

Recent Significant Unfair Labor Practice Cases

By

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1. LEAD CASES

***American Baptist Homes of the West d/b/a Piedmont Gardens*, 362 NLRB No. 139**

The Board majority (Pearce, Hirozawa, and McFerran), overruling *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), found that witness statements obtained by employers during an internal investigation are not automatically exempt from disclosure. Rather, the Board will apply the balancing test from *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318-320 (1979) and weigh the union's need for requested information against any legitimate and substantial confidentiality interests established by the employer. The Board unanimously agreed to apply this new test prospectively to avoid manifest injustice against this Employer.

The Charging Party had been observed sleeping on the job and the Employer collected witness statements from the employees who witnessed the misconduct. One employee assumed her statement would be kept confidential and another was explicitly assured by a representative of the Employer that her statement was confidential. During the grievance process, the Union requested the names and job descriptions of the witnesses and asked for copies of their statements. The Employer refused to turn over the statements citing *Anheuser-Busch*, which held that an employer's duty under Section 8(a)(5) to disclose information does not include witness statements.

The ALJ ruled that the Employer had to identify the witnesses but was not required to furnish their statements under *Anheuser-Busch*. The Board was "not persuaded that witness statements are so fundamentally different from other types of information that a blanket exemption from disclosure is warranted," and reversed the ALJ's decision regarding the witness statements. The Board decided to apply the balancing test from *Detroit Edison* finding that "the party asserting the confidentiality defense has the burden of proving that it has a legitimate and substantial confidentiality interest in the information, and that it outweighs the requesting party's need for the information."

Members Johnson and Miscimarra disagreed with the majority's overruling *Anheuser-Busch* and dissented in part because of the potential risk of coercion, intimidation, harassment, and retaliation by unions.

The Finley Hospital, Local 199, 362 NLRB No. 102

The Board majority (Pearce and McFerran), affirming the ALJ, held that the Employer violated Section 8(a)(5) of the Act by unilaterally discontinuing the annual 3-percent pay raises provided for in the parties' collective bargaining agreement upon the expiration of the agreement. In finding a violation, the Board reasoned that the contract's language, which stated "[f]or the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date" in the amount of three percent, did not establish a "clear and unmistakable waiver of the Union's statutory right to bargain over the posttermination cessation of pay raises."

The Board stated that there is a distinction between an employer's contractual obligation to maintain a particular term and condition of employment post-contract expiration and the employer's statutory obligation to do so. The Board stated that even when a contractual right does not survive the agreement's expiration, the statutory right typically does. The Board also noted that language in a collective bargaining agreement can intentionally preclude a provision from having any contractual force after the expiration of the agreement, but given the employer's statutory duty to maintain the status quo post-contract expiration, such language will not permit a unilateral change of a term established by the same agreement unless it amounts to a clear and unmistakable waiver of the union's separate statutory right to maintenance of the status quo. *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–12 (2007).

Member Johnson dissented from the majority's conclusions that the Employer violated the Act. Johnson argues the only accurate reading of the language in the Agreement means that the Employer's obligation ended with the expiration of the Agreement, thus allowing unilateral change postexpiration.

Fresh & Easy Neighborhood Market, 361 NLRB No. 12

The Board majority (Pearce, Hirozawa, and Schiffer), reversing the ALJ, found that the Charging Party had engaged in concerted activity for the purpose of mutual aid and protection when she sought assistance from her co-workers in raising an individual sexual harassment complaint to the Employer.

The Charging Party's co-worker had posted a sexually harassing message directed at the Charging Party on a whiteboard located in a break room. In order to prepare a sexual harassment complaint regarding the whiteboard message, the

Charging Party copied it to a piece of paper and asked a supervisor and two co-workers to sign the paper. Subsequently, during the Employer's investigation of the incident, the Employee Relations manager asked the Charging Party why she had requested that her co-workers sign the paper and instructed her not to solicit additional written statements from the co-workers so that the manager could conduct her own investigation into the incident. But the manager advised the Charging Party that she could talk to other employees about the incident and ask them to be witnesses.

The ALJ had dismissed the complaint, relying on *Holling Press, Inc.*, 343 NLRB 301 (2004), where the Board previously held that an employee, although acting concertedly, did not act for the purpose of mutual aid or protection when she sought a colleague's assistance in connection with her individual sexual harassment complaint. In reversing the ALJ, the Board overruled *Holling Press* and held that an employee seeking the assistance or support of co-workers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection, whether that employee is raising a complaint directly to her employer or to an outside entity. The Board noted that Congress, in enacting Section 7, created a framework for employees to band together in solidarity to address their terms and conditions of employment with their employer. What mattered was that the Charging Party approached her co-workers with a concern implicating the terms and conditions of their employment and sought their help in pursuing it. The solicited employees had an interest in helping the Charging Party, even if she alone had an immediate stake in the outcome, because next time it could be one of them. Therefore, the Charging Party's request for her co-workers to sign the paper documenting the sexually harassing message was protected activity under Section 7. Nonetheless, the Board found that the Employer's question and instruction to the Charging Party did not violate Section 8(a)(1) because both were narrowly tailored and reasonably necessary to ensure the integrity of the Employer's investigation into the Charging Party's sexual harassment complaint.

Member Miscimarra dissented from the majority's conclusions that the Charging Party's activity was concerted and was for the purpose of mutual aid and protection, as well as from the majority's decision to overrule *Holling Press*. Member Johnson dissented from the majority's holding that an employee seeking the assistance or support of co-workers in raising a sexual harassment complaint is always acting for the purpose of mutual aid or protection, but he concurred that, on the facts of this case, there was such a purpose, primarily because the offensive message was posted on a whiteboard in an employee break room visible to other employees.

Triple Play Sports Bar & Grille, 361 NLRB No. 31

The Board panel (Miscimarra, Hirozawa, and Schiffer), affirming the ALJ, held that the Employer unlawfully discharged the Charging Parties for participating in a Facebook comment thread about the Employer's perceived failure to properly withhold income taxes. Applying the Supreme Court's decisions in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) and *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966), rather than the test set forth in *Atlantic Steel Company*, 245 NLRB 814 (1979), the Board found that the Charging Parties had not lost the protection of the Act.

The Charging Parties' co-worker posted on Facebook "Maybe someone should do the owners of Triple Play [Employer] a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money ... Wtf!!!!" Both Charging Parties clicked the Like button on the post. One of the Charging Parties also commented on the post: "I owe too. Such an asshole." After learning of the Facebook exchange, the Employer discharged the Charging Parties, citing their Facebook activity as the reason.

The Employer did not dispute that the Charging Parties' Facebook activity was concerted or that they had a protected right to engage in a Facebook discussion about the Employer's tax withholding calculations, but argued that the Charging Parties had lost the protection of the Act. The Board concluded that the *Atlantic Steel* test was not appropriate for analyzing employees' off-duty, offsite use of social media. That test typically is applied to analyze face-to-face communications between an employee and manager or supervisor to determine whether the employer's interest in maintaining order at its workplace outweighs an employee's exercise of Section 7 rights. While noting that it was not suggesting that off-duty, offsite use of social media can never implicate an employer's interest in maintaining workplace discipline in the same manner as a face-to-face workplace confrontation, in the circumstances of this case, where no manager or supervisor participated in the discussion, the Board determined that the standards applied to communications by employees with third parties or the general public were more appropriate. Applying those standards, the Board held that the Charging Party's Facebook comments did not lose protection under *Jefferson Standard* because they disclosed the existence of an ongoing labor dispute, were not directed at the general public, and did not disparage or even mention the Employer's product or services. The Board held that the comments did not lose protection under *Linn* because they were not maliciously untrue, i.e. made with knowledge of their falsity or with reckless disregard for their truth or falsity.

The Board, with Member Miscimarra dissenting, also held that the Employer's Internet/Blogging Policy's prohibition on "inappropriate discussions about the company, management, and/or co-workers" violated Section 8(a)(1).

Applying *Lutheran Heritage Village*, 343 NLRB 646 (2004), the Board majority held that the rule was unlawfully overbroad because employees would reasonably construe the policy to prohibit protected activity, particularly in light of the unlawful discharges. The Board majority further held that the unlawful discharges in this case also negated any power the policy's savings clause might have had to reassure employees that the rule against "inappropriate discussions" would not be invoked unlawfully.

Member Miscimarra dissented from the Board's holding that the Internet/Blogging policy violated Section 8(a)(1). He found that the policy was not actually applied to discharge the Charging Parties here, but rather they were discharged for purported defamation and disloyalty. He also criticized the majority for "cobbling together" two different prongs of *Lutheran Heritage*, and found that the policy would not be reasonably construed as prohibiting protected conduct because it stated only that, by engaging in "inappropriate discussions," an employee "may be violating the law and is subject to disciplinary action." Finally, Miscimarra noted that the savings clause reinforced that the policy was meant not to be interpreted as prohibiting protected activity.

***Food & Commercial Workers, Local 700 (Kroger Limited Partnership),*
361 NLRB No. 39**

The Board majority (Pearce, Hirozawa, and Schiffer), reaffirmed the three-stage process that unions must follow to fulfill their *Beck* obligations set forth in *California Saw & Knife Works*, 320 NLRB 224 (1995), *enforced sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998). Affirming the ALJ, the majority found that the Union did not violate Section 8(b)(1)(A) by failing to provide the Charging Party with a computation of the reduced fees and dues applicable to nonmember objectors when it provided its initial notice of her obligations and rights under the union-security clause.

The Union did not advise the Charging Party of the specific amount of the reduced dues and fees applicable to nonmember objectors upon her hire but did provide her with that information once she resigned her membership and requested objector status. The General Counsel and the Charging Party conceded that the Union had complied with extant Board law, but urged the Board to overrule that precedent and hold that the duty of fair representation requires provision of reduced payment information when the union first informs an employee of his or her obligations under a union-security clause.

Declining to overrule precedent, the Board reaffirmed that a union's performance of its obligations under *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), is to be judged under the duty of fair representation standard, and that *California Saw & Knife Works* properly outlined the set of procedures

unions must follow to fulfill their *Beck* obligations. Under *California Saw*, unions must follow a three-stage process. At stage 1, the union must inform employees of their right not to join the union and that nonmembers (1) have the right to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to decide intelligently whether to object; and (3) to be apprised of internal union procedures for filing objections. If an employee decides not to become a member and exercises the *Beck* right to object to paying non-representational fees, then at stage 2 the union must inform the objector of the percentage reduction in fees he or she will receive, the union's basis for that determination, and the right of the objector to challenge those figures. Stage 3, which pertains to handling such challenges, was not implicated in this case.

In rejecting the contention of the Charging Party and General Counsel that unions should provide a computation of fees going towards non-representational activities at stage 1, the Board majority found that the extant stage 1 notice requirements strike the most reasonable balance between the competing interests. Thus, the present notice requirements meet employees' fundamental need for information about their right to object, without imposing administrative and financial burdens on unions simply because some employees may object in the future.

Members Miscimarra and Johnson dissented, noting that the Board's established rule is inconsistent with cases decided by the federal courts and asserting that the balance of interests favors notice of the percentage of non-representational expenses at stage 1.

***CNN America, Inc.*, 361 NLRB No. 47**

The Board majority (Pearce and Hirozawa), affirming the ALJ, held that CNN was a joint employer with Team Video Services (TVS), the subcontractor that provided its audio and video technicians for its Washington, D.C. and New York City bureaus. The majority held that, *inter alia*, CNN violated Section 8(a)(3) and (1) by terminating the subcontracts out of antiunion animus and causing the discharge of the unit employees; and violated Section 8(a)(5) and (1) by failing to bargain about the decision to terminate the subcontracts and the effects of that decision, and by failing to apply the terms of TVS' collective-bargaining agreements with the Union after replacing the unit employees with an in-house nonunion workforce.

CNN, a news television channel, awarded exclusive technical service contracts to a series of subcontractors between 1980 and 2002, ending with TVS. Starting in 1982 and 1985 respectively, the technicians in the D.C. bureau were represented by NABET, CWA Local 13, and the technicians in the New York City

bureau were represented by NABET, CWA Local 11 (collectively the Union). Each successive subcontractor hired nearly all of its predecessor's employees and continued to recognize and bargain with the Union. CNN terminated its contracts with TVS effective December 6, 2003 and January 17, 2004 and directly hired employees to perform the unit work. CNN refused to recognize the Union or to apply the terms and conditions embodied in TVS's collective-bargaining agreement with the Union.

Noting first that the Board will find two employers to be joint employers if they share or codetermine matters governing the essential terms and conditions of employment, the Board majority looked specifically to the factors set forth in *Laerco Transportation*, 269 NLRB 324, 325 (1984) – hiring, firing, discipline, supervision, and direction. The majority also pointed out though that those five aspects of the employment relationship are not the only relevant areas of consideration. Rather, the relevant facts in such a determination “extend to nearly every aspect of employees’ terms and conditions of employment and must be given weight commensurate with their significance to employees’ work life.” 361 NLRB No. 47, slip op. at 3, quoting *Aldworth Co.*, 338 NLRB 137, 139 (2002), enforced sub nom. *Dunkin’ Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004). Significantly, the majority did not rely upon the Board’s statement in *Airborne Express*, 338 NLRB 597, 597 n.1 (2002), that the test requires “direct and immediate” control by the putative joint employer over employment matters. Instead, in footnote 7, the majority expressly noted that *Airborne Express* cited *TLI, Inc.*, 271 NLRB 798, 798-99 (1984) but that *TLI* makes no mention that control must be direct and immediate.

Applying its interpretation of the extant joint employer test to the facts of the case, the majority determined that CNN was involved in practically every important aspect of the employment relationship between TVS and its employees. Thus, the Board found that CNN was able to exert significant influence over hiring and work hours by barring from employment technicians who had worked for its competitors, determining overall staffing levels, directing TVS to hire freelancers for temporary assignments, and controlling the number of regular, part-time, and overtime hours of unit employees. CNN also substantially controlled work assignments and carried out a significant amount of supervision and direction, with some employees receiving their sole supervision and direction from CNN. Among other factors, CNN provided TVS employees with office space, email accounts, and equipment. Further, TVS employees performed work that was at the core of CNN’s business, worked exclusively for CNN, and were held out as CNN employees.

In dissent, Member Miscimarra relied on *Airborne Express* and stated that the essential element in the joint employer analysis was whether CNN had “direct and immediate” control over employment matters. Applying this test, he concluded

that CNN had no such control and therefore was not a joint employer of the TVS technical employees.

Pressroom Cleaners, 361 NLRB No. 57

The full Board, affirming the ALJ, held that the Employer violated Section 8(a)(3) and (1) by discriminatorily refusing to hire six of its predecessor's employees because of their union affiliation and, as a successor employer, violated Section 8(a)(5) and (1) by unilaterally imposing new terms and conditions of employment on the employees it hired. A Board majority (Pearce, Hirozawa, and Schiffer), however, overruled *Planned Building Services, 347 NLRB 670 (2006)*, and set aside the portion of the ALJ's order directing that the Respondent be given the opportunity in compliance to limit its liability by showing that, even absent its unfair labor practices, it would not have agreed to the monetary provisions of the Union's contract with the predecessor and on some identifiable date would have bargained to impasse or reached agreement on other terms.

The Employer successfully bid for a janitorial service contract previously held by a company whose employees were represented by the Union, and proceeded to conduct the same business as its predecessor at the same location. Further, the predecessor's employees would have comprised a majority of the Employer's workforce had it not engaged in discriminatory refusals to hire. Accordingly, under *Love's Barbeque Restaurant No. 62, 245 NLRB 78, 82 (1979)*, enforced in relevant part *sub nom. Kallmann v. NLRB, 640 F.2d 1094 (9th Cir. 1981)*, the Employer was a statutory successor, obligated to recognize and bargain with the Union. Although a statutory successor typically is not bound by the terms of its predecessor's contract and is free to set its own initial terms and conditions, in *Love's Barbeque*, the Board held that the right to set initial terms is forfeited where the successor unlawfully refuses to hire its predecessor's employees. Instead, in such cases the successor must maintain the status quo and continue the predecessor's terms and conditions of employment until the parties have bargained to agreement or impasse.

In *Planned Building Services*, the Board modified the traditional remedy in *Love's Barbeque* cases and fashioned a new approach that gave the respondent an opportunity to show in compliance that, even absent its unfair labor practices, at some identifiable time it would have reached impasse or agreement on terms less favorable than the monetary provisions of the Union's contract with the predecessor. The Board majority found the rationale in *Planned Building Services* fundamentally flawed and inconsistent with the Board's standard remedial scheme in Section 8(a)(5) unilateral change cases – i.e. rescission of the unlawful changes, restoration of the status quo terms and conditions, and bargaining to agreement or impasse. Instead, the approach in *Planned Building Services* presents the wrongdoing successor employer with an option that is not available to employers in any other refusal-to-bargain cases and creates a one-sided opportunity that can only

benefit the wrongdoer. Accordingly, the Board majority overruled *Planned Building Services* and returned to the remedy outlined in *Love's Barbeque Restaurant No. 62* and *State Distributing*, 282 NLRB 1048 (1987). Then, determining that it was appropriate to apply its decision retroactively, the majority applied the older precedent to the instant case and modified the remedy imposed by the ALJ accordingly.

Members Miscimarra and Johnson dissented from this aspect of the majority's decision, and would adhere to the holding and remedial structure of *Planned Building Services*.

***FedEx Home Delivery*, 361 NLRB No. 55**

The Board majority (Pearce, Hirozawa, and Schiffer), revisiting its earlier denial of review, held that a petitioned-for unit of delivery drivers were Section 2(3) employees rather than independent contractors, and concluded therefore that the Employer had violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union that represents the drivers.

The Regional Director had previously determined that the delivery drivers were employees under the Act and certified the Union as their representative after a successful election. The Board denied review of that determination. The Employer then refused to bargain in violation of Section 8(a)(5), in order to challenge the drivers' employee status. Ordinarily, the Board would have granted the General Counsel's motion for summary judgment, but instead the Board revisited the question of employee status because, in the interim, the D.C. Circuit had held that drivers performing the same job at other FedEx Home Delivery facilities were independent contractors. *See FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). In its decision, the D.C. Circuit observed that the Board had recently shifted its focus in these cases away from the employer's right to control the means and manner of the work and towards the existence of an entrepreneurial opportunity for gain or loss. The Court then treated the existence of entrepreneurial opportunity as an overriding consideration.

The Board has now restated and refined its approach for assessing independent contractor status. First, the Board reaffirmed that it follows the common-law agency principles in determining whether an individual is an employee or an independent contractor and that all the incidents of the relationship and no one factor, including entrepreneurial opportunity, is decisive. Second, the Board clarified that in assessing entrepreneurial opportunity for gain or loss, it will look to actual, not theoretical, entrepreneurial opportunity and evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity. Third, the Board stated that entrepreneurial opportunity is only one aspect of the broader factor of whether the putative contractor is rendering services as part of an

independent business. Relevant to that inquiry is whether the alleged contractor (a) has a realistic ability to work for other companies; (b) has a proprietary or ownership interest in his or her work; and (c) has control over important business decisions, such as the scheduling of performance, the hiring and assignment of employees, the purchase and use of equipment, and the commitment of capital.

The Board then applied to the instant case the factors set out in the Restatement (Second) of Agency, as well as the “newly-articulated independent-business factor,” and found the drivers to be employees under the Act.

In dissent, Member Johnson asserted that the majority’s revised approach goes beyond the limits of the Agency’s discretion and fails to give adequate weight to entrepreneurial opportunity as part of the test. Member Johnson also criticized the majority for incorrectly measuring and artificially restricting the relevant evidence for assessing what opportunity actually exists for the drivers. He would have remanded the case to the Regional Director to reopen the record and accept relevant systemwide evidence to allow a proper determination of the fair market value of the entrepreneurial opportunities available to drivers.¹ Member Miscimarra recused himself and took no part in the consideration of this case.

Fedex Home Delivery, 362 NLRB No. 29

The Board unanimously denied the Employer’s motion for reconsideration after it applied a redefined independent-contractor standard retroactively.

Purple Communications, Inc., 361 NLRB No. 126

The Board majority (Pearce, Hirozawa, and Schiffer), overruled the holding in *Register Guard*, 351 NLRB 1110 (2007), *enforced in relevant part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), that employees have no statutory right to use employers’ email systems for Section 7 purposes.² The Board will now apply the test set forth in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and presume that employees who have rightful access to their employer’s email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. However, an employer can rebut the presumption by demonstrating that “special circumstances” make its restrictions necessary to maintain production and discipline.

¹The majority had noted, however, that they would have reached the same result even considering the systemwide evidence that the Employer proffered and the Regional Director excluded.

² The Board did not reach or disturb *Register Guard*’s definition of discrimination. See slip op. at 5 n.13.

The full Board reviewed the ALJ's finding under *Register Guard* that the Employer's business-use-only electronic communications policy did not violate Section 8(a)(1). The majority concluded that *Register Guard* had focused too much on employers' property rights and too little on the importance of email as a means of workplace communication. Overruling *Register Guard*, the majority reiterated that the workplace is uniquely appropriate for employee communication and recognized the centrality of such workplace communications to employees' exercise of their Section 7 rights. The majority characterized email as a forum for communication that rarely interferes with employers' business practices and costs, thereby rejecting *Register Guard's* reliance on Board's "equipment" cases involving telephones, copiers, bulletin boards, and other office supplies. Instead, the majority adopted the analysis set forth in *Republic Aviation* that accommodates employers' management rights and employees' ability to communicate effectively at the workplace. Notably, the majority rejected arguments that *Republic Aviation's* presumption should apply only if employees would otherwise be entirely deprived of their statutory right to communicate, and that employees' alternative means of communication (such as through personal email or social media) made the presumption inappropriate. Rather, the availability of "alternative means" of communication is relevant only with regard to access by nonemployees, who were not at issue in *Purple*. The majority also rejected arguments that overruling *Register Guard* would infringe on employers' free speech rights, noting that email users understand that an email message conveys the views of the message sender and not those of the email account provider. The majority further explained that its decision was limited because it applies only to email, only to employees who use their employer's email system for work, and only to employees' use of their employer's email system during nonworking time. Employers may still monitor email use for legitimate management reasons and tell employees that they have no expectation of privacy when they use the email system. Finally, the majority held that it would apply its holding retroactively, thus remanding the case to the ALJ for the parties to introduce evidence concerning the effect of any "special circumstances" on the lawfulness of the Employer's business-use-only email policy.

Member Miscimarra dissented for four main reasons. Specifically, he asserted, the majority decision: (1) improperly presumed that employees need their employers' email systems to engage in protected activity; (2) fails to accommodate an employer's substantial property interests in its computer resources, including the employer's right to manage its business; (3) will create many new problems for employers, unions, employees, and the Board, including by blurring the line between work and nonwork time, creating privacy and surveillance issues, and resulting in employers providing unlawful assistance under Section 8(a)(2) and/or financial assistance under Section 302(a) of the Labor Management Relations Act; and (4) created a new legal presumption that is ill-suited for practical application.

In a separate lengthy dissent, Member Johnson argued that the majority's legal presumption that employees have a Section 7 right to use their employer's email system is a radical and ill-advised departure from Board and court precedent. First, Member Johnson asserted that the majority misapprehended the difference between physical and virtual space, thereby undermining employers' rights to own and operate their email networks for business purposes. In this regard, Member Johnson asserted that email is not an employee gathering place or "forum," as so described by the majority, because email has no definite bound in physical space, time, or audience, and poses an acute danger of infringing on employers' productivity. Second, Member Johnson asserted that the Board's "equipment" cases appropriately hold that employees have no Section 7 right to use company equipment, which he would apply to employers' email systems, and that employee "convenience" in using employer equipment does not establish such a right. Third, Member Johnson concluded that, even if *Republic Aviation* applies to employees' use of employer email, it still requires the Board to consider (i) the primary function and use of the employer's communication network at issue; (ii) whether alternative means of communication exist (including alternative communication networks such as personal email, social media, and texting); and (iii) the risk of interference with the employer's operation, including the principle that "working time is for work." Fourth, Member Johnson argued that the majority's presumption violates employers' free speech rights because it requires employers to sponsor and subsidize "hostile speech" by (i) compensating employees who compose hostile speech on work time; (ii) paying for the licensing, electricity, and maintenance that allows the transmission of hostile speech; and (iii) storing or archiving hostile speech. Finally, Member Johnson criticized the majority for creating an unworkable rule and for failing to provide adequate guidance concerning what constitutes, and how the Board will evaluate, "special circumstances" justifying employer restrictions, including monitoring, of email systems.

***Murphy's Oil USA, Inc.*, 361 NLRB No. 72**

The Board majority (Pearce, Hirozawa, and Schiffer) reaffirmed *D.R. Horton, Inc.*, 357 NLRB No. 184 (January 3, 2012), *enforcement denied*, 737 F.3d 344 (5th Cir. 2013), and found that the Employer violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that waived employees' right to maintain class or collective actions, and which employees reasonably would believe barred them from filing charges with the Board. The Board reiterated that mandatory agreements that require individual arbitration are unlawful because they restrict employees' substantive Section 7 right to pursue their work-related legal claims *together*. The Board further emphasized that its finding does not conflict with the Federal Arbitration Act (FAA). For these reasons, the Board majority held that the Fifth Circuit and other circuit courts have erred by rejecting *D.R. Horton*.

Significantly, the Board majority held that the Employer violated Section 8(a)(1) of the Act when it enforced its unlawful arbitration agreement through a motion in federal court to compel individual arbitration of employees' collective Fair Labor Standards Act claims. In so holding, the Board majority found that the Employer's motion was not protected by the First Amendment because it had the illegal objective of seeking to enforce an unlawful contract provision. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983).

The Board majority included in its remedial order provisions requiring the Employer to: (1) reimburse the employees for expenses and legal fees incurred in opposing the unlawful motion; (2) rescind or revise the unlawful arbitration agreement; (3) notify employees and the court that it has done so; and (4) inform the court that it no longer opposes the plaintiffs' claims on the basis of the unlawful arbitration agreement.

Member Miscimarra dissented, arguing that: (1) the Board does not have the authority to require any particular adjudication procedures for non-NLRA claims; (2) Section 9(a) of the Act -- which protects the rights of employees and employers "at any time" to adjust grievances on an "individual" basis -- protects the right of individual employees and employers to enter into arbitration agreements; (3) the FAA precludes the Board from invalidating class waivers contained in individual employment agreements; and (4) the Act and its legislative history render inappropriate the majority's remedies, including the requirement that the Employer pay attorneys' fees.

Member Johnson also dissented, arguing that: (1) the majority interpreted Section 7 too broadly; (2) the Board cannot transform procedural class and collective action rules -- established under other statutes -- into substantive rights under the Act; (3) employers have a legitimate interest in avoiding aggregated, meritless suits; and (4) Supreme Court FAA jurisprudence makes clear that the Board cannot override the FAA.

Babcock & Wilcox Construction Co., 361 NLRB No. 132

The Board majority (Pearce, Hirozawa, and Schiffer) adopted new standards for determining whether to defer to arbitral decisions, the arbitral process, and grievance settlements in cases alleging violations of Section 8(a)(1) and (3) of the Act.

In *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), the Board held that it would defer to an arbitrator's decision when the arbitral proceedings appeared to be fair and regular, all parties agreed to be bound, and the arbitrator's decision was "not clearly repugnant to the purposes and policies of the Act." After some years of experience applying *Spielberg*, the Board expanded on that test by requiring an arbitrator to have considered the unfair labor practice issue. *Raytheon Co.*, 140

NLRB 883 (1963), *enforcement denied*, 326 F.2d 471 (1st Cir. 1964). In *Olin Corp.*, 268 NLRB 573 (1984), the Board relaxed the consideration requirement, holding that it was satisfied if the contractual and statutory issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin* placed the burden on the party opposing deferral to show that the standards for deferral were not met.

In *Babcock & Wilcox*, the Board majority found that the existing postarbitral deferral standard did not adequately balance the protection of employee rights under the Act and the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements. The majority reasoned that the existing standard created excessive risk that the Board would defer when an arbitrator had not adequately considered the unfair labor practice issue, or when it was impossible to tell whether that issue had been considered.

Based on these concerns, the majority adopted a new postarbitral deferral standard. The new standard retains the *Spielberg* requirements that the arbitral proceedings appear to be fair and regular and that all parties have agreed to be bound. In addition, the new standard places the burden on the party urging deferral to show that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue (i.e. the specific statutory right at issue was incorporated in the collective-bargaining agreement or the parties agreed to authorize arbitration of the statutory issue in the particular case); (2) the arbitrator was presented with and considered the statutory issue (or the party opposing deferral acted affirmatively to prevent the party advocating deferral from placing the statutory issue before the arbitrator); and (3) Board law reasonably permits the arbitral award.

The Board determined that it would apply the new postarbitral deferral standard prospectively rather than retroactively because parties had relied on the preexisting framework in negotiating contracts and processing grievances. Thus, where current contracts do not authorize arbitrators to decide unfair labor practice issues and the parties have not agreed to authorize such arbitration, the Board will not apply the new standard until those contracts have expired. If, however, the parties' contracts already provide for arbitration of unfair labor practice issues, or the parties authorized arbitration in particular cases, the Board will apply the new standard to future arbitrations, since its application will not contravene the parties' settled expectations. Applying the existing standard to the facts in *Babcock*, the Board determined that it was appropriate to defer to the arbitral award upholding the discharge of a union steward.

The Board also determined that the above modifications to the postarbitral deferral standard necessitated certain changes to the standards for deferring to the arbitral process and grievance settlements. Thus, the Board will no longer defer an unfair labor practice charge to the grievance-arbitration process unless the arbitrator is explicitly authorized to decide the unfair labor practice issue, since

there is no reason to delay processing a Board charge if it is plain from the outset that deferral to the ultimate arbitral decision would be improper. In addition, in order to maintain consistency between the deferral principles applicable to grievance settlements and arbitral decisions, the Board will defer to such settlements only if it is shown that: (1) the parties intended to settle the unfair labor practice issue; (2) they addressed it in the settlement agreement; and (3) Board law reasonably permits the settlement agreement (in light of the factors set forth in *Independent Stave Co.*, 287 NLRB 740 (1987)).

In separate dissents, Members Miscimarra and Johnson questioned the need and the legal rationale for changing the Board's long-standing reliance on the *Spielberg/Olin* standard. The dissenters emphasized, among other things, the history of Congressional and legislative support for the private resolution of disputes through arbitration, and the absence of any perceived or manifest shortcomings in the current standard.

HTH Corporation, Pacific Beach Corp., and KOA Management, LLC, d/b/a Pacific Beach Hotel, 361 NLRB No. 65

The full Board, affirming the ALJ, found multiple violations by the recidivist Respondents. In addition to the standard Board remedies, the Board majority (Pearce, Hirozawa, and Schiffer) imposed on the Employer a number of enhanced remedies and also indicated that the Board likely has the authority to impose the previously unused remedy of front pay, though it opted not to do so here.

The Board found in prior decisions, over a ten year period, that the Employer maintained an overbroad solicitation policy, threatened and coerced employees, unlawfully granted promotions and wage increases just prior to an election, unlawfully discharged members of the Union's bargaining committee, promulgated numerous overbroad rules, threatened employees with job loss, bargained in bad faith, unlawfully withdrew recognition from the employees' chosen representative, unilaterally changed various terms and conditions of employment, unlawfully imposed discipline, laid off employees and reassigned employees to other jobs without providing the Union notice and opportunity to bargain, and refused the Union's information requests. Despite Board orders finding the Employer violated multiple provisions of the Act and engaged in objectionable conduct that interfered with elections on two occasions, two Section 10(j) injunctions, and a contempt of court order for violating one of those injunctions, the Employer has continued to engage in unlawful activities and failed to comply with the remedial obligations previously imposed by the Board.

In the instant case, the Employer unlawfully disciplined and discharged an employee, disparaged the Union by telling employees that Union agents were barred from the premises, threatened Union agents with removal from a public

sidewalk, denied Union agents access in violation of the parties' agreement, implemented unilateral changes to terms and conditions, and refused to respond to Union information requests. The ALJ recommended the standard Board remedies for this unlawful conduct, as well as a broad cease and desist order and a notice reading.

Given the Employer's track record, the Board determined that the ALJ's recommended remedies were inadequate. Such remedies would be insufficient to dissipate the likely chilling effects of the Employer's unlawful conduct, to promote the free exercise of Section 7 rights, and to fully restore the Union to its former position. Accordingly, the Board also imposed certain enhanced remedies to reimburse the Union for certain costs incurred as a direct result of the Employer's unfair labor practices and to insure that the employees were fully informed of the Board's actions and the protections of the Act. Those enhanced remedies included: (1) reimbursement of the litigation expenses of the General Counsel and the Union; (2) reimbursement of the Union's bargaining expenses, as well as other expenses incurred because of the Employer's unlawful activity; (3) the posting of a notice and Explanation of Rights for three years and the distribution and mailing of those documents to all current and new employees and supervisors over a three-year period; (4) the publication of the notice and Explanation of Rights in two local publications twice a week for eight weeks; (5) a reading of the notice and Explanation of Rights in front of the employees, supervisors, and managers; and (6) periodic visitation by Board agents over a three-year period to ensure compliance.

The Board awarded the discriminatee the traditional remedy of reinstatement and back pay, but the majority (Pearce, Hirozawa, and Schiffer) noted that he had been unlawfully terminated twice for his protected activity, in the context of numerous other violations of the Act and instances of retaliation for union activity, and that front pay might be a more appropriate remedy in such circumstances. The majority cited to *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001), a Title VII Civil Rights Act case, as providing "strong support" for concluding that the Board has the authority to award front pay, even though it has not previously done so. In *Pollard*, the Supreme Court made clear that front pay awards in lieu of reinstatement are a make-whole remedy under Title VII, and noted further that the remedial provisions of Title VII closely track those of Section 10(c) of the Act. The majority also cited to other employment discrimination cases where reinstatement was found not feasible and front pay was awarded because there was extreme hostility between the parties, the employee had suffered psychological harm from the discrimination, or the employer had demonstrated aggressive behavior toward the former employee. Further, the majority referenced empirical evidence that the effectiveness of reinstatement as a remedy is limited; discriminatees are often deterred from accepting reinstatement because of the risk of retaliation from their employers, and many that accept reinstatement remain at work for only a short time. Nonetheless, the majority decided to defer consideration

of front pay to a future case, since determinations of what circumstances warrant such an award and the methodology for calculating it would be better made where the necessary factual record has been fully developed and the issue has been thoroughly briefed.

Writing separately, Member Miscimarra concurred with the majority's findings of violations and on some of the remedies ordered, but dissented on other remedies, particularly the award of attorneys' fees to the General Counsel and the Union, and the majority's discussion of the Board's authority to award front pay as a remedy in an appropriate case. In his separate opinion, Member Johnson also concurred with the majority's findings of violations and some of the remedies ordered, but dissented on the award of attorneys' fees to the General Counsel and the Union, the award of certain nonlitigation expenses to the Union for costs resulting from the Respondents' violations, and the requirement that the Respondents publish the notices in local newspapers. Member Johnson would also apply a different time frame to satisfy the mailing requirements, require a more limited notice posting period, and refrain from consideration of front pay.

2. SECTION 8(a)(1)

a. *Weingarten*

***YRC Freight*, 360 NLRB No. 90**

The Board panel (Miscimarra, Johnson, and Schiffer) adopted the ALJ's finding that the Employer did not violate Section 8(a)(1) by denying an employee's request for *Weingarten* representation, inasmuch as the Employer then discontinued the interview. The Board majority (Miscimarra and Johnson) further agreed with the ALJ that the Employer did not violate Section 8(a)(1) by subsequently issuing the employee a warning for his alleged misconduct.

The Employer operates a trucking company in Illinois. One morning a supervisor observed an employee pulling out of the Employer's yard in his truck an hour behind schedule. The supervisor approached the employee and asked why he was tardy. The employee questioned whether the supervisor was conducting an investigation, and if so, stated that he wanted a *Weingarten* representative. The supervisor replied that no stewards were available, but that the employee could choose another co-worker. (The collective-bargaining agreement allowed a co-worker to serve as a representative when a steward was unavailable.) The employee asked for a list of people scheduled to work that day, at which point the supervisor terminated the interview and informed the employee that he would be disciplined for misuse of company time. The employee then received a warning letter six days later, stating that he was being disciplined because he could offer no valid reason for his delay in pulling out of the yard.

The Board majority explained that the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), allows an employer confronted with an employee request for union representation during an investigatory interview to *not* move forward with the interview. In such a situation, the employee is considered to have relinquished any benefit associated with explanations he may have conveyed during the interview, and the employer can make a disciplinary decision based on other information available to it. In the instant case, as the supervisor had already observed the employee leaving the trucking yard an hour late, the Employer was privileged to issue discipline based on that information. Thus, the Board majority concluded, the discipline was based on the Employer's observation of the employee's tardiness, not on the employee's invocation of his *Weingarten* right, and therefore did not violate Section 8(a)(1).

Member Schiffer, dissenting in part, used a *Wright Line* analysis to find that the Employer's issuance of discipline violated the Act because it was motivated by the employee's request for a representative, rather than the supervisor's observation of the employee's tardiness. *See Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). She first concluded that the Charging Party's assertion of his *Weingarten* right was a motivating factor in the Employer's decision to discipline him, since the warning letter relied at least in part on the Charging Party's failure to offer a valid reason for his delay and the Employer knew that the lack of an explanation was the result of his request for a *Weingarten* representative. She then concluded the Employer had not presented sufficient evidence to show that it would have disciplined the Charging Party absent his request for a *Weingarten* representative.

***Ralph's Grocery Co.*, 361 NLRB No. 9**

The Board majority (Pearce and Schiffer), affirming the ALJ, found that the Employer violated Section 8(a)(1) by suspending and terminating an employee for refusing to submit to a drug and alcohol test without union representation. Because the employee's termination was inextricably linked to his assertion of *Weingarten* rights, the Board majority also concluded that a make-whole remedy was appropriate.

After various other employees observed the discharged employee engaging in odd behavior, the Employer informed the employee that he would be required to submit to a drug and alcohol test, and that his refusal to take the test would be considered both insubordination and an automatic positive test result. The employee then asked to contact a Union representative. Although the Employer stated that he did not have that right, it nevertheless allowed the employee to attempt to call a Union representative. After the employee was unable to reach anyone, the Employer again informed him that he was required to take a drug and

alcohol test. The employee continued to refuse, however, as he had been unable to obtain Union representation. The Employer then suspended him on that day, and terminated him the following day. The termination report stated that the employee was terminated for insubordination and for refusing to take the drug and alcohol test.

All three Board members agreed that the Employer violated Section 8(a)(1) by insisting the employee submit to the drug and alcohol test notwithstanding his request for union representation. The Board majority further held that, based on the wording of the termination report, the suspension and discharge were based solely on the employee's protected refusal to submit to the intoxication test without *Weingarten* representation, rather than on the Employer's observation of the employee's erratic behavior. Thus, the Board majority distinguished this case from *YRC Freight*, 360 NLRB No. 90 (Apr. 30, 2014), where the employer disciplined an employee based on information the employer had obtained prior to the employee's invocation of his *Weingarten* rights. The Board majority further concluded that a make-whole remedy was appropriate, as the discipline was inextricably tied to the employee's request for union assistance.

Member Johnson dissented in part, concluding that the employee was suspended and discharged lawfully based on the Employer's belief that he was intoxicated, and not due to any hostility toward his request for union representation.

***Postal Service*, 360 NLRB No. 79**

The Board panel (Pearce, Miscimarra, and Hirozawa), reversing the ALJ, held that an Employer did not violate Section 8(a)(1) by asking an employee an additional question after he had asserted his *Weingarten* right at an investigatory interview.

On February 23, 2012, the employee completed a request for leave from March 1 through March 4, and his request was approved without incident. On March 1, the employee informed a supervisor of his upcoming scheduled leave. The supervisor questioned whether the employee had an approved leave slip, the employee replied that he did, and the supervisor requested the slip. The employee then requested a *Weingarten* representative, and the supervisor assured him their conversation would not lead to discipline. The employee asked the supervisor to put that assurance in writing, which the supervisor did. The employee showed the supervisor the leave slip, and the supervisor then asked the employee to give him the leave slip. The employee refused, and the supervisor left the room. A short time later, a higher-ranking supervisor entered and asked if the employee had scheduled leave. The employee replied that he had and again requested a *Weingarten* representative. The higher-ranking supervisor asked if he was kidding, the

employee replied that he was not, and the higher-ranking supervisor then left the room as well.

The Board disagreed with the ALJ's conclusion that, after the employee's initial request for a *Weingarten* representative, the Employer violated Section 8(a)(1) by continuing the questioning without giving the employee the option of continuing without a union representative or discontinuing the interview. Thus, the Board explained that the *Weingarten* right is only triggered when the employee requests it. As there was no evidence that the second, higher-ranking supervisor was aware of the employee's prior *Weingarten* request during the employee's conversation with the first supervisor, the Employer did not violate the Act through the second supervisor's questioning of the employee. The Board noted that as soon as the employee reiterated his request for a union representative to the second supervisor, that supervisor discontinued the interview, thus satisfying the requirements of *Weingarten*.

b. Access

***Piedmont Gardens*, 360 NLRB No. 100**

The Board majority (Johnson and Schiffer), affirming the ALJ, held that an Employer's rule concerning off-duty employee access to the Employer's facility was facially unlawful. The Employer rule prohibited employees from remaining on the Employer's premises after their shift ended unless expressly authorized by a supervisor to do so.

The Board majority explained that, under *Tri-County Medical Center*, 222 NLRB 1089 (1976), a rule restricting off-duty employee access is valid only if it: (1) limits access solely with respect to the interior of the facility and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. The Board majority held that the Employer rule failed under the third prong of this standard, as the exception to the general prohibition on off-duty access (i.e., that an employee may access the facility if given permission by a supervisor) was indefinite in scope and effectively permitted the Employer to decide when and why employees may access the facility.

Member Johnson, though agreeing with Member Schiffer in the holding, did not rely on the ALJ's citation of precedent that arguably suggests that a rule permitting any limited exception to a uniform prohibition of off-duty employee access is unlawful.

Member Miscimarra, disagreeing with the majority's holding, would find that a rule broadly prohibiting off-duty employee access can lawfully contain an

exception permitting access if the employee obtains prior approval from a supervisor. He would find that such an exception reasonably contemplates legitimate business needs, which cannot all be enumerated in advance, that would warrant allowing off-duty employees on the premises.

c. Insignia

***Healthbridge Mgmt.*, 360 NLRB No. 118**

The Board panel (Hirozawa, Miscimarra, and Schiffer), affirming the ALJ, concluded that the Employer violated Section 8(a)(1) by removing flyers from Union bulletin boards at various facilities and by broadly prohibiting employees from wearing Union stickers at two of its facilities. The Board majority (Hirozawa and Schiffer), affirming the ALJ, also found that the Employer violated Section 8(a)(1) by prohibiting employees from wearing those stickers in patient care areas in four of its facilities.

The Employer manages six separate healthcare facilities in Connecticut where the events at issue transpired. In March 2011, the Union prepared flyers and stickers stating that the Employer had been “busted” by the NLRB for violating federal labor law, referencing an earlier complaint against the Employer and these six facilities. The flyer was posted on Union bulletin boards at each of the six facilities, and employees wore the stickers while at work. The Employer removed the flyers from all bulletin boards, four of the facilities specifically prohibited the stickers in patient care areas, and the remaining two facilities categorically banned employees from wearing the stickers in any part of the facilities.

The Board panel initially found that the Employer violated the Act by removing the flyers from union bulletin boards. Thus, the parties’ collective-bargaining agreement requires the Employer to provide the Union with bulletin boards at each of its facilities for posting notices, and the Employer was unable to present any evidence that it retained contractual authority to unilaterally approve the content of the bulletin boards.

In regard to the stickers, the Board explained that in the healthcare sphere, restrictions on wearing union insignia in nonpatient care areas are presumptively invalid, while such restrictions in patient care areas are presumptively valid. *See NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 779-81 (1979). In the latter case, however, the presumption of validity does not apply to a selective ban on only certain union insignia. In that case, as in the case of restrictions of union insignia in nonpatient care areas, the employer must demonstrate special circumstances justifying the restriction. *See Saint John’s Health Center*, 357 NLRB No. 170, slip op. at 2 (Dec. 30, 2011). Here, as the Employer broadly prohibited the “busted” stickers in all areas at two facilities and banned only the “busted” stickers—but not

other union insignia—at the remaining four facilities, the Employer was required to demonstrate special circumstances justifying its ban. The Board majority determined that the Employer did not meet this burden, as it provided only speculative testimony supporting its view that the stickers would upset patients.

Member Miscimarra, dissenting from the Board majority’s holding that the Employer violated Section 8(a)(1) by banning employees from wearing the “busted” sticker in patient care areas, would have found that the ban was presumptively valid and that categorically banning all unofficial insignia in patient care areas was not necessary in order to lawfully ban the “busted” sticker. Moreover, Member Miscimarra would have found that the ALJ did not give enough weight to the Employer’s testimony regarding the potentially detrimental effects the stickers would have on patients, and thus that special circumstances justified the Employer’s restriction on the “busted” stickers in patient care areas.

d. Rules

***First Transit, Inc.*, 360 NLRB No. 72**

The Board panel (Pearce, Johnson, and Schiffer), applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), examined numerous provisions in the Employer’s employee handbook to determine whether employees would reasonably construe the challenged rules in context to prohibit protected Section 7 activity. For example, the panel found that the stealing/theft rule and the employee-performance rule were lawful because when the contested language—“using Company property for activities not related to work anytime” and “loitering, or excessive visiting”—was read in light of the bullet points and examples listed, employees would reasonably construe such language to refer respectively to the theft of Employer property and to a failure to perform job duties, rather than Section 7 activity. Similarly, the use of the words “uncivil” and “insulting” in the portion of the personal conduct rule prohibiting “[p]ropane or abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious” was not so ambiguous as to render that bullet point overbroad; the introductory language made the purpose of the bullet point clear. On the other hand, Members Pearce and Schiffer, with Member Johnson dissenting, found that other portions of the personal conduct rule and certain portions of the employer’s disloyalty rule were unlawfully overbroad.

Further, the Board panel found that the inclusion of a “savings clause” in the handbook’s freedom of association policy was insufficient to ensure that employees would not read otherwise overbroad rules as restricting their Section 7 rights. An employer’s express notice to employees advising them of their rights under the Act may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule. But an effective “savings clause” or “safe harbor” provision should address the “broad panoply of rights protected by Section 7.” 360 NLRB No. 72, slip

op. at 4 (Apr. 2, 2014). This savings clause did not and focused solely on union organizational rights. In addition, the clause's placement was neither prominent nor proximate to the rules it purported to inform. Finally, the clause did not reference those rules, nor did the rules expressly reference the policy.

Copper River of Boiling Springs, LLC, 360 NLRB No. 60

The Board majority (Miscimarra and Johnson), affirming the ALJ, found that the Employer did not violate Section 8(a)(1) by maintaining a rule prohibiting “[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests.” The rule went on to state, “[t]his includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests.” The majority found that the language of the rule limited it to unprotected conduct that would interfere with the Employer’s legitimate business concerns.

Chairman Pearce dissented, finding that an employee would reasonably interpret a “negative attitude” as one that is critical of the Employer, and that the rule would thereby reasonably inhibit employees from discussing controversial topics, including terms and conditions of employment.

Hill & Dales General Hospital, 360 NLRB No. 70

The Board panel (Pearce, Johnson, and Schiffer) held that three paragraphs of the Employer’s Values and Standards of Behavior Policy, which respectively prohibited “negative comments” about co-workers and managers, required employees to represent the Employer in “a positive and professional manner,” and precluded employees from engaging in or listening to “negativity” were facially overbroad in violation of Section 8(a)(1).

Affirming the ALJ, the panel agreed that prohibitions upon “negative comments” and “negativity” were overbroad and ambiguous by their own terms, and, under *Lutheran Heritage*, employees would reasonably construe them to prohibit protected Section 7 activity. (A prohibition of gossip was not alleged to violate the Act.) Reversing the ALJ, a majority of the panel (Pearce and Schiffer) also found language stating that employees will “represent [the Employer] in the community in a positive and professional manner in every opportunity” just as overbroad and ambiguous. Particularly when considered in context with these other unlawful paragraphs, employees would reasonably view such language as proscribing them from engaging in any public activity or making any public statements on work-related matters that were not perceived as “positive” toward the Employer. This would, for example, discourage employees from engaging in protected public protests of unfair labor practices or making statements to third parties protesting their terms and conditions of employment. Member Johnson would have upheld the ALJ’s finding that this particular provision was lawful.

Philips Electronics North America Corp., 361 NLRB No. 16

The Board majority (Johnson and Schiffer), reversing the ALJ, held that the Employer violated Section 8(a)(1) by maintaining a rule prohibiting employees from discussing their discipline with their co-workers. The majority noted that an employer violates Section 8(a)(1) when it prohibits employees from speaking with their co-workers about discipline and other terms and conditions of employment, absent a legitimate and substantial business justification for the prohibition. More specifically, employees must be permitted to communicate the circumstances of their discipline so that their co-workers can be made aware of the nature of discipline being imposed, how they might avoid such discipline, and matters that can be raised in their own defense. Member Miscimarra dissented, on the ground that there was insufficient evidence that the Employer maintained such a rule.

Fresh & Easy Neighborhood Market, 361 NLRB No. 8

The Board majority (Pearce and Schiffer), reversing the ALJ, held that the Employer violated Section 8(a)(1) by maintaining a confidentiality rule in its “Code of Business Conduct” requiring employees to keep employee information “secure” and use it “fairly, lawfully and only for the purpose for which it was obtained.” The majority applied *Lutheran Heritage* and concluded that employees would reasonably construe the admonition to keep employee information “secure” to prohibit discussion and disclosure of information about other employees, such as wages and terms and conditions of employment. Further, the instruction to use information “only for the purpose for which it was obtained” reinforces that impression because the Employer’s business purpose clearly does not include protected discussion of wages or working conditions with fellow employees, union representatives, or Board agents.

Member Johnson dissented, finding that the Employer’s Code was dedicated only to consideration of ethical matters and did not resemble an employee handbook dealing with working conditions, the challenged rule was adequately limited by context, and therefore the rule would not reasonably tend to chill employees’ exercise of their Section 7 rights.

Casino San Pablo, 361 NLRB No. 148

The full panel (Pearce, Johnson, and Schiffer) found unlawful the maintenance of handbook rules prohibiting solicitation and distribution of literature in the workplace, and precluding the making of “false, fraudulent or malicious statements” to or about a fellow employee. Board Members Pearce and Schiffer also found that that the Employer violated Section 8(a)(1) by maintaining a handbook rule that prohibited “disrespectful conduct,” and a rule that limited off-duty

employee access to the back of the house areas. A different Board majority (Schiffer and Johnson) upheld the rule prohibiting “gossip” as lawful.

With regard to the rule prohibiting “false, fraudulent, or malicious statements,” the full panel held that prohibiting employees from making merely false statements, as opposed to maliciously false statements, had the tendency to chill protected activity, citing *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999), where a virtually identical rule was found unlawfully overbroad. Applying *Lutheran Heritage*, Members Pearce and Schiffer held that employees would reasonably construe the rule stating that employees would be subject to discipline for “[i]nsubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers)” as encompassing any form of Section 7 activity that might be deemed insufficiently deferential to a person in authority, in other words, as referring to something less than actual insubordination. The rule would reasonably be construed to preclude, for example, concerted objections to working conditions imposed by a supervisor, collectively complaining about a supervisor’s arbitrary conduct, or joint challenges to an unlawful pay scheme. Members Schiffer and Johnson found, however, that employees would not reasonably construe the rule prohibiting gossip as precluding Section 7 activity, as gossip is reasonably understood as chatty talk, rumors, or reports of an intimate nature. Chairman Pearce would find this rule too ambiguous and subject to a reasonable belief that it would include Section 7 activity.

Members Pearce and Schiffer analyzed the rule limiting off-duty employees’ access to “back of the house areas” under *Tri-County Medical Center*, 222 NLRB 1089 (1976). The rule limited such access more than 30 minutes prior to the beginning of or after the end of employees’ shifts except to conduct business with Human Resources, for pre-arranged training sessions or orientations, or with the approval of a director, manager, or supervisor. They found the rule unlawful under the third prong of the *Tri-County* test because the last exception effectively vested management with unlimited discretion to expand or deny off-duty employees’ access for any reason it chose.

Member Johnson dissented, and would have upheld as lawful both the rule limiting off-duty employees’ access and the rule prohibiting “[i]nsubordination or other disrespectful conduct.” More significantly, he called attention to what he considers justifiable criticism of the Board’s application of the *Lutheran Heritage* “reasonable employee” standard, noting that Member Miscimarra has already “given up on the test entirely.” See *MCPc, Inc.*, 360 NLRB No. 39, slip op. at 1, n.4 (Feb. 6, 2014) (Member Miscimarra, concurring). He urged the Board to decide on a defined set of rules for applying the *Lutheran Heritage* test that will provide more guidance to employers. He proposed starting with *ejusdem generis*, the concept that “where general words follow words of a particular and specific meaning, such

general words are not to be construed in their widest extent, but are to be held as applying to persons or things of the same kind or class as those specifically mentioned.” 360 NLRB No. 148, slip op. at 12 (Dec. 16, 2014) (Member Johnson, dissenting). Applying that concept here, he would find that “a normal person” would interpret the phrase “disrespectful conduct” to be “a species of, or akin to, insubordination.” *Id.*

Care One at Madison Ave., 361 NLRB No. 159

The Board majority (Pearce and Schiffer), affirming the ALJ, found that the Employer violated the Act by posting a postelection memorandum directed at union activity on its employee bulletin board. The memorandum was posted three days after the election, with the Employer’s preexisting Workplace Violence Prevention Policy attached. The Employer’s administrator stated in the memorandum that, “I thought that after the election we would treat each other with dignity and respect[,]” but that it had been reported to him “that a few employees are not treating their fellow team members with respect and dignity. I have even heard disturbing reports that some of our team members have been threatened.” The memorandum went on to state that anyone engaging in such conduct would be disciplined. *The ALJ* found no evidence that any such threats had actually occurred. Applying *Lutheran Heritage*, the Board held that the Employer violated Section 8(a)(1) because the memorandum was promulgated in response to union activity, and employees would reasonably construe the memorandum to prohibit such activity. The Board reasoned that employees would understand the memorandum to suggest that employees had not treated each other with dignity and respect when they had engaged in protected union activity during the Union campaign, and would reasonably construe the memorandum to target such protected activity in the wake of the election.

Member Johnson dissented, finding that the postelection memorandum merely reiterated the Employer’s lawful, preexisting Workplace Violence Prevention Policy and would not reasonably be construed by employees to restrain their Section 7 rights.

e. Lawsuits

Atelier Condominium & Cooper Square Realty, 361 NLRB No. 111

The Board panel (Hirozawa, Schiffer, and Miscimarra writing in a separate concurrence) found, among other violations, that the Employer violated Section 8(a)(1) by filing and maintaining a baseless and retaliatory lawsuit against one of the Charging Parties.

The Employer operates a luxury residential condominium building. A group of condominium owners filed a lawsuit against members of the Employer's Board of Directors, the Employer's Property Manager, and the Board President's real estate company, accusing the defendants of corruption, bribery, payoffs, and extortion. The day the lawsuit was filed, the Employer's Resident Manager committed suicide. Shortly thereafter, anonymous internet postings addressed to the condominium residents discussed the suicide and the alleged corrupt activities of those named in the lawsuit. In response to the internet postings, the Board President, Property Manager, and estate of the Resident Manager filed and maintained a state-court lawsuit for libel and tortious business interference against anonymous "John and Jane Doe" defendants and three former employees, including one of the Charging Parties, whom the Employer had previously unlawfully discharged.

The Board found that the Employer's lawsuit against that Charging Party was baseless because the Employer had no evidence and could not reasonably believe it would acquire evidence in discovery that showed he had published the anonymous internet postings, a requisite element of a libel claim and a necessary factual foundation for the tortious business interference claim. The Board found the lawsuit retaliatory based on the following circumstantial evidence: (1) the Employer knew of the Charging Party's protected union activity; (2) the Employer had demonstrated anti-union animus by conducting unlawful interrogations, threatening reprisals during the Union's organizing drive, unlawfully discharging the Charging Parties, and assisting a different minority union; (3) the Employer's lawsuit was baseless; and (4) the Employer's lawsuit sought \$190 million in compensatory and punitive damages, without attempting to justify the amount of damages sought.

Member Miscimarra concurred with the majority's conclusion, but he would not rely on the baselessness of the lawsuit as evidence of retaliation because baselessness is a separate requirement of the *Bill Johnson's* test. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). He also would not infer a retaliatory motive from the amount of damages sought in an employer's state-court lawsuit because the amount of damages sought might be based on many factors, and the Board does not have the expertise to determine what constitutes reasonable damages under a state-law claim. He concluded that the Employer's unfair labor practices alone were sufficient to support a finding that the lawsuit had a retaliatory motive.

3. SECTION 8(a)(3)

Conagra Foods, Inc., 361 NLRB No. 113

The Board majority (Pearce and Schiffer), affirming the ALJ, held that the Employer violated Section 8(a)(3) and (1) by issuing an employee a verbal warning for violating its lawful no-solicitation policy, based on her having informed employees during work time that she had placed authorization cards in their locker.

The Union was organizing the Employer's Troy, Ohio food processing plant when the discriminatee, a third-shift employee who was also an open Union supporter, encountered two second-shift employees in the restroom. The discriminatee asked the two second-shift employees if they would like to sign authorization cards, and they answered affirmatively. A few days later, again in the restroom, one of the second-shift employees provided the discriminatee with the locker number shared by the two second-shift employees, so that the discriminatee could place the authorization cards therein. Later, the discriminatee told the two second-shift employees on the production floor, while one was waiting to start work and the other was cleaning, that she had placed the authorization cards in their locker. The discriminatee did not ask the employees then to sign the cards, and the encounter lasted only a few seconds. Thereafter, the Employer issued the discriminatee a verbal warning for violating the Employer's lawful no-solicitation policy.

The Board majority agreed with the ALJ that the discriminatee's conduct on the production floor had not amounted to solicitation and, therefore, the Employer had unlawfully applied its no-solicitation policy to her. The Board majority applied longstanding Board precedent—holding that “solicitation” occurs when someone is asked to join a union by signing an authorization card at that time—and concluded that the discriminatee's statement that the authorization cards were in the employees' locker did not amount to “solicitation.” There was no request to take action, and merely providing information to co-workers does not constitute solicitation. The Employer therefore violated Section 8(a)(3) by issuing the discriminatee a verbal warning for protected activity.

Member Miscimarra dissented in part and concluded that the discriminatee's conduct constituted “solicitation” under a commonsense definition of the word because it interrupted the employees' work time and was intended to obtain their signatures, despite the absence of Union authorization cards at that conversation. He would therefore have found that she was lawfully disciplined for engaging in solicitation during working time.

4. SECTION 8(a)(5)

a. Decision Bargaining

Mi Pueblo Foods, 360 NLRB No. 116

The Board majority (Pearce and Hirozawa), reversing the ALJ, held that the Employer's unilateral elimination of its "cross-docking" delivery system and assignment of that work to a subcontractor were unlawful under *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) and *Torrington Industries*, 307 NLRB 809 (1992). Additionally, the full Board panel affirmed the ALJ's conclusion that the Employer made other unlawful unilateral changes, including eliminating backhauls and pickups of its products and subcontracting that work. Members Pearce and Hirozawa analyzed those unilateral changes under *Fibreboard*, whereas Member Johnson analyzed them under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

The Employer had engaged in "cross-docking" of products since 2008, i.e., using its distribution center employees to receive vendors' goods and prepare them for delivery to the Employer's retail grocery stores. In April 2011, the Employer unilaterally decided, without bargaining with the Union, to cease "cross-docking" some products and contract out the delivery of those products directly from the vendors to the retail stores to cut costs and improve operational efficiency.

The Board majority found that the Employer's decision to change from a hub-and-spoke delivery system to a point-to-point system for distributing the products of one supplier to most but not all of its stores was not a change in the scope or direction of its enterprise but, rather, entailed substituting one group of employees for another. As such, the Employer's decision was not akin to a core entrepreneurial decision, like a closure or partial closure, under *First National Maintenance* and thus fell squarely under the *Fibreboard* and *Torrington* framework. The majority also concluded though that, even under the balancing test set forth in *First National Maintenance*, since the Employer's concerns raised issues amenable to the collective-bargaining process, the potential benefits of seeking a solution to those concerns through bargaining outweighed any temporary burden on the Employer that bargaining would entail. The Board therefore rejected the ALJ's reasoning that the Employer's decision did not materially, substantially, or significantly affect employees' terms and conditions of employment because no employees were immediately laid off or adversely affected.

Member Johnson dissented and, analyzing the Employer's "cross-docking" decision solely under *First National Maintenance*, concluded that the Employer made a core entrepreneurial decision to discontinue that portion of its business model. He further concluded that the Employer's need for unencumbered decision-

making over its distribution model outweighed any potential benefits to the collective-bargaining process.

b. Unilateral Changes

Barstow Community Hospital, 361 NLRB No. 34

The Board (Pearce, Hirozawa, and Johnson), affirming the ALJ, held that the Employer violated Section 8(a)(5) by declaring impasse and refusing to bargain unless the Union directed the unit registered nurses to stop using the Union’s “assignment despite objection” form to document circumstances they believed to be unsafe or could jeopardize their nursing licenses. A majority of the panel (Pearce and Hirozawa) also agreed with the ALJ that the Employer violated Section 8(a)(5) by refusing to submit any bargaining proposals or counterproposals until it received the Union’s entire contract proposal. Unlike the ALJ, however, the full Board panel held that the Employer also violated Section 8(a)(5) by unilaterally changing its certification training policy.

Nurses at the Employer’s hospital are required to be certified in basic, advanced cardiac, and pediatric life support. Previously, the Employer offered instructor-led certification training at its facility, which nurses were paid to attend, and other pre-approved in-person training at other facilities, for which nurses were not reimbursed. Shortly after the Union was certified as the nurses’ representative, the Employer unilaterally replaced its on-site training with the online service and capped the number of training hours for which nurses would be paid.

Chairman Pearce and Member Hirozawa rejected the Employer’s claim that its change was not “material, substantial, or significant,” noting the difference in format and potential effectiveness of online versus in-person training, as well as the limited number of paid hours for the new training. Member Johnson did not find that the training change alone was material, substantial, or significant but concluded that the Employer’s unilateral change was unlawful because it included the reimbursement limitation. Finally, the Board majority ordered the Employer to reimburse the Union for its negotiating expenses; Member Johnson would not have concluded that such an award was necessary.

5. SECTION 8(b)(1)(A)

a. Duty of Fair Representation

Amalgamated Transit Union Local 1498 (Jefferson Partners L.P.), 360 NLRB No. 96

The Board majority (Pearce and Hirozawa), reversing the ALJ, held that the Union did not violate its duty of fair representation under Section 8(b)(1)(A) by negligently failing to timely request arbitration of the Charging Party's grievance and thereafter mistakenly conveying to the Charging Party that his grievance was pending.

The applicable contract required that a party seeking arbitration must, within 30 days of the Employer's grievance denial, notify the Federal Mediation and Conciliation Service and request a list of arbitrators or forfeit the claim. The Charging Party filed a grievance concerning his unsuccessful bid for a mechanic position, and thereafter an appeal thereof, with the Union's support and assistance. However, Union counsel negligently failed to comply with the contractual 30-day requirement, thereby resulting in the forfeiture of the Charging Party's grievance. Two years elapsed between the Union's initial noncompliance and ultimate discovery of the mistake, during which the Union had informed the Charging Party several times that his arbitration was pending.

The majority held that the Union's negligent failure to timely obtain an arbitration was an inadvertent error and not arbitrary, discriminatory, or bad faith conduct violative of Section 8(b)(1)(A). Under longstanding precedent, "something more" than mere negligence, ineptitude, or mismanagement is required to establish a union's breach of its duty of fair representation. Because the Union had not ignored the Charging Party's grievance, or processed it perfunctorily, its negligent failure to timely file for arbitration was not arbitrary conduct, and the Union's subsequent actions, including the Union's failure to discover its error for two years, did not render the Union's initial negligent mistake arbitrary. Moreover, the Union president and attorney never deliberately misrepresented the status of the grievance to the Charging Party, and instead operated under the good faith but mistaken belief that the attorney had properly scheduled the arbitration.

Member Miscimarra dissented, concluding that the Union's conduct as a whole amounted to gross negligence. Miscimarra agreed with the ALJ that the Union's mishandling of the Charging Party's grievance was "unconscionable and far outside the pale of reasonable" because it was comprised of multiple cumulative lapses, including the Union's subsequent failure to realize and correct its initial filing mistake, rather than a single inadvertent error as characterized by the majority.

b. Facebook

Amalgamated Transit Local 1433 (Veolia Transportation Services), 360 NLRB No. 44

The Board panel (Pearce, Hirozawa, and Miscimarra), affirming the ALJ, held that the Union did not violate Section 8(b)(1)(A) by failing to disavow or remove certain comments posted on its Facebook page by individuals who were not Union agents.

The Union represents drivers of a private contractor that provides public bus service and maintains a Facebook page intended to function as a forum for discussions among its members. During a six-day strike, individuals, who were neither alleged nor found to be Union agents, posted on the Union's Facebook page comments that threatened employees with physical harm and less favorable Union representation if they refused to participate in the strike. The Acting General Counsel argued that the Union had a duty to disavow such comments because the Union's Facebook page was an electronic extension of its picket line. The ALJ rejected that argument.

Affirming the ALJ, Chairman Pearce and Member Hirozawa held that the Union did not violate Section 8(b)(1)(A) by failing to remove the comments from its Facebook page because the comments did not constitute threats and the individuals who posted them were not Union agents. Because the Facebook comments referenced physical violence, Member Miscimarra relied solely on the lack of agency status to dismiss the allegations, and disagreed with the majority that the comments would have been permissible under Section 8(b)(1)(A) if they been made by Union agents.

6. PROTECTED CONCERTED ACTIVITY

Flex Frac Logistics, LLC 360 NLRB No. 120

The Board panel (Miscimarra, Hirozawa, and Schiffer), affirming the ALJ, concluded that the Employer did not violate Section 8(a)(1) by discharging an employee pursuant to an unlawfully overbroad confidentiality rule.

The Employer was engaged in the business of delivering frac sand for use in oil and gas drilling. To make these deliveries, it directly employed drivers and also contracted with other trucking companies to obtain additional drivers. The Employer maintained a confidentiality rule concerning financial information and client rates that the Board, in an earlier proceeding, found to be unlawfully overbroad inasmuch as it could be read by employees to forbid them from discussing

wages, hours, and other terms and conditions of employment with one another. The Charging Party, an accounting employee, was aware of this rule and nevertheless informed a dispatch employee, who was a former driver, that the Employer was charging much more for client deliveries than it paid its drivers. The dispatch employee reported this conversation to management. Shortly afterwards the Employer received calls from several trucking companies that it contracted with, who demanded more money in light of having learned how much the Employer charged for its deliveries. Believing that the companies obtained this information from the Charging Party, the Employer discharged her for violating its confidentiality policy.

Members Hirozawa and Schiffer explained that, under *Continental Group, Inc.*, 357 NLRB No. 39 (Aug. 11, 2011), discipline pursuant to an unlawfully overbroad rule is unlawful only if the discharged employee violated the rule by: (1) engaging in protected conduct, or (2) engaging in conduct that otherwise implicates concerns underlying Section 7. Here, the Board determined that even though the Charging Party's actions might have implicated Section 7 concerns, she was terminated for her gross misconduct in betraying the Employer's confidentiality interests, and not because of application of the rule. Importantly, other employees would have understood her termination to be for her gross misconduct, and thus the discharge would not tend to chill the exercise of Section 7 rights.

Member Miscimarra, though agreeing in the outcome, would have found the Charging Party's actions to be unprotected conduct whether or not the Employer applied an overbroad rule, and thus would not apply or rely on *Continental Group*. For that reason, he expressed no opinion as to the merits of the Board's earlier determination finding the Employer's confidentiality rule unlawful.

***Food Services of America, Inc.*, 360 NLRB No. 123**

The Board majority (Hirozawa and Schiffer), reversing the ALJ, held that the Employer violated Section 8(a)(1) by terminating an employee in retaliation for her protected concerted activity of warning a fellow employee that she was in danger of being discharged for poor work performance. The Board panel (Hirozawa, Schiffer, and Miscimarra), affirming the ALJ, also concluded that the Employer did not violate Section 8(a)(1) by terminating the Charging Party pursuant to an unlawfully overbroad rule, inasmuch as his transfer of hundreds of confidential business emails to his and the other employee's personal email accounts had only a tangential connection to Section 7 activity.

In November 2010, a supervisor on several occasions sent the discriminatee e-mails promoting the supervisor's religious beliefs and intimating that the discriminatee would be more likely to be promoted if she adopted them. At about the same time, the Employer hired her friend, based in part on her

recommendation. Due to the friend's work performance issues, however, the discriminatee was criticized by the same supervisor for recommending the friend for hire, and the discriminatee believed that the friend's job was in jeopardy. The discriminatee began telling the friend every other day that she was going to be fired, and sending her website links for other job opportunities. On February 25, 2011, the discriminatee—suspicious that the supervisor's proselytizing was motivated by a national origin bias—suggested to her friend via instant message that the two speak Spanish in front of the supervisor in order to upset her and see if the supervisor would "say something stupid." The discriminatee also stated that, in the future if the friend did not understand the supervisor's instructions, she should "play dumb" and just ask the discriminatee or the Charging Party, (another co-worker), for help. The friend declined to participate in this scheme designed to provoke the supervisor and later provided a copy of the February 25 conversation (and their earlier discussions regarding the friend's job security) to the Employer, who then terminated the discriminatee. After her termination, the discriminatee asked the Charging Party to forward her work emails in an effort to document her allegations concerning harassment and discrimination. The Charging Party transferred hundreds of emails to both his and the discriminatee's personal email accounts, many of which contained confidential business information. The Employer, learning of the Charging Party's actions, terminated him for violating its confidentiality policy.

Citing *Jhirmack Enterprises*, 283 NLRB 609 (1987), the Board majority explained that one employee's warning to another that the latter's job is at risk is protected concerted activity. Then, applying *Wright Line*, the Board majority concluded that, because the discriminatee's warnings to the friend regarding her job security played a significant role in the discriminatee's discharge, and the Employer did not demonstrate that it would have terminated her in the absence of these warnings, her termination violated Section 8(a)(1).

Member Miscimarra, dissenting, would have found the discriminatee's actions in instructing the friend to "play dumb" and disregard the supervisor when being given instructions to be unprotected misconduct. Because the Employer lawfully focused on this aspect of the discriminatee's conduct, Member Miscimarra would have concluded that her termination did not violate Section 8(a)(1).

Members Hirozawa and Schiffer agreed with the ALJ that the Charging Party's termination was not unlawful under *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 4, inasmuch as the transfer of hundreds of confidential business emails was an egregious act that had a minimal relationship to his Section 7 interest in documenting the discriminatee's allegations of discrimination and the Charging Party's own satisfactory job performance. Member Miscimarra agreed that the Charging Party was not unlawfully discharged, but would not apply or rely on *Continental Group*.

Alternative Energy Applications, Inc., 361 NLRB No. 139

The Board majority (Hirozawa and Schiffer), reversing the ALJ, concluded in relevant part that the Employer violated Section 8(a)(1) by discharging an employee because it believed he had discussed wages with other employees.

The Employer weatherizes homes and offices in Tampa, Florida. The Charging Party was hired as a driver/installer and, shortly after hire, asked the Employer for a wage increase. The Employer gave him a raise in advance of the traditional six-week waiting period but instructed him not to discuss his wage increase with other employees because “we have fired employees in the past for talking about their wages.” A month later, the mother of another employee, who was a friend of the company president, called the president to complain about her son’s pay. During that conversation, she told the president that her son had discussed issues relating to overtime pay with the Charging Party. A few weeks later, the Charging Party was working an installation job when his foot went through an attic ceiling because he failed to follow the Employer’s installation directions. The Charging Party thereafter contacted OSHA. The Employer then terminated him on the grounds that he did not fit the Employer’s “philosophy” and other employees complained about working with him. As part of the OSHA investigation, the Employer’s attorney wrote that it had not terminated the Charging Party because of the OSHA complaint but, rather, in part because he “had disclosed his rate of pay to other employees, prompting the mother of another employee to contact [the Employer] and complain.”

Applying *Wright Line*, Members Hirozawa and Schiffer concluded that the Employer violated Section 8(a)(1) by terminating the employee because it believed he had discussed wages with his co-workers. The majority concluded that the evidence, including the Employer’s response to the OSHA investigation, established a prima facie case that the Employer discharged the employee based on its belief that he had discussed wages with other employees. The majority rejected the Employer’s argument that the Charging Party’s wage-related complaints were not concerted activities, noting that wage discussions are “inherently concerted” because wages are a vital term and condition, and wage discussions are often preliminary to organizing or other action for mutual aid and protection. Further, the majority would have found his discharge unlawful even if his wage discussions were not concerted because he was discharged to prevent him from talking to others about wages. *See Parexel International, LLC, 356 NLRB No. 82, slip op. at 3 (Jan. 28, 2011)*. Finally, the majority held that the Employer had failed to establish that it would have discharged the employee for his poor attitude and work ethic, absent its belief that he discussed wages with others.

Member Miscimarra dissented, concluding that the evidence failed to establish that the employee's wage discussions were meant to induce group action. He found that the majority's view that any discussion about wages is inherently concerted, as well as the "preemptive strike" theory of *Parexel*, are directly contrary to the holdings in *Meyers Industries*, 281 NLRB 882 (1986), *affirmed sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) and *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). Even assuming *Parexel* was correctly decided, Member Miscimarra concluded that there was no evidence that the Employer discharged the Charging Party to prevent him from engaging in future concerted activity.

***Jimmy John's*, 361 NLRB No. 27**

The Board majority (Pearce and Schiffer), affirming the ALJ, found that the Employer violated Section 8(a)(3) and (1) by disciplining and terminating employees for publishing a "Sick Days" poster at various Employer facilities during the course of an organizational campaign. In so doing, the Board majority concluded that the poster did not lose the protection of the Act under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

The Employer operates ten sandwich shops in the Minneapolis area as a franchisee of Jimmy John's, a nationwide fast food chain. One of the employee concerns underlying the organizing drive was the lack of paid sick leave. If an employee was sick, he was required to find a replacement for his shift or risk receiving discipline. In late January or early February 2011, the Union placed identical posters about the sick leave policy on community bulletin boards in the Employer's stores. The posters displayed side-by-side pictures of a sandwich, one described as made by a healthy employee and the other as made by a sick employee. The caption read, "Can't tell the difference? That's too bad because Jimmy John's workers don't get paid sick days. Shoot, we can't even call in sick. We hope your immune system is ready because you are about to take the sandwich test.... Help Jimmy John's workers win sick days." The poster then listed contact information for the Union. The Employer removed all of the posters. In March, four employees approached one of the Employer's owners and gave him a letter from the Union requesting that he change the sick leave policy and that he discuss the matter with the Union; on the same day, the Union issued a press release which included a copy of the poster. The co-owner refused to meet with the Union. Later that month employees posted additional posters in stores and also in public places near the stores. These posters were identical to the earlier copies except that in lieu of the Union's contact information, it contained the co-owner's telephone number. Shortly thereafter the Employer discharged six employees and issued written warnings to three others for their participation in the poster campaign.

Initially, the Board majority noted that it is well settled that employees are protected when they seek to improve their working conditions through channels outside the immediate employee-employer relationship, such as communications to third parties. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Here, the Employer argued that the posters were disloyal and therefore lost protection under the Act. Under *Jefferson Standard*, the Board focuses on whether communications to third parties indicate they are related to an ongoing labor dispute and if so, whether they nevertheless lose protection because they are “so disloyal, reckless or maliciously untrue as to lose the Act’s protection.” *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (July 21, 2011). Further, in regard to disloyalty, the Board considers whether the communications were made at a critical time during the start of a company’s business, and whether the communications were so disparaging that they could be seen as reasonably calculated to harm the company or reduce its income. *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007). Applying this framework, the Board majority first observed that the communications expressly indicated they were related to an ongoing labor dispute. Next, the majority concluded that none of the statements contained in the poster were maliciously untrue or reckless, inasmuch as the statements that employees don’t receive sick days and cannot call in sick were fairly accurate characterizations of the impact of the Employer’s policy. Finally, the Board determined that the posters were not “so disloyal” as to lose protection of the Act because they were not published at a critical time in the initiation of the Employer’s business, and were not designed to inflict economic harm on the Employer. Moreover, although the posters touched on a potential public safety issue, the employees were motivated by a sincere desire to improve their working conditions, and raising the potential safety hazard of sick employees making sandwiches was in direct furtherance of that aim. Therefore, by disciplining and terminating employees engaged in the poster campaign, the Employer violated Section 8(a)(3) and (1).

Member Johnson, dissenting, found that the posters contained maliciously untrue statements, since employees could in fact call in sick if they found a replacement, and also disparaged the Employer’s product with the primary aim of injuring the Employer’s business and income, rather than redressing the employees’ work-related grievances. In this respect, Member Johnson would find that implying the Employer’s sandwiches were a public health risk was akin to a nuclear bomb wholly out of proportion to the employees’ single issue of unpaid sick leave. For those reasons, he would find that the employees lost protection and were therefore lawfully disciplined and terminated.

Richmond District Neighborhood Center, 361 NLRB No. 74

The Board panel (Miscimarra, Johnson, and Schiffer), affirming the ALJ, found that an Employer did not violate Section 8(a)(1) when it rescinded the rehire letters of two employees based on a Facebook conversation.

The Employer is a teen center attached to a San Francisco high school that provides afterschool activities to students. Prior to the beginning of each school year, the Employer sends rehire letters to those employees it wishes to return. Both of the discharged employees in this case received rehire letters in advance of the 2012-2013 school year. In early August, the two employees engaged in a profanity-laden Facebook exchange that expressed displeasure with the way the Employer operated, and contemplated various acts of insubordination, including refusing to obtain permission before organizing youth activities as required by the Employer's policies, disregarding school rules (such as encouraging the kids to paint graffiti on the walls), undermining leadership, and neglecting their duties. The Employer obtained a screenshot of the exchange, and rescinded both employees' rehire letters.

Citing *Neff-Perkins Co.*, 315 NLRB 1229, 1229 n.2, 1233-34 (1994), the Board found that the Employer had reasonably concluded that the discharged employees' conduct was so egregious as to take it outside the protection of the Act and render them unfit for further service. Members Johnson and Schiffer did not pass on whether this standard was the appropriate standard for analyzing private Facebook conversations, given that no exceptions were filed to the ALJ's use of this test. Member Miscimarra would find that the ALJ used the appropriate standard.

7. REMEDY

***Mimbres Memorial Hospital & Nursing Home*, 361 NLRB No. 25**

The Board panel (Pearce, Johnson, and Schiffer), on remand from the D.C. Circuit, affirmed its finding in an earlier proceeding that the backpay due employees whose hours had been unlawfully reduced, but who did not lose their jobs, should not be reduced by any interim earnings.

In 2004 the Board issued a Decision and Order finding that the Employer had violated Section 8(a)(5) and (1) by unilaterally reducing unit employees' hours from 40 hours per week to between 32 and 36 hours per week. To remedy the violation, the Board ordered the Employer to make the affected employees whole for any loss of earnings in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), *enforced*, 444 F.2d 502 (6th Cir. 1971). In a subsequent compliance proceeding, the Board held that the backpay due each employee should not be reduced by any interim earnings the employees may have obtained during the backpay period. On appeal from the compliance proceeding, the D.C. Circuit Court of Appeals, in relevant part, vacated the Board's backpay computation and remanded the case for a more thorough review of the question of whether the Board should deduct an employee's interim earnings from other employment when calculating backpay where the employee suffers no cessation of employment with the respondent.

The Board first explained that the duty of an employee to mitigate lost earnings was rooted in an ancient principle of law that discouraged an unjustifiable refusal to take new employment, and, as explained by the Supreme Court in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 200 (1941), furthers “the healthy policy of promoting production and employment.” However, declining to impose a duty to mitigate damages where there is no cessation of employment is well within the Board’s broad discretionary authority as defined by Section 10(c) of the Act. The Board noted that although some of its decisions may have mistakenly deducted interim earnings where there had been no cessation of employment, overwhelming Board policy and precedent has been to preclude the deduction of such interim earnings. The Board accepted the D.C. Circuit’s view that the Board could deduct interim earnings without imposing a duty to mitigate damages, but concluded that doing so would contravene the policy of promoting production and employment. And, permitting the deduction of interim earnings would result in two deleterious consequences: (1) wrongdoing employers would have an incentive to delay compliance with a Board order to reduce the backpay owed a wronged employee, and (2) wronged employees confronted with the necessity of working two jobs may simply seek full-time employment elsewhere, thus abandoning their entitlement to a full vindication of their statutory rights. For these reasons, the Board affirmed its earlier order providing for full backpay.

8. IT’S ALL IN THE FOOTNOTES

a. Rules

***MCPc, Inc.*, 360 NLRB No. 39, fn. 4:**

“Member Miscimarra agrees that the Respondent’s confidentiality rule violated Sec. 8(a)(1) because it would prohibit protected employee discussions regarding compensation without other important justifications, and this aspect of the rule was a basis for the employer’s actions in this case; but Member Miscimarra does not agree with the current Board standard regarding allegedly overly broad rules and policies, which is set forth as the first prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (finding rules and policies unlawful, even if they do not explicitly restrict protected activity and are not applied against or promulgated in response to such activity, where ‘employees would reasonably construe the language to prohibit Section 7 activity’). He advocates a reexamination of this standard in an appropriate future case.”

***California Institute of Technology Jet Propulsion Laboratory*, 360 NLRB No. 63, fn. 1:**

“... In addition, although Chairman Pearce agrees with the judge and his colleagues that, in context, a reasonable employee would not understand sec. 2.3 of

the Respondent's Ethics and Business Conduct policy to interfere with Sec. 7 activity, in doing so he finds it unnecessary to pass on whether *Ark Las Vegas*, 335 NLRB 1284 (2001), and *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), were correctly decided.

Member Miscimarra agrees that Sec. 2.3 of the Respondents Ethics and Business Conduct policy is not overly broad in violation of the Act, but he disagrees with the standard set forth in the first prong of the test in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), which was relied upon by the judge; Member Miscimarra advocates for a reexamination of this standard in an appropriate future case.”

***Durham School Services*, 360 NLRB No. 85, fn. 5:**

“For the reasons stated by the judge, we find objectionable the provision of the Respondent’s social networking policy requiring that employees’ contacts with parents, school representatives and school officials be ‘appropriate,’ and the provision subjecting employees to investigation and possible discipline for publicly sharing ‘unfavorable ... information related to the company or any of its employees.’

...

Members Miscimarra and Johnson join their colleagues in setting aside the election, but do so based solely on Cheesman’s unlawful discharge. They do not reach or join in the findings of the majority or the judge regarding the Respondent’s off-duty access and social networking policies.”

***Good Samaritan Medical Ctr.*, 361 NLRB No. 145, fn. 14:**

“Under the third prong of *Lutheran Heritage Village*, supra, application of a rule or policy to restrict the exercise of Sec. 7 rights makes the maintenance of that rule unlawful, and the Board has ordered rescission of rules found unlawful under *Lutheran’s* third prong. See *Albertson’s, Inc.*, 351 NLRB 254, 259, 262 (2007). Member Miscimarra and Member Johnson disagree that the unlawful application of an otherwise lawful rule should make it unlawful to *maintain* that rule. Similarly, they disagree that rescission is an appropriate remedy when an otherwise lawful rule or policy is unlawfully applied. In their view, the proper remedy would be an order that the employer cease and desist from applying such a rule in a manner that restricts the exercise of protected employee rights. See *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 404 fn. 4, 405 (2006). ...”

b. Deferral of Information Requests

***Chapin Hill at Red Bank*, 360 NLRB No. 27, fn. 2:**

“... Finally, we affirm the judge’s finding that deferral to arbitration is inappropriate. The Board has long held that deferral is inappropriate in 8(a)(5)

information request cases. See, e.g., *United Technologies Corp.*, 274 NLRB 504, 505 (1985); *DaimlerChrysler Corp.*, 331 NLRB 1324, 1324 fn. 3 (2000), enfd. 288 F.3d 434 (D.C. Cir. 2002). ...

Because the Union requested the information at issue here to police the parties' collective-bargaining agreement as well as in connection with a grievance arbitration, Member Miscimarra finds it unnecessary to pass on the foregoing cases or decide whether--and, if so, under what circumstances--it would be appropriate to defer to arbitration a dispute about information requested solely in connection with a pending grievance.”

***Endo Painting Service*, 360 NLRB No. 61, fn. 6:**

“... Regarding the Respondent's contention that the parties' dispute over the Union's information request must be submitted to arbitration, Member Miscimarra notes that the Board's policy is not to defer information-request disputes to arbitration, but he believes deferral to arbitration could be appropriate where either (1) the scope of an information request would be significantly affected by the merits of a particular grievance pending arbitration, and/or (2) nondeferral would result in duplicative litigation that undermines the role played by arbitration as the method agreed upon by the parties for the final adjustment of disputes involving interpretation of collective-bargaining agreements. Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d). Such circumstances are not present here. ...”

c. Information Request (out of unit)

***Conditioned Air Systems*, 360 NLRB No. 97, fn. 3:**

“... Member Miscimarra also notes that, because the requested information was not presumptively relevant, he would follow *Hertz Corp. v. NLRB*, 105 F.3d 868 (3d Cir. 1997), where the Third Circuit held that the employer's duty to respond was conditioned on the union's disclosure of facts sufficient to demonstrate relevance unless the factual basis was readily apparent from the surrounding circumstances. In the instant case, Member Miscimarra would find that the factual basis for the Union's request was readily apparent and he agrees with the judge's finding that Respondent's failure to adequately respond violated Sec. 8(a)(5).”

d. Successor Bar

***FJC Security Services*, 360 NLRB No. 115, slip op. at 2 (Miscimarra, concurring):**

“... I would adhere to the standard established in *MV Transportation*, supra, where the Board held that ‘an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not

serve as a bar' whenever a rival union petition is filed 337 NLRB at 770. Based on *MV Transportation*, and for reasons stated by former Member Hayes in his *UGL-UNICCO* dissent, I would find that the newly filed petition warrants an election, without any evaluation of whether a 'reasonable period for bargaining' had elapsed."

e. *St. George Warehouse* (Mitigation)

***Pessoa Construction Co.*, 361 NLRB No. 138, fn. 2:**

"... No party asks us to revisit or overrule *St. George Warehouse*, 351 NLRB 961 (2007), but the General Counsel excepts to the judge's determination that the Respondent showed that substantially equivalent jobs were available during the backpay period as required by *St. George*. We find it unnecessary to pass on this exception. A finding that the Respondent failed to carry its burden would not affect the outcome because the judge found, and we agree, that the General Counsel demonstrated that the discriminatee engaged in a reasonable effort to find work. ..."