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

Advice Memorandum

DATE: May 7, 2019

TO: David Cohen, Regional Director
Region 12

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

SUBJECT: ADC LTD NM
Cases 12-CA-225371 and 12-CA-230301

512-5012-0100
512-5012-0125
512-5012-6737
512-5036-6718

These cases were submitted for advice as to whether the Employer's confidentiality rules violate Section 8(a)(1) of the Act in light of the Board's decision in *Boeing Co.*,[1] and whether the Employer's discipline of an employee pursuant to these rules also violated Section 8(a)(1). We conclude that the portions of the rules prohibiting the disclosure of "[p]ersonnel employee information," information concerning "[e]mployee [i]nvestigations," and "[a]ny other information considered confidential by management" are unlawfully overbroad under current Board law and violate Section 8(a)(1) of the Act, but the discipline pursuant to these rules did not violate the Act because the employee was not engaged in protected concerted activity or activity that otherwise fell within the ambit of Section 7. Lastly, although the rule prohibiting disclosure of information concerning "[e]mployee [i]nvestigations" is currently unlawful under *Banner Estrella Medical Center*,[2] the Region should argue, consistent with the General Counsel's brief to the Board in *Apogee Retail LLC d/b/a Unique Thrift Store*,[3] that *Banner Estrella* should be overruled and that the rule is lawful under *Boeing*.

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[1] 365 NLRB No. 154 (Dec. 14, 2017).

[2] 362 NLRB 1108, 1110 (2015), *enforcement granted in part and remanded*, 851 F. 3d 35 (D.C. Cir. 2017).

[3] Cases 27-CA-191574 and 27-CA-198058, General Counsel's Brief to the Board filed Feb. 4, 2019.

FACTS

ADC LTD NM (the Employer) is a security contractor to the federal government, including the Federal Aviation Administration's San Juan Combined Center/Radar Approach Control (CERAP) facility. The Charging Party has been a security officer at that facility since 2011, when the facility had a contract with another security contractor, and has been represented by the Government Security Guards Association (the Union) since that time. The current Employer took over the operation on October 1, 2017 and had a collective-bargaining agreement with the Union which expired on September 20, 2018. The parties signed a new agreement on October 1, 2018, which is in effect through September 30, 2020. There are eight security officers in the bargaining unit.

On April 5, 2018, the Charging Party reported to work at 10:00 p.m. and did (b) (6), (b) rounds from 2:00 a.m. to approximately 2:20 a.m., and then took a half-hour break. During (b) (6), (b) break, at 2:31 a.m., an FAA employee who works in the San Juan CERAP (b) (6), (b) (7)(C) went to the Charging Party's security booth and explained to the Charging Party how to fix a problem the Charging Party had with (b) (6), (b) car's computer. The Charging party told another security officer, SO-1, that (b) (6), (b) was going to (b) (6), (b) vehicle for a moment with the FAA employee to check the car. The Charging Party returned to the security booth at 2:47 a.m. and finished (b) (6), (b) shift. Shortly afterward, SO-1 documented in an "Employee Grievance Complaint Form" that the Charging Party had left (b) (6), (b) post.

On (b) (6), (b) (7)(C), 2018, (b) (6), (b) (7)(C) told the Charging Party that (b) (6), had abandoned (b) (6), (b) (7 post by going to (b) (6), (b) (7 personal vehicle without being relieved from duty from 2:31 a.m. to 2:47 a.m. on April 5, 2018 and issued the Charging Party a five-day suspension. On about (b) (6), (b) (7)(C) 2018, the Employer's (b) (6), (b) (7)(C) called the Charging Party and told (b) (6), (b) that although (b) (6), (b) had briefly gone to (b) (6), (b) car without being relieved from (b) (6), (b) post, that action did not constitute post abandonment. Therefore, the Employer reimbursed the Charging Party for the wages lost during the five-day suspension and reduced the disciplinary action to a first warning.[4] The Charging Party returned to work on (b) (6), (b) (7)(C), 2018, without incident, after a brief discussion with (b) (6), (b) (7)(C).[5]

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[4] The written disciplinary action issued on (b) (6), (b) (7)(C) in lieu of the suspension.

[5] The Employer asserts that, during this discussion, (b) (6), (b) (7)(C) advised the Charging Party not to discuss the April 5 incident or investigation with anyone.

On (b) (6), (b) (7)(C) 2018, the Charging Party arrived at (b) (6), (b) post for (b) (6), (b) shift, and SO-1 and another security officer, SO-2, were present. The Charging Party told them that (b) (6), (b) suspension had been reduced to a warning. (b) (6), (b) then asked SO-1 why (b) (6), (b) didn't talk to (b) (6), (b) (7)(about the April 5 incident rather than reporting (b) (6), (b) (7)(accused SO-1 of trying to hurt (b) (6), (b) (7 since SO-1 began working at the job site; stated that the Coast Guard had let SO-1 go for being a bad co-worker; and called SO-1 a "rat."

On (b) (6), (b) (7)(C) 2018, the Employer gave the Charging Party a second warning for discussing the details of the Employer's investigation and the rescinded suspension with coworkers on (b) (6), (b) (7)(C) The discipline notice related the Employer's understanding of the facts of the Charging Party's conduct on (b) (6), (b) (7)(C) and stated:

> ADC encourages employees to discuss their concerns or issues to [sic] one another in hopes to resolve it in a professional manner. However as explained to you during the investigation on April 17, 2018, you were advised not to discuss the incident or details of the investigation with anyone. Not only did you discuss the details of the investigation with someone who wasn't even involved, but you retaliated against an Officer who did participate in the investigation by questioning (b) (6), (b) (7 and insulting (b) (6), (b) (7)(ADC is committed to ensuring that all individuals that participate in reporting alleged improper or wrongful activity is [sic] protected. Just as you would be protected in your right to report improper or wrongful activity.
>
> For your above mentioned violation, you are being issued a Second Disciplinary Action for the following Code of Conduct violation (s):
>
> #2-Using abusive or threatening language or the use of profanity towards any ADC employee, customer or the public.[6]
>
> #14-Unauthorized disclosure of confidential information.

The Employer's Policy and Procedures Manual includes a code of conduct, which contains rule #2, prohibiting use of abusive or threatening language or profanity, and rule #14, prohibiting the disclosure of confidential information. Section 9.15 of the Policy and Procedures manual defines confidential information as follows:

> The protection of confidential business information and trade secrets is vital to the interests and the success of ADC. Such confidential information includes, but is not limited to, the following examples:

[6] This is a lawful civililty rule that is not at issue in this case.

1. Customer Lists
2. Financial Information
3. Business and marketing strategies
4. Strategic plans
5. Security procedures
6. Internal control procedures
7. Surveillance procedures
8. Personnel employee information
9. Employee Investigations
10. Vendor Contracts
11. Computer Programs
12. Training Materials
13. Policy and Procedure manuals
14. Any other information considered confidential by management

The Employee handbook contains a substantially identical definition of confidential information, and further states that violations of the code of conduct "will result in disciplinary action, up to and including immediate termination."

ACTION

We conclude that the Employer's confidentiality rules are unlawfully overbroad to the extent they cover "[p]ersonnel employee information," information regarding "[e]mployee [i]nvestigations," and "[a]ny other information considered confidential by management," but that the Charging Party's discipline pursuant to these rules did not violate the Act because the Charging Party was neither engaged in protected concerted activity nor involved in activity which otherwise implicates rights under Section 7 of the Act. Although the Employer's rule prohibiting disclosure of information concerning employee investigations is currently unlawful under *Banner Estrella Medical Center,*[7] the Region should argue, consistent with the General Counsel's brief to the Board in *Apogee Retail LLC d/b/a Unique Thrift Store*, that *Banner Estrella* should be overruled and that the rule is lawful under *Boeing*.

[7] 362 NLRB at 1110.

A. THE EMPLOYER'S CONFIDENTIALITY RULES

In *Boeing*, the Board decided that where a facially-neutral employer work rule, if reasonably interpreted, would potentially interfere with Section 7 rights, the Board will balance the nature and extent of the rule's potential impact on Section 7 rights against the employer's legitimate business justifications associated with the rule.[8] The Board will conduct this evaluation "consistent with the Board's 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees."[9] In so doing, "the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)," and make "reasonable distinctions between or among different industries and work settings."[10] The Board will also account for particular events that might shed light on the purpose served by the rule or the impact of its maintenance on Section 7 rights.[11]

The *Boeing* Board also indicated that its balancing test will ultimately result in its ability to classify the various types of employer rules into three categories, thereby eliminating the need to conduct case-specific balancing as to certain types of rules so as to provide employers, employees, and unions with greater certainty in the future. The Board described the following categories:

- <u>*Category 1*</u> will include rules that the Board designates as *lawful* to maintain, either because: (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights and thus no balancing of rights and justifications is required; or (ii) even though the rule has a reasonable tendency to interfere with Section 7 rights, the potential adverse impact on those protected rights is outweighed by employer justifications associated with the rule. The Board included in this category rules requiring "harmonious relationships" in the workplace, rules requiring employees to uphold

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[8] *Boeing Co.*, 365 NLRB No. 154, slip op. at 2-3.

[9] *Id.*, slip op. at 3 (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)).

[10] *Id.*, slip op. at 15.

[11] *Id.*, slip op. at 16.

basic standards of "civility," and rules prohibiting cameras in the workplace.

• *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of Section 7 rights, and if so, whether any adverse impact on protected conduct is outweighed by legitimate business justifications.

• *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit Section 7 conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. The Board included as an example of a Category 3 rule one that prohibits employees from discussing wages and benefits with each other.[12]

Applying the *Boeing* test, three aspects of the Employer's confidentiality rules are facially unlawful.

1. The restriction on disclosing "[p]ersonnel employee information"

"Personnel employee information" would reasonably be read by employees to include employee contact information and other non-confidential employment-related information, and prohibiting disclosure of that information would significantly restrict employees from engaging in core Section 7 activities.[13] Indeed, "it is hard to fathom how *any* Section 7 activity can be conducted . . . without having employee-related information 'disclosed' or 'used' in some manner."[14] The rule contains no limiting context or language that makes clear that "[p]ersonnel employee information" does not include employee contact information or terms and conditions of employment. Thus, "[p]ersonnel employee information" is not defined anywhere else in the rule, the handbook, or the Policy and Procedures Manual, and there is nothing to indicate that it only encompasses information that is legitimately confidential, such

[12] *Id.*, slip op. at 3-4, 15.

[13] *See* Memorandum GC 18-04, at 17 (stating that confidentiality rules broadly encompassing "employee information" fall in Category 2); *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 15 (June 10, 2016) (Miscimarra, concurring) (arguing that rule restricting disclosure of "information concerning . . . employees" would affect conduct that is central to many or most types of Section 7 activity and was unlawful, even though majority relied on *Lutheran Heritage*, with which Miscimarra disagreed).

[14] *Id.* (Miscimarra, concurring).

as employees' sensitive personal information (e.g., medical or Social Security information) or private internal company documents containing employee personnel records.[15] While the Employer has a legitimate business interest in restricting disclosure of other types of information that it has defined as confidential—including customer lists, financial information, and marketing strategies—these items do not contextualize "[p]ersonnel employee information" so as to clarify that it does not restrict employees from sharing contact information or discussing wages, working conditions, or employment disputes. Moreover, the rule's prohibition on disclosing "any other information considered confidential by management" (which, as described below, is unlawfully overbroad) increases the likelihood that employees would reasonably interpret "[p]ersonnel employee information" to include Section 7-protected information.

Additionally, the Employer has not identified any business interests justifying the aspects of the rule that interfere with employees' Section 7 rights, and the Employer could easily tailor its definition of confidential information to accommodate both its business interests and employees' Section 7 rights. Accordingly, this rule violates Section 8(a)(1) of the Act.

2. The restriction on disclosing information about "Employee Investigations"

In a pre-*Boeing* case, *Banner Estrella Medical Center*,[16] the Board held that an employer may only restrict disclosure of employee investigations if it can demonstrate, on a case-by-case basis, objectively reasonable grounds for believing that the integrity of the particular investigation will be compromised without confidentiality. Therefore, because the Employer's rule is a blanket restriction on disclosure of information concerning employee investigations, it violates extant Board law. However, the General Counsel disagrees with the Board's holding in *Banner Estrella* because it fails to give appropriate weight to the shared employee and national interests furthered by the maintenance of confidentiality in the course of sensitive workplace investigations, and it elevates to a controlling status the comparatively slight and speculative Section 7 interests related to investigations

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[15] *Cf. Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 9 (Feb. 24, 2017) (Miscimarra, concurring) (arguing that rule requiring employees to protect "confidential personal employee information" was lawful because it listed as examples "social security numbers, identification numbers, passwords, bank account information and medical information"); *Roadway Express*, 271 NLRB 1238, 1239 (1984) (taking employer's private business records from limited-access office and giving it to union, in attempt to enforce collective-bargaining agreement's work-preservation clause, unprotected).

[16] 362 NLRB at 1110.

concerning sensitive matters.[17] The Region should argue, consistent with the General Counsel's brief to the Board in *Apogee Retail*, that the rule is a lawful category 1 rule under *Boeing*.

3. The restriction on disclosing "[a]ny other information considered confidential by management"

Because this rule conveys management's ability to designate *any* information it considers to be confidential on an ad hoc basis, employees would reasonably construe it as limitless and encompassing of Section 7 communications. Thus, while this kind of restriction undoubtedly encompasses much conduct that is unrelated to Section 7 activity, it also encompasses significant protected concerted or union activity, such as discussions about wages and other terms and conditions of employment. The legitimate business interests that the Employer seeks to advance by promulgating this kind of rule can be achieved with a narrower rule that prohibits specific types of business-related disclosures. Given that the impact on core Section 7 rights is significant, and that the Employer's legitimate interests can be served by a more clearly-defined rule, the Region should allege that this rule is unlawfully overbroad and that maintaining the rule violates Section 8(a)(1).

B. THE CHARGING PARTY'S SECOND WARNING WAS NOT UNLAWFUL.

Under *Continental Group, Inc.*,[18] an employer violates Section 8(a)(1) by imposing discipline pursuant to an unlawfully overbroad rule in two scenarios: (1) if the employee was engaged in protected conduct; or (2) if the employee was engaged in conduct that is not protected because it is not concerted but otherwise implicates the concerns underlying Section 7. However, an employer does not violate the Act by disciplining an employee for conduct "wholly distinct" from the concerns underlying Section 7, even if the discipline is imposed pursuant to an unlawfully overbroad rule.[19] For example, in *Continental Group*, the Board held that an employer did not violate the Act by disciplining an employee pursuant to an unlawfully overbroad "no

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[17] *See* General Counsel's brief to the Board in *Apogee Retail LLC d/b/a Unique Thrift Store*, at 2-3.

[18] *Continental Group, Inc.*, 357 NLRB 409, 412 (2011). (b) (5) [redacted]
(b) (5)
(b) (5)

[19] *Id.* at 412, 413.

access" policy because the conduct for which he was disciplined, sleeping on the employer's premises, was conduct "wholly distinct" from Section 7 concerns.[20]

Here, the stated grounds for the Charging Party's second warning were violations of rule #2 (using abusive or threatening language), which is a facially lawful civility rule,[21] and rule #14 (unauthorized disclosure of confidential information), which is facially unlawful, as discussed above, because the Employer's definition of "confidential information" includes the following overbroad examples: "[p]ersonnel employee information," "[e]mployee investigations" (overbroad under extant Board law), and "[a]ny other information considered confidential by management." Because the Employer has relied, in part, on overbroad rules to discipline the Charging Party, a *Continental Group* analysis is appropriate. However, as described below, we find that neither prong of *Continental Group* has been satisfied.

1. The Charging Party Did Not Engage in Concerted Activity.

An individual employee's conduct is concerted when it is "engaged in with or on the authority of other employees," or when the employee seeks "to initiate or to induce or to prepare for group action."[22] Regarding the latter, although other employees do not need to accept an individual's invitation to group action before the invitation itself is considered concerted,[23] there must at least be an invitation.[24]

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[20] *Id.* at 413. If the employee was disciplined for protected concerted activity or for conduct "implicating the concerns underlying the Act," the employer may successfully defend against the alleged violation only by showing that the employee's conduct interfered with the employee's work, the work of other employees, or the employer's operations. *Id.* at 412.

[21] *Boeing*, 365 NLRB No. 154, slip op. at 3-4, 15.

[22] *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), *cert. denied*, 487 U.S. 1205 (1988); *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 7 (Jan. 11, 2019) (to be concerted, the totality of the circumstances must support a reasonable inference that an employee was seeking to initiate, induce, or prepare for group action).

[23] *Whittaker Corp.*, 289 NLRB 933, 934 (1988), *affirmed in Alstate Maintenance*, 367 NLRB No. 68, slip op. at 4-5. *See also Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003) ("'the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection'" is "concerted as long as it is 'engaged in with the object of initiating or inducing . . . group action'") (quoting *Cibao Meat Products*, 338 NLRB 934 (2003), *enforced mem.*, 84 F. App'x 155 (2d Cir. 2004))).

[24] *See, e.g.*, *Alstate Maintenance*, 367 NLRB No. 68, slip op. at 7-8; *El Gran Combo*, 284 NLRB 1115, 1117 (1987), *enforced*, 853 F.2d 996 (1st Cir. 1988).

Here, the Charging Party's conduct was not concerted. There is no evidence of any group discussions amongst employees, or that any employees planned to take group action, regarding the Charging Party's discipline, the policy the Employer relied on in disciplining (b) (6), (b) (7)(or discipline in general. Nor did the Charging Party call for group action or request that other employees take any action to support the resolution of (b) (6), (b) discipline. And nothing that was discussed on (b) (6), (b) (7)(C) can be seen as a logical extension of prior group activity because there is no evidence of any prior group concerns regarding related issues.[25] In these circumstances, we conclude that the Charging Party's discussion with SO-1 and SO-2, during which the Charging Party explained that (b) (6), (b suspension had been reduced to a warning and expressed anger regarding SO-1's reporting (b) (6), (b) (7)(C was not concerted activity.[26]

We also conclude that the Charging Party's conduct was not "inherently concerted." The Board has held that certain categories of employee discussions are "inherently concerted," meaning that they are "protected regardless of whether they are engaged in with the express object of inducing group action."[27] Here, however, although the Charging Party conveyed to (b) (6), (b coworkers a personal history of (b) (6), (b) own discipline and job security, the employees did not "discuss" the discipline or the Employer's policy behind the discipline.[28] Thus, under current Board law, the Charging Party's conduct here cannot be considered inherently concerted.[29]

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[25] *Cf. Salisbury Hotel*, 283 NLRB 685 (1987) (an individual's call to the DOL to ask about new break policy was part of concerted effort to get employer to change the break policy because employees, including discriminatee, had previously complained about the policy amongst themselves); *Mike Yurosek & Son, Inc.,* 306 NLRB 1037, 1038-39 (1992) (finding four employees' individual decisions to refuse overtime work were logical outgrowth of concerns they expressed as a group over new scheduling policy), *supplemented by* 310 NLRB 831 (1993), *enforced*, 53 F.3d 261 (9th Cir. 1995).

[26] *See Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964) ("Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping'"); *Tampa Tribune*, 346 NLRB 369, 371-72 (2006) (employee who raised personal gripe about favoritism not engaged in protected concerted activity because he was speaking only for himself and there was no evidence that coworkers even shared his belief that favoritism existed).

[27] *Hoodview Vending Co.*, 362 NLRB 690, 690 n.1 (2015) (quoting *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 n.10 (2014)) (finding discussions regarding job security inherently concerted); *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992) (discussions of wages are inherently concerted), *enforced mem.*, 977 F.2d 582 (6th Cir. 1992); *Aroostook County Regional Ophthalmology Ctr.*, 317 NLRB 218, 220 (1995) (employee discussions of schedules are inherently concerted), *enforcement denied in relevant part*, 81 F.3d 209 (D.C. Cir. 1996).

[28] *Cf. Hoodview Vending Co.,* 359 NLRB 355, 357 (2012) ("Job security—whether and under what circumstances employees will be discharged or laid off, and with what procedural protections—concerns the very existence of the employment relationship

2. The Charging Party's Conduct Was Not for Mutual Aid or Protection and Did Not Otherwise Implicate Concerns Underlying Section 7.

We also conclude that the Employer did not violate the Act under the second prong of *Continental Group*, because the Charging Party's conduct was not for mutual aid or protection and did not otherwise implicate concerns underlying Section 7 of the Act. The focus of the "mutual aid or protection" inquiry is on the goal of the concerted activity, primarily whether the employee or employees involved are seeking to improve general terms and conditions of employment or otherwise improve their lot as employees[30] or whether the activity was in furtherance of a solely individual goal.[31] The second prong of *Continental Group* addresses not only conduct for mutual aid or protection but also conduct that "otherwise implicates the concerns underlying Section 7 of the Act."[32]

We conclude that the Charging Party's conduct was not for mutual aid or protection. Thus, on (b) (6), (b) (7)(C) the Charging Party confronted SO-1 for reporting to management that (b) (6), (had abandoned (b) (6), (b)(post. The Charging Party's sole purpose in engaging (b) (6), (b) (colleagues was to berate SO-1 for being a "rat" and a bad coworker, press SO-1 not to go to management with misconduct concerns in the future, and communicate to SO-1 and SO-2 that, despite SO-1's betrayal, the suspension had been reduced to a warning. The Charging Party did not act with the objective purpose of improving the "lot of employees."[33] We further conclude that the Charging Party's conduct did not otherwise touch the concerns animating Section 7. The Charging Party's comments reflected a personal vendetta against SO-1 regarding the Charging

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and, accordingly, any concerns about job security quickly ripple through, and resonate with, the work force."), *incorporated by reference in Hoodview Vending Co.*, 362 NLRB at 690.

[29] (b) (5)
(b) (5)

[30] *See, e.g.*, *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 152 (2014). (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

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

[32] *Continental Group, Inc.*, 357 NLRB at 412.

[33] *Fresh & Easy Neighborhood Market*, 361 NLRB at 152.

Party's discipline and had only a very attenuated connection with common terms and conditions of employment or any concerns underlying Section 7 of the Act. Indeed, the Charging Party's uncivil and offensive statements were "wholly distinct from activity that falls within the ambit of Section 7."[34]

Accordingly, the Region should issue complaint regarding the rules, absent settlement, and should dismiss the allegation regarding the Charging Party's discipline, absent withdrawal.

/s/
J.L.S

ADV.12-CA-22537.Response.ADC (b) (6), (b) (7)(C)

[34] *Continental Group, Inc.*, 357 NLRB at 412, 413. (b) (5)
(b) (5)