UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE KROGER CO. OF MICHIGAN,

and **Case No. 07–CA–098566**

ANITA GRANGER, an Individual.

Counsel:

Darlene Haas-Awada, Esq. (NLRB Region 7)
of Detroit, Michigan, for the General Counsel

Terrence J. Miglio, Esq. and
Barbara E. Buchanan, Esq. (Keller Thoma, P.C.)
of Detroit, Michigan, for the Respondent

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves the government's facial challenge to an employer's online communications policy. The government contends that portions of the policy, including a revised version, are overbroad and would have a reasonable tendency to chill employee conduct protected by the National Labor Relations Act. As discussed herein, I agree with the government's allegations in all significant respects. In reaching this conclusion I reject the employer's partial statute of limitations defense. I also reject the relevance of its claim that a National Labor Relations Board Regional Director, in the past, in another case, settled an unfair labor practice allegation by permitting maintenance of an online communication policy similar to that at issue here.

STATEMENT OF THE CASE

On February 15, 2013, Anita Granger (Granger) filed an unfair labor practice charge alleging violations of the National Labor Relations Act (Act) by the Kroger Co. of Michigan (Kroger), docketed by Region 7 of the National Labor Relations Board (Board) as Case 07–CA–098566. The charge was amended on May 3, July 26, and August 28, 2013. Based on an investigation into the charge, on August 30, 2013, the Board's General Counsel, by the Regional Director for Region 7 of the Board, issued a complaint alleging that Kroger promulgated and maintained unlawfully broad work policies and unlawfully discharged Granger in violation of the Act. Kroger filed an answer and amended answer denying all alleged violations of the Act.

Prior to the opening of the hearing in this matter on January 27, 2014, the Regional Director for Region 7, acting on behalf of the General Counsel, approved a request by Granger to partially withdraw her charge and ordered dismissal of the complaint allegations alleging her unlawful discharge. A hearing was conducted on the remaining allegations of the complaint on January 27, 2014, in Detroit, Michigan. Counsel for the General Counsel and counsel for the Respondent filed posthearing briefs in support of their positions by March 3, 2014. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

Kroger is engaged in the operation of retail grocery stores, with places of business throughout Michigan including a store in Flint, Michigan. In conducting its operations during the calendar year ending December 31, 2012, Kroger derived gross revenues in excess of $500,000 and purchased and received at its places of business within the State of Michigan goods valued in excess of $5,000 directly from points outside the State of Michigan. At all material times, Kroger has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

As of February 2011, Kroger maintained an online communication policy for employees that stated the following:

ONLINE COMMUNICATIONS POLICY

> The Company recognizes that online communications (such as social networking sites, personal websites, podcasts, videos, or blogs) are increasingly becoming a part of everyday life and are important to many of our associates.
>
> Likewise, online sources can influence the public's impressions of the Company. When associates identify themselves as members of the Company and engage in inappropriate online communications, they can have a negative effect on the Company. Therefore, the Company has a policy on online communications.
>
> You are responsible for the content you publish and the online spaces you manage.

If you identify yourself as an associate of the Company and publish any work-related information online, you must use this disclaimer: "The postings on this site are my own and don't necessarily represent the positions, strategies or opinions of The Kroger Co. family of stores."

You must comply with copyright, fair use and financial disclosure laws, and you must not use without permission or compromise in any way the Company's intellectual property assets (like copyrights, trademarks, patents or trade secrets– including, for example, Kroger or banner logos, or trade names of products, or non-public information about the Company's business processes, customers or vendors).

Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. Do not comment on rumors, speculation or personnel matters.

The Company's other policies and rules of conduct (including, but not limited to, its policy on business ethics, its intellectual property policy and its anti-discrimination and anti-harassment policies) apply to all publications of any kind that relate in any way to the Company or to your work with the Company. When online, do not engage in behavior that would be inappropriate at work and that will reflect a negative or inaccurate depiction of our Company.

The Company recognizes the value online media can have. If you would like to create or propose a site or other online communications medium for or in the interest of Company business purposes (including, for example, marketing, communications or other legitimate purposes), you must have approval from the Company before initiating or launching it. Speak with your supervisor or other leaders from your management team about the approval process.

Please be advised that the Company has the right to monitor online activity, including sites or communications external to the Company, that may have an effect upon the Company.

As with all Company policies, violations of the terms of this policy can result in disciplinary action up to and including termination of employment.

The above-quoted online communication policy is found in the Kroger "Employee Handbook," at page 31-32 (It is also found in the substantially identical employee handbook used by Kroger in stores that were previously New Market stores and later acquired by Kroger.) This handbook is distributed to all new employees.

On or about August 24, 2011, store managers (including associate store managers and co-managers) received an email from Kroger headquarters attaching an updated online communications policy with a date on the updated policy of June 24, 2011. The email stated that "[p]olicy copies dated prior to 6/24/11 should be discarded." The email instructed the managers

to review the new policy and then post it on the communication boards in their stores. The revised June 24, 2011 policy[1] stated:

The Kroger Co.
Online Communications Policy

Philosophy:
The Kroger Co. and its family of companies operates in a highly competitive. increasingly complex and ever-changing business environment. Our Customer 1st strategy requires that we respond differently to the ever-changing wants and needs our customers. Everything we do must align and support that strategy. One critical element for the success of our Customer 1st strategy is our ability to attract and retain the best and most qualified associates.

The company recognizes that online communications (such as social networking sites, personal websites, podcasts, videos, or blogs) are increasingly becoming a part of everyday life and are important to many associates.

Likewise, online sources can influence the public's impressions of the Company. When associates identify themselves as members of the Company and engage in inappropriate online communications, they can have a negative effect on the Company. Therefore, the Company has a policy on online communications.

Scope:
This policy applies to all associates of The Kroger Co and its family of companies.

Effective Date:
This Policy is effective immediately and supersedes all prior policies regarding this subject matter. However, this policy does not supersede any collective bargaining agreements, or legal obligations.

Policy Owner:
Associates should direct questions concerning this policy to a member of management. The member of management should direct questions to their Division Human Resources Department. The Division Human Resources Department should direct questions to The Kroger Co. Manager, HR Policy and Administration.

Statement of Policy:
You are responsible for the content you publish and the online spaces you manage.

[1]Throughout this decision I refer to and identify this version of the policy as the June 24, 2011 (or June 2011) policy. That is the date listed on it. However, I note that there is no dispute that it was not unveiled to employees until August 2011.

If you identify yourself as an associate of the Company and publish any work-related information online, you must use this disclaimer: "The postings on this site are my own and do not necessarily represent the positions, strategies or opinions of The Kroger Co. family of stores."

You must comply with copyright, fair use and financial disclosure laws, and you must not use without permission or compromise in any way the Company's intellectual property assets (like copyrights, trademarks, patents or trade secrets - including, for example, Kroger or banner logos, or trade names of products, or non-public information about the Company's business processes, customers or vendors).

Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. Do not comment on rumors or speculation related to the Company's business plans.

The Company's other policies and rules of conduct (including, but not limited to, its policy on business ethics, its intellectual property policy and its anti-discrimination and anti-harassment policies) apply to all publications of any kind that relate in any way to the Company or to your work with the Company. When online, do not engage in behavior that would be inappropriate at work–including, but not limited to, disparagement of the Company's (or competitors') products, services, executive leadership, employees, strategy and business prospects.

The company recognizes the value online media can have. If you would like to create or propose a site or other online communications medium for or in the interest of Company business purposes including, for example, marketing, communications or other legitimate purpose), you must have approval from the company before initiating of launching it. Speak with your supervisor or other leaders from your management team about the approval process.

Please be advised that the Company has the right to monitor online activity, including sites or communications external to the Company that may have an effect upon the Company.

Violation of this Policy:
As with all Company policies, violations of the terms of this policy can result in disciplinary action up to and including termination of employment.

Kroger followed its regular procedures for promulgating the updated policy. Flint store Manager Kimberly Francis testified that in addition to posting new policies on communication boards, she would post new policies by the employee time clocks. The communications boards had a designated and prominent place on them (by the weekly work schedules) for the posting of new policies.

In addition to the store manager, the human resources coordinator, who has responsibility for stores in a region of the state, is responsible for ensuring that the stores post policy revisions. Scott Bell, the human resources coordinator for the Flint, Saginaw, Bay City region, testified that he had responsibility for 20 stores.

In addition to the email and posting, the revised policy was available to Kroger's employees through computers (available at the stores) on the Employer's internal "intranet" site. The human resources coordinator or labor manager would update the intranet site to add revised policies. Paper copies of the intranet screen sites were introduced into evidence (R. Ex. 5) showing the list of policies under a human resources tab. The page showed a PDF file of each policy and its title. The online communication policy showed that it had been "revised 6/24/11" alerting a reader of the site that the file contained a change to the policy.

New employees receive information and access to the intranet as part of their orientation. However, all new employees also continue to receive the employee handbooks upon their hire, which contain the February 2011 online communications policy. The employee handbooks continued to be distributed, at least to all new employees, and perhaps more generally (see Tr. 42, 48, 91–92), even after August 2011. These handbooks are less frequently updated, perhaps every "couple of years," and therefore may contain superseded policies, the newer versions of which are found on the intranet or posted on the communications board.

The employee handbook states (page 28) that employees are to consult the communication boards before each shift in order to apprise themselves of any information—presumably including revised policies—that affect their job.

On December 16, 2012, an employee, Anita Granger, received a "construction advice record"—essentially a written disciplinary warning—for "[d]isregard of established rule well known to the employee and "[v]iolation of online policy." According to the warning:

> Anita violated the online communication policy which states "**When online, do not engage in behavior that would be inappropriate at work and that will reflect negative or inaccurate depiction o[n] our Company."** Anita violated this posting on Face Book about the Kroger Company.

This language is found in the February 2011 online communications policy (found in the employee handbook) but is not found in the June 24, 2011 online communications revised policy. Bell testified that it was a mistake to rely on the February 2011 online communication policy when he wrote up the warning for Granger in December 2012.

A second Kroger disciplinary action from December 2012 was introduced into evidence, this one involving the suspension of an employee for numerous offenses including violating "Page 31 & 32 of the employer handbook. Violation of the on-line communication policy." Again, this evidences that the employee handbook version of the online communication policy was relied upon as a basis for discipline in December 2012.

Analysis

The General Counsel alleges that the Respondent has been in violation of Section 8(a)(1) of the Act by maintaining its February and June 2011 versions of the online communications policy. Cognizant of the Act's statute of limitations, and the fact that the charge in this case was first filed on February 15, 2013, the General Counsel confines his allegations to the claim that the online communication policy has been unlawfully maintained since August 16, 2012. Specifically, the General Counsel challenges five specific portions of Kroger's online communications policy and alleges that they constitute unlawful overbroad limitations on the right of employees to communicate regarding activities protected by the Act. Kroger contends that neither its February 2011 policy nor its revised June 2011 policy violate the Act.

In addition, Kroger contends that the claims against the February 2011 policy are barred by the statute of limitations, as it claims that the February 2011 policy was replaced and no longer in effect nearly 18 months before the charge in this case was filed. The General Counsel alleges, however, that the February 2011 version of the policy remained in effect at all times, even after implementation of the June 2011 policy, and that both versions were maintained through the date of the hearing in this matter.

Finally, Kroger renews an argument I rejected at trial regarding the relevance of evidence of a Regional Director's 2011 settlement of another unfair labor practice case, involving a similar online communications policy.

Herein, I consider all of these matters.

A. Background precedent

The cornerstone of the Act is Section 7, which provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities."

A core activity protected by Section 7 is the right of employees to discuss, debate, and communicate with each other regarding their workplace terms and conditions of employment. "This guarantee [of Section 7 rights] includes both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542 (1972). This is because "[Section 7 organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights." Id. at 543 (internal citations omitted).

"In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights." *Hyundai American Shipping Agency*, 357 NLRB No. 80, slip op. at 2 (2011); *Lafayette*

Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). "Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." *Lafayette Park Hotel*, supra.

If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage*, 343 NLRB 646, 646 (2004). If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

In the instant case, there is neither evidence nor allegation that the challenged portions of the online communications policy were promulgated in response to union activity. Further, the complaint does not allege that the policy has been discriminatorily applied. Rather, in this case the claim is that the online communications policy—both the February 2011 version and the revision dated June 24, 2011—reasonably tend to chill employees in the exercise of their rights under Section 7.

In making this determination, the Board follows certain guides in its decision making that are pertinent here. "As the mere maintenance of the rule itself serves to inhibit the employees engaging in otherwise protected organizational activity, the finding of a violation is not precluded by the absence of specific evidence that the rule was invoked as any particular date against any particular employee." *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970), enfd. 450 F.2d 942 (5th Cir. 1971). However, "[I]n determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage*, supra at 846, citing *Lafayette Park Hotel*, 326 NLRB at 827. Finally, when a rule is ambiguous, "[e]ven if the Respondent . . . did not intend the rule to extend to protected communications, [if] that intent was not sufficiently communicated to the employees" then "[i]t is settled that ambiguity in a rule must be construed against the respondent-employer as the promulgator of the rule." *DirectTV*, 359 NLRB No. 54, slip op. at 2 (2013), citing *Lafayette Park Hotel*, supra at 828 (even if rule not intended to reach protected conduct, its lawful intent must be "clearly communicated to the employees"); *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2 (2012) ("Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it").

B. The specific provisions of the policy challenged by the General Counsel

The General Counsel contends that the following provisions of the online communications policy, in context, are unlawful under the above-standards. Unless otherwise noted, the objected-to provisions are identical in the February and June 2011 versions of the policy.

1. Provision requiring employees to use a specified disclaimer if they identify themselves as an associate of the Employer

If you identify yourself as an associate of the Company and publish any work-related information online, you must use this disclaimer: "The postings on this site are my own and do not necessarily represent the postings, strategies or opinions of The Kroger Co. family of stores."

To restate: this provision requires an employee who, while involved in online communications, identifies him/herself as a Kroger employee and, in addition, "publishes" online "work-related" information, to post a prescribed disclaimer.

In considering the lawfulness of this rule under the Act, I think it helpful to set forth some preliminary conclusions.

First, in the context of "online communications," the word "publish" will reasonably be understood to apply broadly to any online postings or statements conveying "work-related information."

Second, there is no question but that this rule implicates much Section 7 activity. While not all "work-related information" is potentially protected by Section 7, a great deal of it is.

Third, the breadth of the rule is such that we are considering a rule that covers employees who are posting online using their own computers and networks, while off-work, and at a home. In other words, this is not a *Register-Guard* case.[2]

Fourth, and unlike many employer rules that the Board is called upon to evaluate, this one does not flatly prohibit any Section 7 communications, or, indeed, any communications at all. Instead, what it does is burden certain online statements—including those that are and those that are not protected by Section 7—with the obligation to state the disclaimer in conjunction with the posting of any matters covered by the rule.

Fifth, it is to be acknowledged that an employer has a legitimate interest in stopping unauthorized employees from speaking on behalf of the company, and indeed, from being perceived to have spoken on behalf of the company. At the same time, it is also true that much of the communications covered by this rule reasonably could never be confused for employer-sanctioned speech. As discussed below, in evaluating this rule one must consider with a clear eye what the risk is that, in the absence of a disclaimer, employee section 7 activity will be mistaken for speech on behalf of the employer. Of course, requiring a disclaimer is easier for the employer, no doubt, but problematic under the Act if (and only if) the disclaimer is likely to chill legitimate and protected employee speech, and is not justifiable based on the employer's legitimate interest.

The ultimate issue, then, is whether requiring a disclaimer for every posting by an individual identified as a Kroger employee that conveys "work-related" information unduly burdens legitimate Section 7 communication to an extent that would be likely to chill employees willingness to engage in it. After all, Section 7 communication is not only protected but valued by

[2]See *Register-Guard*, 351 NLRB 1110 (2007) (holding that employees have no statutory right to use employer's email system for Section 7 purposes when ban on such use nondiscriminatorily maintained and applied), enfd. in part, denied in part, 571 F.3d 53 (D.C. Cir. 2009).

the Act. If a rule does not prohibit activities protected by Section 7, but, rather, unduly burdens them to the extent that employees protected activity is chilled, that represents an offense to the Act as surely as an overbroad prohibition. Of course, employees' section 7 rights are not boundless. Whether a burdening of Section 7 rights is undue is based on a calculation that reflects a balancing of the employees' section 7 rights with any legitimate interest the employer has in the burdening of those rights.

In considering the lawfulness of the disclaimer rule, the first point to be made is that the burdensomeness of the disclaimer should not be underestimated: it is reasonably read to apply to any communication posted to a group, or the public. It would include an online comment made in response to a news article, on Facebook, blogs—examples are endless. Each time an employee spoke about workplace conditions in any capacity that would reveal or suggest themselves to be an employee of Kroger—and speaking firsthand about workplace conditions by itself suggests affiliation with the employer—the disclaimer would have to be repeated. Indeed, if an employee indicated approval for another person's comment about Kroger's working conditions on Facebook by "liking" the comment, the rule could be understood to require the posting of a disclaimer (although it is hard to imagine how that could be accomplished).[3]

Given the breadth of online communications to which the rule applies, it would be extremely burdensome to have to post the disclaimer in each instance, or on each new page, and this would have a reasonable tendency to chill Section 7 activity in this regard.

Moreover, the insistence that every employee comment on Kroger's workplace be accompanied by the disclaimer poses more subtle risks of chilling effects. It is an implicit reminder of the involvement and insertion of the employer into every work-related online comment or discussion engaged in by the employee. It denies the employee the right to speak publicly about Kroger's workplace with others without the intrusive demand by the employer that it may force its disclaimer upon the discussion. And finally, there is the implicit but unavoidable specter of enforcement: if the disclaimer is mandatory, how will its use be monitored and enforced by the employer? Not all online communications are public, but they are all subject to monitoring with and sometimes without the knowledge of the individuals engaged in discussion. This prospect, which is implicit in a rule such as this, cannot but have a tendency to chill Section 7 speech, just as would an employer that threatened to check union meetings and gatherings to see if disclaimer rules are being complied with in that setting.

On the other side of the balance, one must consider the justification for Kroger's rule. In fact, Kroger has not offered any, but it is fairly obvious, and, as referenced above, I accept, that Kroger has a legitimate interest in employees not appearing to or actually speaking for or on behalf of Kroger. This is a legitimate interest of Kroger's and an interest Kroger has with regard to employees' online and offline communications. Indeed, it may be assumed that employees do not have a legitimate Section 7 right to speak without authorization *on behalf* of their employer.

However, Kroger's disclaimer rule is manifestly broader than its legitimate interest. It seeks to protect Kroger's interest by requiring the imposition of a disclaimer on every identifiably-employee communication conveying work-related information. This goes far beyond any legitimate interest of the Employer, much less any legitimate balancing of the Employer's interest

[3]See, *Foxwoods Resort Casino*, 356 NLRB No. 111 (2011) (employer contends that comments attributable to union because union representative indicated approval of comments by "liking" the comment).

with employee Section 7 rights. It simply has not been demonstrated, is highly counterintuitive, and defies common sense, that any Kroger employee discussions about Kroger "work related information"—online or in the line at the post office—will be likely to be misconstrued as a statement of Kroger's.

As the General Counsel has recognized in related circumstances, the appropriate analogy for online communications is the water cooler at work—not a company-issued press release. Simply put, unless an employee is actively seeking to give the appearance of speaking on behalf of an employer—it is unlikely in the extreme that an employee's online communications and postings will be mistaken for an authorized communication of the employer.

Resolution of this issue follows from the premise that online protected communication engaged in by an employee is entitled to the same protection, and may be engaged in with the same informality, frequency, and with no more burdensomeness imposed requirements as to identification, as any other traditional written, oral, or in-person communication. The adherence to this principle cannot be overstated nor its importance underestimated.

An ever increasing amount of social, political, and personal communication, increasingly by people of all ages, takes place online. This is no less true for work-related and Section 7 communication than it is for every other type of communication between people. Surely there are very few workplaces in the country where a significant amount of whatever Section 7-protected activity that exists, is not happening online between employees. Certainly, the online world is a locus of employee union (and anti-union) campaigning. In this regard, employer prohibitions, restrictions, and burdens on Section 7 online speech can be no more limiting than that of traditional written and oral speech. A rule that required Kroger employees, who are identified as such, to mouth a disclaimer whenever they conversed with others about "work-related information," while standing on a street corner, picket line, in church, in a union meeting, or in their home, would never—ever—withstand scrutiny. As with traditional, in-person communication, this required online disclaimer has no significant legitimate justification and is, indeed, burdensome to the point that it would have a tendency to chill legitimate section 7 speech.

A contrary conception of online communications and indeed, public communications, as a rare, formal, carefully prepared, and nonpersonal form of communication is significantly outdated. And as today's young workers become an ever increasing percentage of the workforce this outdated conception of online communications will become positively archaic, if it is not already so.

For this reason, the requirement that a disclaimer be posted by the employee every time he or she speaks on work related issues and is identifiable as an employee of the employer, is unduly burdensome, well beyond any legitimate interest of the employer, and will have a tendency to chill legitimate Section 7 speech by the burden it brings to it. The Respondent's rule impinges on Section 7 activity beyond any reasonable accommodation with any legitimate concern.

I note that the issue appears to be one of first impression. The General Counsel cites not a single case in support of finding this provision a violation of the Act. For its part, the Respondent also cites no applicable precedent in support of its position that such a disclaimer is lawful. It relies upon *Dish Network Corp.*, 359 NLRB No. 108 (2013), but that case is inapposite. Kroger asserts that the rule at issue in *Dish Network* contained a provision similar to the disclaimer language at issue here. If it did, it was not mentioned in the decision and not alleged

by the General Counsel to be unlawful. The Respondent also cites a General Counsel Operations Management Memorandum, OM-12-59 (May 30, 2012), which is a report from the then Acting General regarding his review of several social media rules cases that had been filed. One of the cases considered in OM 12-59 involved a social media policy that included the following:

> When the company wishes to communicate publicly---whether to the marketplace or to the general public---it has a well-established means to do so. Only those officially designated by [Employer] have the authorization to speak on behalf of the company through such media. We recognize the increasing prevalence of Social Media in everyone's daily lives. Whether or not you choose to create or participate in them is your decision. You are accountable for any publication or posting if you identify yourself, or you are easily identifiable, as working for or representing [Employer].
>
> You need to be familiar with all [Employer] policies involving confidential or proprietary information or information found in this Employee Handbook and others available on Starbase. Any comments directly or indirectly relating to [Employer] must include the following disclaimer: 'The postings on this site are my own and do not represent [Employer's] positions, strategies or opinions.' [OM 12-59 at 16.]

With regard to this provision, the General Counsel's office:

> concluded that the requirement that employees must expressly state that their postings are "my own and do not represent [Employer's] positions, strategies or opinions" is not unlawful. An employer has a legitimate need for a disclaimer to protect itself from unauthorized postings made to promote its product or services, and this requirement would not unduly burden employees in the exercise of their Section 7 right to discuss working conditions.

This conclusion amounts to an opinion from an office of the General Counsel and is without precedential value. Such memoranda have weight only to the extent that the reasoning is persuasive, and in my view, it is not persuasive to the extent such a disclaimer would apply to every online communication by an employee which concerns work-related information and as to which the employee is identifiable as an employee for the Employer. Such a burdensome and overreaching disclaimer requirement significantly misconceives and underestimates the ubiquitous role of online communications in communications generally, and in Section 7 activity specifically. I do not accept its reasoning, for all the reasons set forth above.

Accordingly, I conclude that the Kroger's rule would reasonably chill employees from engaging in Section 7 activity, through the burdens it places on employees engaged in Section 7 activity online. I find the Respondent's disclaimer provision violates Section 8(a)(1) of the Act.

2. Intellectual property provision

You must comply with copyright, fair use and financial disclosure laws, and you must not use without permission or compromise in any way the Company's intellectual property assets (like copyrights, trademarks, patents or trade secrets – including, for example, Kroger or [sic] banner logos, or trade names of products, or non-public information about the Company's business processes, customers or vendors).

This provision of the Respondent's policy prohibits, among other things, the use without permission of any kind of Kroger insignia, banner, or logo. In terms of protecting Kroger's intellectual property rights, this prohibition is overly broad.

Fair use laws permit the limited use of copyrighted material for parody, comment, and other noncommercial uses. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–577 (1994). With regard to trademark law the "central inquiry" is the risk of confusion by the public regarding the source or identity of the user—where there is no reasonable risk, trademark law is not violated. *Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136, 1142–1143 (10th Cir. 2013); *Smith v. Chanel, Inc.*, 402 F.2d 562, 563 (9th Cir. 1968). Thus, there are many nonoffensive uses of an employer's "intellectual property" that employees might utilize for purposes protected by Section 7. For instance, the Board has recognized that the use of employer logos by employees engaged in union activity may be protected activity. See, *Spirit Construction Services*, 351 NLRB 1042, 1045 (2007) (even assuming trademark protection, violation of Section 8(a)(1) to order removal of sticker with logo from hardhat); *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1019–1020 (1991), enfd. 953 F.2d 638 (4th Cir. 1992) (wearing of uniforms with logo protected activity).

The Respondent's flat prohibition on employee use of any of its "intellectual property" without permission of the Respondent, will limit, without grounds, many activities that are protected by Section 7. The requirement that employees request and receive permission in order to find out if Section 7 activity will be permitted is antithetical to the Act. See, *J.W. Marriot*, 359 NLRB No. 8 (2012) (managers' absolute discretion over application of rule is unlawful because it requires management permission to engage in Section 7 activity and leads employees to reasonably conclude that they are required to disclose to management the nature of the activity for which they seek permission, a compelled disclosure that would certainly tend to chill the exercise of Section 7 rights). Accordingly, it is an overbroad restriction.

In support of its argument the Respondent cites (R. Br. at 8) only a General Counsel's Division of Advice Memorandum, *McKesson Corporation*, Case 06–CA–066504, NLRB Advice Memo, Mar. 1, 2012. As with the other General Counsel's office memoranda relied upon by the Respondent in this case, this memo is not precedential, and does not reflect the Board's view. In any event, the policy that met with the General Counsel's approval in *McKesson Corp.* stated only that employees were to "Respect all copyright and other intellectual property laws" and stated that "it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including McKesson's own copyrights, trademarks and brands." This is a far cry from and far less than the complete prohibition of the unapproved use of employer logos, banners, and trade names barred by Kroger's policy.[4]

[4]Kroger argues (R. Br. at 8-9) that its policy, like the one in *McKesson*, "focuses on compliance with intellectual property laws." This is incorrect. Kroger's policy, in pursuit of compliance with intellectual property laws, directs employees that "you must not use without

3. Provision restricting discussion of "confidential and proprietary information"

> Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. *Do not comment on rumors, speculation or personnel matters.* (February 2011 policy)
>
> Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. *Do not comment on rumors or speculation related to the Company's business plans.* (June 2011 Policy)

The General Counsel contends that the last sentence of each of these iterations of the confidentiality provisions of the policy renders them unlawful. The first, from February 2011, orders employees not to comment on "rumors, speculation or personnel matters." The second, the June 2011 version, prohibits employees from commenting on "rumors or speculation related to the Company's business plans."

The February 2011 version is unlawful based on extensive precedent. A rule prohibiting employees from commenting on "personnel matters" strikes at the heart of Section 7 activity. See, *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 1 (2012) (finding unlawful rule prohibiting disclosure of "personnel information and documents" to persons "outside the organization" and noting numerous cases in which "The Board has repeatedly held that nondisclosure rules with very similar language are unlawfully overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives--an activity protected by Section 7 of the Act").

The June 2011 revision is also unlawful. It prohibits "rumors or speculation related to the Company's business plans." A prohibition on the discussion of issues "related to" business plans would reasonably be understood by employees to cover a range of issues that are obviously subjects on which employees have a protected right to speak: i.e., transfer of employees, potential shutdowns, closures, layoffs, and transfer of work. The rule against discussing things "related to" the Employer's "business plans" would reasonably chill discussions of such matters and is therefore unlawful.

I note that *Hyundai American Shipping Agency, Inc.*, 357 NLRB No. 80 (2011), in which the Board found lawful a rule that prohibited "harmful gossip" is not to the contrary. That case considered a rule that threatened discipline against "harmful gossip" generally, without application

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permission or compromise in any way the Company's intellectual property assets (like copyrights, trademarks, patents or trade secrets – including, for example, Kroger or [sic] banner logos, or trade names of products . . ." The focus is not on compliance with the law, but with not using Kroger's logos, banners, etc., under any unapproved circumstances, many of which, would not violate intellectual property law.

to a specific topic that encompassed protected subjects. The Board in *Hyundai American* distinguished the rule there from rules tying the limitation on discussion to a particular topic protected by Section 7 (such as gossip about "managers"). Id., slip op. at 1. In this case, it is the prohibition on discussion related to *business plans* that puts the rule on the wrong side of the Act. Moreover, the "rumors and speculation" prohibited by the rule here—unlike mere "gossip"—are by definition, (Merriam-Webster online) information "passed from person to person but [which] has not been proven to be true" or "with no discernible source" (rumors) and "ideas or guesses about something that is not known" (speculation). The Act has long condemned rules that penalize employees for making merely "false" statements (as opposed to maliciously untrue statements). *Heartland Catfish Co.*, 358 NLRB No. 125, slip op. at 1 fn. 3 (2012); *Lafayette Park Hotel*, 326 NLRB at 828. Obviously, rules that prohibit possibly false statements, or statements that have "not been proven to be true"—i.e., rumors—must necessarily fall. In other words, the Respondent's rule reasonably will chill discussion of unproven business matters such as plant closings, transfer of work, etc. Employees have a statutorily protected right to engage in such discussions.

The Respondent's defends by asserting that when read in context it is clear that the offending passages do not reach protected matters. Kroger attempts to equate its policy with those that, by listing and describing examples of prohibited conduct, clarify that the policy is not reasonably read to prohibit protected activity. However, I do not believe the provisions at issue are amenable to such an interpretation.

Thus, Kroger's rules restricting discussion of "confidential and proprietary information" are composed of three sentences. The first states that confidential and proprietary information should not be discussed publicly (unless already disclosed publicly by the company). The second sentence provides examples of what the Employer considers "confidential and proprietary" information, such as "financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications." But the offending sentence—the third sentence in both iterations—stands on its own and prohibits comment on "personnel matters" and then (in the June 2011 version) "rumors or speculation" related to the Respondent's "business plans"). Neither of these terms—"personnel matters" or "business plans" is anywhere else in the confidentiality provision defined, limited, clarified or even mentioned. Nothing suggests—or reasonably would suggest to someone reading English—that the "personnel matters" or "business plans" mentioned in the third sentence of the confidentiality rules are limited to the type of subjects set forth in the preceding second sentence, such as "financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications." To the contrary, read in context, the offending third sentences are reasonably read *to be examples* of the "confidential and proprietary information" that employees are not permitted to discuss. Thus, read in context, the offending third sentence is worse—in terms of the Act—than if read in isolation.

I find that both versions of Kroger's provision restricting discussion of "confidential and propriety information" violates the Act.

4. Provision prohibiting "inappropriate" behavior while online

When online, do not engage in behavior that would be inappropriate at work and that will reflect a negative or inaccurate depiction of our Company. (February 2011 Policy)

When online, do not engage in behavior that would be inappropriate at work—including, but not limited to, disparagement of the Company's (or competitors') products, services, executive leadership, employees, strategy and business prospects. (June 2011 Policy)

Barring employees from online behavior that is "inappropriate at work" and "that will reflect a negative or inaccurate depiction of our Company" is an unlawfully overbroad restriction.

Through this rule the Respondent would reasonably appear to be barring a range of concerted and protected protests, comments, and activities that criticize and challenge the Respondent's treatment of employees and many other issues related to wages, hours, and terms of condition. Many types of protected activity and protests can be reasonably understood to reflect "negatively" on the Respondent. *Hill and Dales General Hospital*, 360 NLRB No. 70, slip op. at 1 (2014) (rule prohibiting "negative comments about our fellow team members" is unlawfully overbroad); *Claremont Resort*, 344 NLRB 832, 832 (2005) (rule prohibiting "negative conversations" about employees or managers unlawful); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000) (rule prohibiting "negative conversations about associates and/or managers" found unlawful), enfd. 297 F.3d 468 (6th Cir. 2002).

Similarly, much protected activity could be deemed "inaccurate." As noted above, rules that prohibit employees from making merely false statements—which for the reasonable reader is no different than "inaccurate" statements—have long been condemned by the Act. *Heartland Catfish Co.*, supra; *Lafayette Park Hotel*, supra. Notably, the February 2011 rule contains no examples of "negative or inaccurate depiction" of the Employer, which might clarify that the rule does not cover protected activities.

I note that the syntax and wording of the February 2011 rule is hard to parse. As stated, above, I believe a reasonable reading is that it prohibits "negative or inaccurate" depictions of the Respondent. However, the rule states that what is prohibited is employee behavior that will "reflect a negative or inaccurate depiction" of the Respondent. This *could* mean that the employee *behavior* must not reflect negatively on the Respondent. That is a somewhat different reading (than the reading I prefer). However, I believe this alternate reading also would be unlawfully overbroad for the reasons explained in *First Transit, Inc.*, 360 NLRB No. 72, slip op. 2 fn. 5 (2014) (provision prohibiting employees from participating in outside activities "that are detrimental to the company's image or reputation, or, where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company" is unlawful).

The June 2011 revision is also unlawfully overbroad. It changes the focus of the prohibition to not engaging online in the type of "behavior that would be inappropriate at work." It then gives clarifying examples of what is prohibited, such as "disparagement of the Company's (or competitors') . . . executive leadership, [and] employees . . . ." The clarifying examples are unlawfully overbroad and render the rule afoul of the Act. As with the rule in *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) against statements that "damage the Company or defame any individual" or "damage" their "reputation," a rule prohibiting disparagement would lead employees

to "reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (i.e., those that are critical of the Respondent or its agents)." *Costco*, 358 NLRB at slip op. 2. See also, *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (rule prohibiting "derogatory attacks" on employer representatives unlawful), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990). Given that disparagement is what the Respondent's rule provides as an example of online behavior that is "inappropriate at work," it is hard to conclude anything but that the rule would have a reasonably tendency to chill protected activity.

The Respondent cites *GM, LLC*, 07-CA-53570 (ALJD May 30, 2012) in support of its position. In that case Judge Sandron approved a policy that stated that "offensive, demeaning, abusive, or inappropriate remarks are as out-of-place online as they are offline." Judge Sandron's decision directly turns on the placement of the prohibition on "inappropriate" remarks within a list that includes avoiding, "offensive, demeaning, [and] abusive" remarks which, the Board recognizes, is language of harassment unlawful under federal and state law. *Lutheran Heritage*, supra at 647. By contrast, Kroger's rule, for all practical purposes, defines "inappropriate" behavior as "disparaging" which simply means "to describe (someone or something) as unimportant, weak, bad etc" (Merriam Webster online). Employees have a Section 7 right to engage in much behavior that could be viewed as disparaging of an employer, officials, or workplace conditions. The Respondent also relies upon *In Re Tradesmen Int'l*, 338 NLRB 460, 460–462 (2012). However that case is inapposite. There, the Board approved a rule prohibiting "disloyal, disruptive, competitive, or damaging" conduct precisely because the rule gave "examples of the types of conduct it proscribes" and these were "illegal acts in restraint of trade and employment with another organization while employed by the Respondent" that clarify "to a reasonable employee that Section 7 activity is not the type of conduct proscribed by the rule." 338 NLRB at 461. The Kroger rule's sole explanation of the proscribed "inappropriate" behavior is that it means "disparaging" behavior, which, as discussed, is not necessarily, or even often, illegal. Rather, it refers squarely to much conduct that is protected under the Act.

I find that both versions of the provision prohibiting "inappropriate" behavior while online violate the Act.

5. Threat of discipline for violating policy

As with all Company policies, violations of the terms of this policy can result in disciplinary action up to and including termination of employment.

The General Counsel argues that the foregoing portion of the rule constitutes an independent unlawful threat to discipline employees for violating unlawful rules. I disagree. This provision is derivative. It is only unlawful to the extent that other substantive provisions of the policy are unlawful. Were the substantive provisions lawful, this disciplinary provision would be lawful too. This provision of the rule is not an independent violation of the Act.

The General Counsel's argues (GC Br. at 12) that in *Target Corporation*, 359 NLRB No. 103 (2013) "the Board upheld the administrative law judge's decision finding, inter alia, that the employer violated the Act by threatening 'corrective action' for violating an unlawful confidentiality rule." It is true that in *Target Corp.* the judge found a set of "information security policies" unlawfully overbroad and "further" found that "such part of the rule" that "directs its employees to report" violations of the rule to the Respondent and "threatens its employees with corrective action, including termination and criminal prosecution" violated the Act. However, neither the Board's order nor notice contains reference to this threat as an independent violation, but rather, simply requires that the employer cease and desist from "[m]aintaining information security

policies that prohibit employees from discussing or otherwise disclosing information regarding wages, benefits, and other terms and conditions of employment." Here, as in *Target Corp.*, the "threat" of discipline for violating the unlawful rule is not an independent violation of the Act. It is simply part of the context in which we must evaluate the substantive challenged portions of the rule.

C. The Respondent's Statute of Limitations Defense

The Respondent contends that as of August 2011, it had replaced its February 2011 policy with the June 2011 policy. Accordingly, it contends that the charge in this matter, first filed February 15, 2013, is untimely with regards to allegations relating to the February 2011 policy. See, Section 10(b) of the Act, 29 U.S.C. § 160(b) ("no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board").

However, the General Counsel disputes that the February 2011 policy was inoperative after August 2011. Essentially, counsel for the General Counsel relies upon the fact that the February policy continued (and continues) to be handed out to new employees as part of the employee handbook received by every new employee. While the updated revisions to the online policy are posted in the store and available to employees on the intranet site, the General Counsel argues that this is insufficient to conclude that the February 2011 policy is no longer "maintained." In addition, the General Counsel notes that on two occasions in December 2012, employees were disciplined based on the February 2011 online communications policy—an event the Respondent's representative described at the hearing as a "mistake."

I agree with the Respondent that the mere inadvertent use of the older policy in December—a "mistake" according to the Respondent—is inadequate to demonstrate that the February 2011 policy continued to be maintained after introduction of the new online communication policy in August 2011. However, the "mistaken" use of the old policy in December is mere flourish to the General Counsel's case. The gravamen of his case is the continued distribution of the February 2011 policy in the employee handbook after August 2011 and, indeed, by all evidence, through the date of the hearing, to every new employee hired by the Respondent (and perhaps to employees generally, the record is unclear). This is why the "mistaken" use of the February 2011 policy happened (and likely will happen again): because the Respondent continues to distribute and make available the February 2011 policy through the handbook. Both employees and managers are likely to continue to look to it as long as it continues to be distributed in unaltered form.

The facts here are similar in many respects to those reviewed by the Board in *Winkle Bus Co.*, 347 NLRB 1203, 1215–1216 (2006). In *Winkle Bus*, the employer argued that the unlawful solicitation policy contained in its handbook

> was no longer in effect during the relevant time period. Although it continued to distribute the handbook policy to employees . . . the Respondent argues that the policy was revoked by [an April 3, 1995] memorandum that [its manager] Winkle issued . . . and posted on the facility's bulletin board. That memorandum, which has remained posted, sets forth specific, narrower, prohibitions on solicitation, but does not . . . state that it is revoking the handbook policy or even mention that policy.

347 NLRB at 1216.

In reasoning adopted by the Board, and worth quoting at length here, Administrative Law Judge Paul Bogas concluded that:

> The Respondent's argument fails for a number of reasons. First, the Respondent did not revoke the unlawful handbook policy by issuing the 1995 memorandum. Four years after the Respondent claims it rescinded the unlawful policy, it still included that unlawful policy in a new version of its employee handbook. Moreover, the Respondent has continued to distribute that unlawful policy to all employees. . . . Second, even if the Respondent no longer intended to give effect to the overbroad policy in the handbook, it would not avoid a finding of violation since the Respondent continued to maintain and distribute the unlawful policy. The mere existence of an overbroad policy chills employees' exercise of their section 7 rights, even if the Respondent no longer intends to enforce the unlawful restriction. See *Alaska Pulp Corp.*, 300 NLRB 232, 234 (1990) enfd. 944 F.2d 909 (9th Cir. 1991); *Brunswick Corp.*, 282 NLRB 794, 795 (1987).
>
> Third, under applicable precedent, in order to avoid a finding of violation for its overly broad solicitation rule, the Respondent would have to demonstrate that it eliminated the impact of the unlawful rule by conveying to employees a [lawful rule]. . . . This, the Respondent undoubtedly failed to do. The most obvious reason is, again, that the Respondent continued to routinely distribute the overbroad solicitation policy to employees long *after* it posted the April 3, 1995 memorandum. This timing would indicate to employees that, if anything, the policy in the . . . handbook superseded the policy in the April 1995 memorandum—not, as the Respondent now claims, the reverse. Moreover, the 1995 memorandum does not mention the employee handbook, much less state clearly that it is revoking, narrowing, or modifying, the solicitation policy contained in it. More specifically, the 1995 memorandum does not state [a lawful policy]. . . . Winkle conceded at trial that the Respondent did nothing to inform employees that the [unlawful handbook policy] had been narrowed, other than to post the 1995 memorandum. Given these facts, it is an understatement to say that reasonable employees would not consistently assume that the policy the Respondent was distributing to them in [in the handbook] had been revoked . . . by the 1995 memorandum. Many employees would consider themselves bound by the unlawful . . . policy in the handbook. At best, the Respondent's two pronouncements regarding solicitation create confusion among employees about what is permitted, and such confusion itself has the effect of unlawfully discouraging employees from engaging in solicitation protected by Section 7 of the Act. . . . Indeed, as noted above, it seems that even Winkle had trouble keeping track of the Respondent's supposed change in policy.

347 NLRB at 1216 (citations omitted; original emphasis).

As in *Winkle Bus*, Kroger continued to distribute its old online communications policy in its handbook, notwithstanding its posting of a different policy on the bulletin board and, in the case of Kroger, on its intranet site. As in *Winkle Bus*, even assuming that the Respondent did not intend to give effect to the policy in the handbook, it would not avoid a finding of violation since the Respondent continued to distribute the unlawful policy. The mere existence of an overbroad policy chills employees' exercise of their section 7 rights, even if the Respondent does not intend to enforce the unlawful restriction. As in *Winkle Bus*, in order to avoid a finding of violation for the

handbook policy, Kroger would have to demonstrate that it eliminated the impact of the unlawful rule by conveying a lawful rule to employees. As I have found, Kroger did not do so; for one thing the new rule is also unlawful on its face. Moreover, as in *Winkle Bus*, Kroger "continued to routinely distribute the [unlawful handbook policy] to employees long *after* it posted the April 3, 1995 memorandum." (Original emphasis.) As Judge Bogas put it: "This timing would indicate to employees that, if anything, the policy in the . . . handbook superseded the policy in the 1995 memorandum -- not, as the Respondent now claims, the reverse." As in *Winkle Bus*, "it is an understatement to say that reasonable employees would not consistently assume that the policy the Respondent was distributing to them [in the handbook] had been revoked. . . . At best, the Respondent's two pronouncements regarding" online communications "create confusion among employees about what is permitted, and such confusion itself has the effect of unlawfully discouraging employees from engaging in solicitation protected by Section 7 of the Act." Finally, as in *Winkle Bus*, even the Respondent "had trouble keeping track of the Respondent's supposed change in policy." In *Winkle* this happened at the trial. In this case it happened as part of the disciplining of an employee. On two occasions the Respondent "mistakenly" disciplined an employee for violating the handbook's online communications policy nearly 16 months after Kroger asserts that it revoked the policy.[5]

Are there any facts that take this case out from within the precedential ambit of the reasoning in *Winkle Bus*? I do not believe so. Kroger's new policy June 2011 version of the policy does state, in the text, under a heading "effective date," that "This policy is effective immediately and supersedes all prior policies regarding this subject matter." In addition, the handbook that contains the February 2011 version of the online communications policy contains a provision (in a section unrelated to the online communications policy) headed "bulletin boards" which states that the "From time to time, bulletin boards contain information regarding Company policies" and warns employees that "it is your responsibility . . . to review the bulletin boards prior to each shift so that you are aware of any information affecting your job." Thus, the Respondent claims that a careful reading of the handbook, coupled with the presence of the June 2011 online communication policy on the bulletin and intranet site, serves to alert employees that the online communications policy is null and void. However, I think it is decidedly unrealistic to believe that a new employee seeking to evaluate the online communication rules would know that he cannot rely upon the policy in the handbook that he has just received. Added to this is the fact that the new policy makes no reference to the old, or how it has changed—the truth is the changes are subtle and unlikely to be noticed or identified by anyone but lawyers in litigation. "At best, the Respondent's two pronouncements regarding" online communications "create confusion among employees about what is permitted, and such confusion itself has the effect of unlawfully discouraging employees from engaging in solicitation protected by Section 7 of the Act." *Winkle Bus*, supra. In fact, the likelihood of confusion for employees could not be more vividly illustrated than by the fact that the Respondent's human resources director in charge of 20 stores disciplined an employee under the allegedly superseded policy.

I find that, without regard to the Respondent's intentions, from the perspective of the employees, the February 2011 online communications policy has remained in effect and

[5]Kroger argues that in one of the two occasions it is unclear whether the employee was disciplined for violating an allegedly *unlawful* portion of the February 2011 online communication policy. This is beside the point. The point is that, indisputably, the evidence shows that on two occasions Kroger relied upon the February 2011 policy to discipline an employee 16 months after Kroger claims that version of the policy was no longer in effect.

maintained at all relevant times. Accordingly, the Respondent's statute of limitations defense must fail.[6]

D. The Respondent's effort to introduce into evidence and rely upon a regional director's settlement in another case

In its brief the Respondent renews its contention, rejected at trial, that it should be permitted to introduce evidence of the settlement of an unfair labor practice case in 2011. The Respondent represents that in that case the Regional Director for Region 19 of the Board (Seattle, Washington regional office) approved a prehearing settlement that permitted the maintenance of an online communication policy that Kroger calls "virtually identical" to that at issue here. (According to Kroger, the employer in the Region 19 case has the same parent company as Kroger.)

I renew my ruling at trial that this evidence is irrelevant. In resolving the instant case, it simply does not matter what position a Regional Director took in a different case three years ago in order to settle that case. The Respondent's argument (see R. Br. at 14–17) fundamentally misconceives how the agency, and indeed, administrative law, works.

The General Counsel's "final authority" with respect to the issuance and prosecution of complaints before the Board extends to the decision not to issue complaints, to withdraw complaints prehearing, to reach informal prehearing settlements, and to resolve cases prior to hearing. Under Supreme Court-approved Board precedent, these decisions, which do not result in a Board order, are unreviewable. Period. *NLRB v. UFCW, Local 23*, 484 U.S. 112 (1987); *Fairmont Hotel*, 314 NLRB 534, 534 (1994)("if the General Counsel, exercising his 'prosecutorial discretion,' decides to withdraw a complaint, pursuant to a prehearing settlement, such a determination is not subject to court review").

The necessary corollary to the General Counsel's unreviewable prehearing discretion is not only that his decisions to settle short of hearing carry no precedential weight, but also that they are not binding on the General Counsel in future cases. *USWA (Cequent Towing Prods.)*, 357 NLRB No. 48, slip op. at 3 (2011) (rejecting respondent's assertion that it was justified in maintaining a challenged rule "because the requirement was consistent with the . . . guidelines issued by the NLRB General Counsel prior to his issuance of the complaint in this case. . . . [T]he General Counsel's earlier exercise of prosecutorial discretion in declining to issue complaint does not insulate the requirement from subsequent Board scrutiny upon the issuance of complaint"); *IAM, Local Lodge 2777 (L-3 Communications)*, 355 NLRB 1062, 1066 (2010)

[6]The Respondent argues (R.Br. at 18) that it would be "unduly burdensome for Kroger to produce and issue a new employee handbook for its thousands of employees every time any change is made to any policy." However, the issue is not changes to any policy, but the elimination and replacement of *an unlawful* policy, of which there are, presumably, and hopefully, few. With regard to an unlawful policy there is no room for employee confusion over its continued existence. And it is not necessarily required that a new handbook issue. Precisely to avoid situations where "republishing the handbook could entail significant costs," the traditional Board remedy for unlawful handbook rules includes "supply[ing] the employees either with handbook inserts stating that the unlawful rules have been rescinded or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions." *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part, 475 F.3d 369 (D.C. Cir. 2007).

(rejecting respondent's reliance on General Counsel's "exercise of prosecutorial discretion" in not previously issuing complaint).

General Counsel memoranda may be persuasive to the extent they offer a persuasive argument on a legal subject. However, a Regional Director's prehearing settlement, which contains no reasoning or explanation for its terms, cannot be of any value. It is nonprecedential, of no persuasive value in terms of legal reasoning, and not in any way binding on the General Counsel's decision to issue a complaint on similar or the same issue in future cases.

Accordingly, there is no relevance to settlement-related documents from another case from 2011. The Respondent's extensive argument on this issue evinces a morass of confusion over how the Board and administrative law operate. But to choose just one conclusive error, at bottom, all its arguments—that it was misled by the 2011 settlement, that the settlement estops the General Counsel from prosecuting Kroger here, that the General Counsel has demonstrated a lack of prosecutorial consistency, and that the General Counsel has "changed course" without explanation—all of these arguments founder on the fact that the Region 19 settlement of the 2011 case does not in any fashion constitute binding General Counsel, much less Board, action. I renew my ruling that evidence of the 2011 settlement is irrelevant.[7]

CONCLUSIONS OF LAW

1. The Respondent Kroger Company of Michigan, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining, since about August 16, 2012, the February 2011 and June 2011 versions of its online communications policy.

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

REMEDY

The Respondent shall be ordered to cease and desist from its unfair labor practices and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent violated Section 8(a)(1) of the Act by maintaining an online communications policy that is overbroad, the Respondent shall be ordered to revise or rescind the portions of the policy (1) requiring a disclaimer if employees identify themselves as an associate of Kroger and publish any work-related information online; (2) prohibiting the use without permission of the Respondent's intellectual property assets; (3) prohibiting comment on personnel matters or rumors or speculation related to the Company's business plans; and (4) prohibiting employees when online from engaging in behavior that would be inappropriate at work and "that will reflect a negative or inaccurate depiction of our Company" or that includes "disparagement of the Company's (or competitors') . . . executive leadership, employees, strategy and business prospects."

The Respondent may comply with the order to rescind these portions of its online communications policy by reprinting the online communications policy without the unlawful

[7]Given my ruling, I do not review the contention, argued by the General Counsel at trial, that Federal Rule of Evidence 408 precludes admission of these settlement-related documents.

language or, with regard to the February 2011 online communication policy contained in the employer's handbook, in order to save the expense of reprinting the whole policy, it may supply its employees with handbook inserts stating that the unlawful rules have been rescinded or with lawfully worded rules on adhesive backing that will correct or cover the unlawfully broad rules, until it republishes the policy without the unlawful provisions. Any copies of the policy that include the unlawful rules must include the inserts before being distributed to employees.

The Respondent shall post an appropriate informational notice, as described in the attached appendix at each of its facilities at which the unlawful online communications policy was maintained.[8] This notice shall be posted at Respondent's facilities wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 2012. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 07 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

Respondent Kroger Company of Michigan, Flint, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

   (a) Maintaining a work rule that requires employees to use a disclaimer if they identify themselves as an employee of the Respondent and publish any work-related information online.

[8] *Long Drug Stores California*, 347 NLRB 500, 501 (2006) ("The Board has 'consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.'") (quoting *Guardsmark, LLC*, 344 NLRB 809, 812 (2005)). See also, *Jack in the Box Distribution Center Systems*, 339 NLRB 40 (2003) ("we deem it an appropriate remedial measure to require that the rescission of the provision, and the posting of the notice, be coextensive with the Respondent's application of its handbook").

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

(b) Maintaining a work rule that prohibits employees from using without permission or compromising the Respondent's intellectual property assets.

(c) Maintaining a work rule that prohibits employees from commenting on rumors, speculation, or personnel matters, or on rumors or speculation related to the Respondent's business plans.

(d) Maintaining a work rule that prohibits inappropriate behavior online that "will reflect a negative or inaccurate depiction" of the Respondent, or that includes disparagement of the Respondent's executive leadership, employees, strategy and business prospects.

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

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

(a) Within 14 days, revise or rescind the rules described in 1(a)-(d) above, of its online communications policy.

(b) Reprint the online communications policy without the unlawful language. With regard to the handbook containing the February 2011 version of the online communication policy, the Respondent may supply its employees with inserts for the online communications policy that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of a lawful rule on adhesive backing that will correct or cover the unlawfully broad rules until the Respondent republishes the handbook with a revised online communications policy that does not contain the unlawful rules.

(c) Within 14 days after service by the Region, post at each of its facilities at which it maintains its online communications policy, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 2012.

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

(d) Within 21 days after service by the Region, file with the Regional Director for Region 07 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 22, 2014

_____
David I. Goldman
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain the following rule stated in our online communications policy:

> If you identify yourself as an associate of the Company and publish any work-related information online, you must use this disclaimer: 'The postings on this site are my own and do not necessarily represent the postings, strategies or opinions of The Kroger Co. family of stores.'

WE WILL Not maintain the following rule stated in our online communication policy:

> You must comply with copyright, fair use and financial disclosure laws, and you must not use without permission or compromise in any way the Company's intellectual property assets (like copyrights, trademarks, patents or trade secrets – including, for example, Kroger or [sic] banner logos, or trade names of products, or non-public information about the Company's business processes, customers or vendors).

WE WILL NOT maintain the following rule stated in our online communication policy:

> Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. Do not comment on rumors, speculation or personnel matters. (February 2011 policy)
>
> Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses

or applications. Do not comment on rumors or speculation related to the Company's business plans. (June 2011 Policy)

WE WILL NOT maintain the following rule stated in our online communication policy:

> When online, do not engage in behavior that would be inappropriate at work and that will reflect a negative or inaccurate depiction of our Company. (February 2011 Policy)
>
> When online, do not engage in behavior that would be inappropriate at work—including, but not limited to, disparagement of the Company's (or competitors') products, services, executive leadership, employees, strategy and business prospects. (June 2011 Policy)

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

WE WILL within 14 days, revise or rescind the above-stated portions of our online communications policy, and WE WILL advise employees in writing that we have done so and that the unlawful rules will no longer be enforced.

WE WILL, reprint the online communications policy without its unlawful language in the manner described in the NLRB decision.

The KROGER CO. OF MICHIGAN

(Employer)

Dated _____ By _____

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.