

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

## Advice Memorandum

DATE: May 8, 2014

TO: George P. Velastegui, Regional Director  
Region 32

Peter Sung Ohr, Regional Director  
Region 13

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

SUBJECT: Wal-Mart Stores, Inc.

Cases 32-CA-111715, 13-CA-114222, and  
13-CA-110452

506-6090-3200

512-5012-6787

512-5012-6787-3300

The Regions submitted these cases for advice as to whether the Employer has violated Section 8(a)(1) of the Act by maintaining a dress code policy that permits its employees to wear only “small, non-distracting” logos and graphics on their work attire and by implementing a so-called “blue hat rule” at one of its stores that prohibits employees from wearing hats bearing union insignia. The Regions also requested advice as to whether the Employer’s prohibition against “offensive” logos and graphics is unlawful.

We conclude that the Employer violated Section 8(a)(1) by maintaining a dress code policy that permits only “small, non-distracting” logos and graphics on employees’ work attire and by implementing its “blue hat rule” because the Employer has not presented substantial evidence of special circumstances that would justify limiting the Section 7 right of its employees to wear union insignia at work. We also conclude that employees would not reasonably construe the term “offensive” as it is used in the Employer’s dress code to chill their Section 7 right to wear logos and graphics pertaining to union or other employment-related issues.

## FACTS

The Employer's "Dress Code Guidelines" for hourly employees was revised in February 2013.<sup>1</sup> The introduction to the dress code states that, "[t]he purpose of this dress code is to provide the parameters for an atmosphere that is professional but at the same time relaxed." It further states that, "[o]ur emphasis is that each associate should be neat and clean and take pride in their appearance."<sup>2</sup> The dress code then provides guidelines pertaining to various subjects such as "Appearance" and "Clothing," as well as requirements for associates who work in certain departments, including fresh foods.

Generally, associates are permitted to wear shirts, with short or long sleeves, in blue or white, which do not have to be tucked in. They are also permitted to wear tan, brown, or black pants or skirts.<sup>3</sup> Logos from clothing manufacturers are permitted on any item of apparel as long as the logos are not larger than the associates' name tags, which measure two by three inches. Nevertheless, associates are not permitted to wear other types of logos and graphics unless they are "small" and "non-distracting." Associates are also prohibited from wearing logos and graphics that reflect inappropriate messages. In this regard, the dress code provides:

Wal-Mart logos of any size are permitted. Other **small, non-distracting** logos or graphics on shirts, hats, jackets or coats are also permitted, subject to the following: The logo or graphic must not reflect any form of violent, discriminatory, abusive, **offensive**, demeaning, or otherwise unprofessional messaging. (Emphasis added.)

In addition, another section of the Employer's dress code states that, "[h]ats may not be worn unless required by the work area, or for associates working outside."

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<sup>1</sup> The charge in Case 32-CA-111715 alleges that the Employer maintains an overly broad rule as a part of its California dress code. The charge in Case 13-CA-114222 alleges that the Employer maintains an overly broad rule as a part of its nationwide dress code. The nationwide dress code applies to all states except those, like California, that have state specific dress codes. Because the Employer's California and nationwide dress codes are substantially the same, we jointly refer to both when we reference the Employer's dress code.

<sup>2</sup> The Employer refers to its hourly employees as "associates."

<sup>3</sup> The Employer's California dress code policy permits black pants, but not its nationwide policy.

However, because state regulations typically require food-handling employees to cover their hair, the Employer requires associates who work in a fresh food department or in areas of food preparation to wear “[a] hair restraint, either a hat that meets policy guidelines (preferred) or a hair net, [which] must be worn at all times while preparing and working with unpackaged food.”<sup>4</sup>

In January 2012, when the Employer opened Store 5781 in Chicago, Illinois, the store manager instructed all employees working in a fresh foods department that if they chose to wear a hat, it must be solid blue or blue with a Wal-Mart logo. Store management communicated its “blue hat rule” to all new food handling associates during new hire orientation. This rule is not written down as part of any dress code that the Employer maintains.

### **ACTION**

We conclude that the Employer violated Section 8(a)(1) by maintaining a dress code policy that permits only “small, non-distracting” logos and graphics on employees’ work attire and by implementing its “blue hat rule” because the Employer has not presented substantial evidence of special circumstances that would justify limiting the Section 7 right of its employees to wear union insignia at work. We also conclude that employees would not reasonably construe the term “offensive” as it is used in the Employer’s dress code to chill their Section 7 right to wear logos and graphics pertaining to union or other employment-related issues.

#### **I. The Employer’s “Small, Non-Distracting” Restriction on the Display of Logos and Graphics and its “Blue Hat Rule” Violate Section 8(a)(1) Because the Rules Are Not Justified by Special Circumstances.**

Section 7 of the Act protects the right of employees to wear attire and insignia that address union and other employment-related issues while at work.<sup>5</sup> An employer may restrict such activity only by presenting substantial evidence of special

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<sup>4</sup> The Employer’s dress code is not clear as to what policy guidelines a hat must meet. The dress code generally prohibits clothing that has holes or ragged edges. It also prohibits do-rags and head caps. In addition, hats that are worn outdoors must be “in good condition.”

<sup>5</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945) (upholding right of employees to wear union buttons while on the job). *See also P.S.K. Supermarkets*, 349 NLRB 34, 34 (2007).

circumstances sufficiently important to outweigh Section 7's guarantees.<sup>6</sup> "The Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia. . . . Nor is the requirement that employees wear a uniform[.]"<sup>7</sup> Indeed, the Board recently has reiterated that "[a]n employer cannot avoid the 'special circumstances' test by simply requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia."<sup>8</sup> The Board will find special circumstances, however, in cases where the display of union insignia "unreasonably interfere[s] with a public image which the employer has established, as a part of its business plan" through strict dress code requirements for its employees.<sup>9</sup> Nevertheless, a work rule based on special circumstances must be narrowly drawn to restrict the wearing of union insignia only in areas or under circumstances that would justify the rule.<sup>10</sup>

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<sup>6</sup> *Eckerd's Market, Inc.*, 183 NLRB 337, 338 (1970) (finding the "vague general evidence" of customer complaints presented by the employer did not constitute substantial evidence of "special circumstances" warranting removal of the union buttons worn by its employees). *See also Albis Plastics*, 335 NLRB 923, 924 (2001) ("the Board and courts balance the employee's right to engage in union activities against the employer's right to maintain discipline or to achieve other legitimate business objectives"), *enforced*, 67 Fed. Appx. 253 (5th Cir. 2003).

<sup>7</sup> *P.S.K. Supermarkets*, 349 NLRB at 35.

<sup>8</sup> *World Color (USA) Corp.*, 360 NLRB No. 37, slip op. at 1, n.3 (2014) (quoting *Stabilus, Inc.*, 355 NLRB 836, 838 (2010) (referencing *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 515 (1993), and *Meijer, Inc.*, 318 NLRB 50, 56-57 (1995), *enforced*, 130 F.3d 1209, 1217 (6th Cir. 1997)).

<sup>9</sup> *Meijer, Inc.*, 318 NLRB at 50 (internal quotation marks omitted) (citing *United Parcel Service*, 312 NLRB 596, 597 (1993), *enforcement denied*, 41 F.3d 1068 (6th Cir. 1994)) (employer's ban on union pins unlawful where employer offered no evidence that pins interfered with company's public image and did not enforce its policy in a consistent and nondiscriminatory manner).

<sup>10</sup> *See, e.g., Albertsons, Inc.*, 272 NLRB 865, 866 (1984) (finding employer's prohibition on display of union buttons "unlawfully broad because it applies to nonselling as well as selling areas of the stores and applies to employee breaktime as well as time when employees are working"). *See also Eastern Omni Constructors, Inc.*, 324 NLRB 652, 652 n.2 (1997) (although employer had legitimate concerns about inflammatory decals some employees had been wearing on their hard hats, it could have promulgated a rule more narrowly drawn and that lawfully addressed the

**A. The Employer's requirement that logos and graphics be small and non-distracting violates Section 8(a)(1).**

As stated above, the Employer's restrictions on the types of logos and graphics its employees may wear to work may be valid if it is able to demonstrate, as a special circumstance, that the display of such insignia would unreasonably interfere with a public image it has established as part of its business plan. In *W San Diego*, for example, the Board held that the employer, a high-end hotel chain, could prohibit in-room delivery servers from wearing union-related buttons in public areas of the hotel in accordance with its strictly enforced dress code prohibiting all adornments on employee uniforms other than one small employer-approved pin.<sup>11</sup> The Board found that the employer had established special circumstances because it sought to provide a unique "Wonderland" experience to customers, of which the "trendy, distinct, and chic" look of its employees was a key component.<sup>12</sup> On the other hand, in *Davison-Paxon Co.*, the Board held that a high-fashion department store could not prohibit its employees, who worked on the sales floor, from wearing large, yellow union campaign buttons, approximately the size of a Kennedy half dollar, inscribed with large black letters.<sup>13</sup> The employer's general dress code did not require sales personnel to wear uniforms "but permitted [them] to wear their own personal choice of 'business like, fashionable attire.'"<sup>14</sup> In finding that the employer had failed to establish special circumstances justifying the prohibition, the Board specifically rejected the employer's contention that these buttons violated its dress code because they were large, gaudy and in bad taste.<sup>15</sup>

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problem rather than broadly proscribing the wearing of all non-company insignia), *enforcement denied*, 170 F.3d 418, 424-26 (4th Cir. 1999).

<sup>11</sup> 348 NLRB 372, 372-73 (2006).

<sup>12</sup> *Id.*

<sup>13</sup> 191 NLRB 58, 59 (1971), *enforcement denied*, 462 F.2d 364 (5th Cir. 1972).

<sup>14</sup> *Id.*, 191 NLRB at 60.

<sup>15</sup> *Id.* at 61 ("The fact of the matter is that the Kennedy half dollar is not 'large.'"). Although the Fifth Circuit denied enforcement of the Board's decision in *Davison-Paxon*, it did so based on factors not present in the current case. *See* 462 F.2d at 368-69. The court first noted that the employer there was a high-fashion department store that "liked the idea of its employees doubling both as customers and fashion models of [its] merchandise." *Id.* at 368. There was also evidence of tension between

We conclude that the Employer has not provided substantial evidence to establish the requisite special circumstances to justify the restrictions it has placed on its employees' statutory right to wear union attire and insignia at work. In contrast to cases where the requisite special circumstances have been found, the Employer does not supply its employees with a professionally designed uniform or even a specific item of clothing to wear at work, such as a smock, apron, or hat.<sup>16</sup> Nor are employees required to conform to a signature look that deprives them of any options for compliance. Rather, employees have a multitude of options by which to comply, including different types of clothing, in a variety of colors and styles. Thus, employees are permitted to wear a wide variety of shirts, including t-shirts, sweatshirts, polo-style shirts, or button-down shirts, with short or long sleeves, in blue or white. The Employer does not require that the shirts be tucked in. Associates are also permitted to wear tan, brown, or black pants, skirts, or skorts in a number of different styles, including cargos, capris, denim, and corduroy. Additionally, the Employer permits the logos of clothing manufacturers on any item of clothing and these logos can be as large as the employees' name tags, which measure two by three inches. Indeed, as the introduction to the dress code states, the Employer's "emphasis is that each associate be neat and clean and take pride in their appearance." When the Employer's dress code policy is considered as a whole, it is clear that the public image it seeks to create is not so tightly controlled that it would be endangered by the addition of larger union insignia that could be characterized as distracting.<sup>17</sup>

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pro- and anti-union factions at the employer's store and concern that a conflict might erupt on the sales floor if the employer permitted the larger union buttons. *Id.* at 369.

(b) (5)

<sup>16</sup> *Cf. W San Diego*, 348 NLRB at 372 & n.4 (finding special circumstances where employer "commission[ed] special uniforms for its public-contact employees" and spent considerable funds to purchase, clean, and replace those uniforms); *Con-Way Central Express*, 333 NLRB 1073, 1075-76 (2001) (finding special circumstances where "uniforms are supplied and cleaned by [employer]" to employees who have public contact; employer spent "1.5 million dollars on the cost, maintenance, and cleaning" of uniforms).

<sup>17</sup> *Cf. United Parcel Service*, 195 NLRB 441, 441 n.2, 443 (1972) (ban on large union campaign button upheld where the employer's "emphasis on a special appearance of the delivery vehicle and the uniform of its employees ha[d] been a consistent policy of UPS since at least 1930[.]" the neat appearance of its drivers was featured extensively in its marketing materials, and the employer spent approximately \$3,750,000 annually on the purchase, maintenance, and cleaning of employee uniforms).

The Employer defends the restrictions it has imposed by asserting that it seeks to provide a single, “branded public-image,” even though it allows some flexibility in its associates’ attire. It explains that its “modest limits” on union insignia comport with this flexible dress code, which is designed to foster its in-store public image. These generalized assertions are not, however, sufficient to establish special circumstances justifying the Employer’s restrictions on logos and graphics.<sup>18</sup> This case stands in sharp contrast to those in which special circumstances were found because it was clear that the employer, by supplying employees with uniforms or articles of clothing that created a signature look, had made appearance a key component of its business plan.<sup>19</sup> Because the Employer here relies on a “relaxed” dress code policy that emphasizes neatness and cleanliness rather than a specific look, it cannot show that larger logos or graphics would interfere with the public image it seeks to project. We accordingly conclude that the Employer has failed to establish special circumstances justifying its requirement that the logos and graphics worn by its employees must be small and non-distracting.<sup>20</sup>

Moreover, the Employer’s requirement that logos and graphics worn by employees must be small and non-distracting does not make a distinction between the public and non-public areas of its stores or between the times when employees are working or on break. In fact, the Employer maintains that there is no need to do so. The Board has long held, however, that a rule that fails to take such circumstances into consideration is unlawfully overbroad.<sup>21</sup> The Employer’s rule pertaining to logos and graphics similarly fails to make such distinctions; that is, it would apply to employees in non-selling areas of its stores, as well as to times when employees are on

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<sup>18</sup> See, e.g., *Eckerd’s Market, Inc.*, 183 NLRB at 338 (employer’s “vague general evidence” of customer complaints did not constitute substantial evidence of special circumstances).

<sup>19</sup> Cf., e.g., *W San Diego*, 348 NLRB at 373 (finding special circumstances where employer provided employees with identical, professionally designed uniforms to enhance its public image); *Con-Way Central Express*, 333 NLRB at 1075-76; *United Parcel Service*, 195 NLRB at 441 n.2, 449-50.

<sup>20</sup> Although the terms “small” and “non-distracting” may also be ambiguous or overbroad, it is unnecessary to resolve that issue here because such an allegation would not change the outcome of this case.

<sup>21</sup> See *Albertsons, Inc.*, 272 NLRB at 866; *Starbucks Coffee Co.*, 354 NLRB 876, 888 (2009), *affirmed and adopted*, 355 NLRB 636 (2010), *enforcement denied*, 679 F.3d 70, 78 (2d Cir. 2012).

break. The Employer cannot show any special circumstances to support such a restriction in those areas and during those times.<sup>22</sup> We therefore find that this aspect of the dress code also violates the Act.

**B. The Employer’s “blue hat rule” violates Section 8(a)(1).**

We also conclude, in agreement with the Region, that the “blue hat rule” that the Employer applies to employees working at Store 5781 in Chicago is unlawfully overbroad. This rule prohibits employees who work in a fresh foods department from wearing any hat other than a solid blue or blue Wal-Mart logo hat. According to the store manager who implemented the rule, he did so to present customers with a clearly identifiable store “brand” to increase their identification and affiliation with the store. Thus, the Employer effectively argues, as a special circumstance, that its blue hat rule is designed to promote its branded public image.

We find that the Employer is unable to establish that the display of union insignia on employee hats would unreasonably interfere with a public image established as part of its business plan. In fact, the Employer’s public image does not include a hat. Rather, the Employer’s dress code specifically *prohibits* employees from wearing hats unless, *inter alia*, they are required by the area in which they work. In addition, employees who work in a fresh foods department and are required to cover their hair are given the option of wearing a hair net *or* a hat. Because employees are either prohibited from wearing a hat or have options on how to comply with the dress code’s requirements for specific departments, there is no support for the Employer’s general assertion that the blue hat rule presents customers with a clearly identifiable store brand. As a result, the Employer cannot establish special circumstances justifying its rule prohibiting any hat other than a solid blue or blue Wal-Mart logo hat, particularly where the rule cannot be linked to a public image the Employer has established as part of its business plan.<sup>23</sup> Accordingly, because the

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<sup>22</sup> See *W San Diego*, 348 NLRB at 374 (although special circumstances permitted employer’s restrictions on display of union button in public areas of hotel, same concerns did not justify extending restrictions to nonpublic areas).

<sup>23</sup> Cf. *World Color (USA) Corp.*, 360 NLRB No. 37, slip op. at 8-9 (employer’s policy prohibiting employees from wearing any baseball cap other than a company provided cap unlawful where employer failed to offer substantial evidence that policy was justified by safety concerns; nor could policy be justified by employer’s concern with its public image where baseball caps were not required by its uniform policy and employees did not interact with its customers).

blue hat rule precludes employees from engaging in the protected activity of wearing a hat with union insignia, it is unlawfully overbroad.<sup>24</sup>

## **II. The Employer’s Prohibition on “Offensive” Logos and Graphics is Lawful.**

We additionally conclude that employees would not reasonably construe the term “offensive” as it is used in the Employer’s dress code to chill their Section 7 right to wear logos and graphics pertaining to union or other employment-related issues.

An employer violates Section 8(a)(1) through the maintenance of a work rule if that rule would “reasonably tend to chill employees in the exercise of their Section 7 rights” even in the absence of enforcement.<sup>25</sup> In other words, the “mere maintenance of an overbroad rule tends to inhibit employees who are considering engaging in legally protected activities by convincing them to refrain from doing so rather than risk discipline.”<sup>26</sup> The Board has developed a two-step inquiry to determine if a work rule would have such an effect.<sup>27</sup> First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will violate the Act only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.<sup>28</sup>

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<sup>24</sup> The cases that the Employer relies on to support the blue hat rule, *Produce Warehouse of Coram*, 329 NLRB 915, 918-19 (1999), and *Meijer, Inc.*, 318 NLRB at 57, can be readily distinguished. The companies in both of those cases had a precise uniform policy—which included a hat—that was strictly enforced. Moreover, the companies in those cases provided the hats and uniforms to their employees.

<sup>25</sup> *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

<sup>26</sup> *Continental Group*, 357 NLRB No. 39, slip op. at 3 (2011).

<sup>27</sup> *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004).

<sup>28</sup> The Regions did not find any evidence that the Employer’s dress code was promulgated in response to union or other protected activity. Nor is there any allegation that the Employer has applied the term “offensive” as it is used in this rule to restrict the exercise of Section 7 rights. Thus, the only question submitted for advice is whether the term “offensive” as it is used in this rule is unlawful under prong (1) of this test.

In determining whether employees would reasonably construe a work rule to prohibit Section 7 activity, the Board has cautioned against “reading particular phrases in isolation,”<sup>29</sup> and it will not find a violation simply because a rule could conceivably be read to restrict such activity.<sup>30</sup> Instead, the potentially unlawful phrases must be considered in the proper context.<sup>31</sup> Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.<sup>32</sup> In contrast, rules that clarify and restrict their scope by including

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<sup>29</sup> *Lutheran Heritage Village–Livonia*, 343 NLRB at 646.

<sup>30</sup> *See id.* at 647 (refusing to interpret rule prohibiting abusive or profane language to apply to Section 7 activity “simply because the rule could be interpreted that way”). *See also Palms Hotel & Casino*, 344 NLRB 1363, 1368 (2005) (“We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it.”).

<sup>31</sup> *Compare Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 3 (2012) (finding context of confidentiality rule did not remove employees’ reasonable impression that they would face termination if they discussed their wages with anyone outside the company), *enforced*, \_\_ F.3d \_\_, 2014 WL 1178698, at \*3-\*4 (5th Cir. 2014), *and The Roomstore*, 357 NLRB No. 143, slip op. at 1 n.3, 16–17 (2011) (finding employees would reasonably interpret employer’s “negativity” rule as applying to Section 7 activity in context of prior employer warnings linking “negativity” to employees’ protected discussion concerning their terms and conditions of employment), *with Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (finding lawful handbook provisions prohibiting employees from “abandoning [their] job by walking off the shift without permission of [their] supervisor or administrator”; in context of direct patient care, employees “would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday”), *vacated in part on other grounds*, 345 NLRB 1050 (2005), *reversed on other grounds sub nom. Johchims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

<sup>32</sup> *See Claremont Resort & Spa*, 344 NLRB 832, 832, 836 (2005) (rule proscribing “negative conversations” about managers that was contained in list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity).

examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.<sup>33</sup>

Here, the Employer's rule states that logos or graphics worn by its employees "must not reflect any form of violent, discriminatory, abusive, *offensive*, demeaning, or otherwise unprofessional messaging." (Emphasis added.) Read in context, it is clear that the purpose of the rule is to prohibit egregious types of messages that are not inherently entwined with Section 7 activity.<sup>34</sup> Consistent with this context, employees reading the rule would not reasonably construe it to restrict their statutory right to wear logos and graphics pertaining to union or other employment-related issues. We therefore agree that this aspect of the Employer's dress code is not unlawful.

In sum, based on the foregoing analysis, we conclude that the Regions should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining an overly broad dress code policy requiring that logos and graphics worn by its employees be small and non-distracting and that hats worn by employees at Store 5781 be solid blue or a blue Wal-Mart logo hat. We also conclude that the charge allegation regarding the prohibition on "offensive" logos and graphics should be dismissed, absent withdrawal.

/s/  
B.J.K.

ADV.32-CA-111715.Response.WalmartDressCode2 (b) (6), (b) (7)

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<sup>33</sup> See *Tradesmen Intl.*, 338 NLRB 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity); *Sears Holdings (Roebucks)*, Case 18-CA-19081, Advice Memorandum dated December 4, 2009 (employees would not reasonably construe reference to "disparagement" made in context of prohibition against serious misconduct, such as use of obscenity, illegal drugs, and discriminatory language, to prohibit Section 7 activity).

<sup>34</sup> See, e.g., *Palms Hotel & Casino*, 344 NLRB at 1367-68 (upholding rule that banned "injurious, offensive, threatening, intimidating, [and] coercing" conduct because it was aimed at ensuring "civility and decorum" in the workplace and did not refer to conduct that is an inherent aspect of Section 7 activity).