair labor practice hearing (D 13:23-24). As such, his claimed "discomfort" is neither credible nor a sound basis for Respondent's assertion of harassment/intimidation.

Slemmer, 48 Wn. App. 48; *Washington State v. Clark*, 129 Wn.2d 211. Thus, Respondent can find no support for any claim of good faith reliance. *Ideal Dyeing & Finishing Co.*, 300 NLRB 303, 303 (1990) (“Protected activity . . . would lose some of its immunity if employers could (even in good faith) discharge employees on false charges, because the example of those discharges could have a deterrent effect on other employees.”), *enfd.* 965 F.2d 1167 (9th Cir. 1992) (unpublished table decision). As such the ALJ correctly found that the January 9 captive-audience meetings were not “private” communications and, therefore, not covered by Washington’s Privacy Act (D 16:37-39).

Respondent criticizes the ALJ as having conducted a “hyper-technical analysis” of Respondent’s policies (R Brf 11). Yet there was no hyper-technical analysis required in concluding that the Washington Privacy Act did not apply in the first place, as there was no expectation of privacy in the meetings that took place on the part of those who attended or Respondent. Respondent’s actors did not have any good faith reliance on the course of their conduct, as they had not actually ascertained what a violation was under the State law they were relying on.

Respondent’s own decision maker (Nixdorf) testified that, without having done any research, he thought the mere fact Washington’s law required dual-consent was sufficient basis for the discharges of Cuff and Mansour (D 12:3-13, 13:8-13). As the Director of Labor Relations and an attorney, what Nixdorf could have done but did not do, was to look up Washington’s definition of “private conversation” to determine if the statute even applied to Cuff and Mansour given that the meetings recorded took place in Respondent’s largest conference room at its Bothell location, with nearly 20 technicians in attendance. There was no announcement that this was a private meeting or that employees were

prohibited from taking notes. McDonough, too, testified that the act of recording the meeting was an issue because of the “potential violation of the law” (TR 395:22-25, 426:25-4). There was no evidence he researched the issue either. The ALJ considered the statute and case law interpreting it (D 15:41-16:39). That, in no way, constitutes a hyper-technical analysis.

The ALJ also appropriately concluded that, because Cuff and Mansour did not violate Washington State law, they could not have violated Respondent’s own policy. (D 16:41-43). Because a violation of Respondent’s No Recording policy is entirely predicated on a violation of State law, the ALJ was correct to conclude that neither Cuff nor Mansour violated Respondent’s policy on recordings (D 15:31-32, 16:42-43). Respondent’s contention that the ALJ erred in this regard (R Brf 5) fails because the entire basis for discharging Cuff and Mansour was the ostensible violation of Respondent’s policy on No Recording, a policy that was conditioned on a State law violation (D 15:28-32). No other reasons or interests were factored here.

Despite Respondent’s assertion, the ALJ made no reference to Nixdorf’s inquisition about a comparator, or lack thereof, as it related to Respondent’s “motives” in the analysis. In the facts, however, the record revealed and the ALJ accurately described Nixdorf’s pitiful attempt at finding a comparator in Rochester, New York, coupled with his failure to even find out enough to recognize the factual differences between the employees’ situation, much less the blatant distinctions between New York and Washington law on recordings (D 12:17-29). Such a draconian imposition of consequences for a first offense is also bizarre, in light of the fact that Respondent took no action when employee Jason Achberger admitted to carrying mace during the

February 16 investigation, which McDonough confirmed is against known company policy (TR 423:20-25, 424:20-425:5).

Notwithstanding, what the ALJ does point out in the facts and which the record supports, is that Nixdorf's stated basis for discharging Cuff and Mansour was incredible and unsupported by the record (D 13:8-13). In its April 23 position statement to the Region, which Nixdorf contributed to, Respondent asserted it "knows of no prior instances in which employees surreptitiously recorded meetings or any other events in its workplace. Cuff and Mansour are the only two employees who have engaged in such conduct." (D 12:31-35, GC Ex. 11).

In stark contrast to what Respondent represented to the Region at a time that was closer to the discharges, at hearing Nixdorf claimed there was a comparator termination for surreptitious recording in New York and yet admitted to only searching for such documentation prior to the hearing (D 12:24-29, TR 445:16-29, 468:2-13). Specifically, Nixdorf testified that, after receiving the interview summary from McDonough dated February 22, he had a conversation with Vice President of Human Resources Amelia Pullman about an employee out of its call center in Rochester, New York, which he learned had a one-party consent law (D 12.:17-21). However, Nixdorf did not bother to even ask about that employee's disciplinary history or request personnel documents, which would have revealed that there was a plethora of serious infractions, resulting in written warnings, even before discharge was recommended (D 12:24-26).

In contrast, Cuff was a nearly 20-year employee who had an impeccable performance record (TR 137:7-139:19). Mansour, likewise, had only a positive performance record; he was also on record having clearly stated to management and to

his fellow employees that he had trouble understanding the January 9 meeting due to a language barrier and his dyslexia (D 7:34-8:3, 10:25-28, TR 20:8-18). Rather than research whether Washington law warranted the discharge of two excellent employees, develop training for these employees who apparently had no knowledge of a rule on recordings, explore ways to address and accommodate Mansour's disability, or make a good faith examination of a potential comparator and request that employee's personnel records, Nixdorf stopped his investigation and moved immediately to discharge. He did not even know which rule he was enforcing; indeed, Respondent's explanation of what rule was actually violated changed throughout the course of the hearing. None of its witnesses could coherently articulate which policy was at issue-even when referencing to the "standards of conduct," it was confusing which portions were allegedly violated (TR 79:7-9, 81:20-83-25, 202:6-8, 506:14-512:10, 513:20-515:22, 514:6-9, 521:5-25).¹¹

Respondent is correct that Nixdorf's testimony about the New York situation is irrelevant, inasmuch as it was not factored as the basis for his decision to fire Cuff and Mansour (R Brf 4). It is relevant, however, for purposes of the ALJ's credibility determination on Nixdorf's testimony regarding that situation (D 12:39-13:6). The Board has held that "[a]n admission against interest may be used as evidence as well as to impeach and thus includes assertions made in position statements of counsel." *United Technologies Corp.*, 310 NLRB 1126, 1127 fn. 1 (1993), *enfd. mem. sub nom. NLRB v. Pratt & Whitney*, 29 F.3d 621 (2d Cir. 1994). *See also United Scrap Metal Inc.*, 344 NLRB 467, 468 n.5 (2005) (submission statements submitted by counsel are admissions against

¹¹ At the hearing, Respondent's counsel asserted that the bullet numbers 1, 5 and perhaps 2, were the portions that were the basis for Cuff's and Mansour's discipline and discharge (TR 363:21-361:11). Yet, Nixdorf distinctly testified that the portion of the policy violated was solely the sixth bullet point, on audio and video recordings of coworkers and managers.

interest by a party). The Board's policy is to receive such position statements and weigh any admissions against the interest of the client-party. *McKenzie Engineering Co.*, 326 NLRB 473, 485 fn. 6 (1998); *Optica Lee Borinquen*, 307 NLRB 705 n.6 (1992); *Massillon Community Hospital*, 282 NLRB 675 n.5 (1987); *American Postal Workers Union*, 266 NLRB 317, 319 n.4 (1983). Respondent's opinion that as a "policy" matter, using position statements at hearing, would disincentivize charged parties from cooperating, is simply that—Respondent's opinion and not the proposition espoused in the cited case, *Mercedes Benz of Orlando Park*, 333 NLRB 1017 at 1017, n.1 (2001) (finding no merit to the Respondent's contention that the judge committed reversible error by receiving into the record certain position statements which Respondent disavowed 4 days before the hearing). Thus, the ALJ's determinations as to Nixdorf's credibility are not properly subject to attack. *See also Standard Dry Wall Products*, 91 N.L.R.B. 544, 545 (1950), *enfd. by* 188 F.2d 362 (3d Cir. 1951) (making clear that while the "clear preponderance of the evidence" standard governs Board review of an administrative law judge's credibility determinations, that standard does not apply to a judge's factual findings or the judge's derivative inferences or legal conclusions).

V. CONCLUSION

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board affirm the Administrative Law Judge's Decision that Respondent violated §§ 8(a)(1) and (3) of the Act as alleged in the Complaint, and order Respondent to remedy the unfair labor practices alleged, including by posting the Notice to Employees contained in the Decision, as well as other such relief as may be necessary and appropriate to effectuate the policies and purposes of the Act (D 17:19-19:37).

DATED at Seattle, Washington, this 3rd day September 2019.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision was served on the 3rd day of September 2019, on the following parties:

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