EYM King of Michigan, LLC d/b/a Burger King *and* Michigan Workers Organizing Committee. Case 07–CA–118835

August 15, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On September 29, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief.[1] The General Counsel filed cross-exceptions, a supporting brief, a reply brief, and an answering brief. The Charging Party filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions in part and to adopt the judge's recommended Order as modified and set forth in full below.[3]

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of the allegations that the Respondent's general manager, Charlene Pack: (1) threatened to reduce employees' work hours because of their protected activities; (2) engaged in surveillance of employees' union activities; and (3) and threatened to remove employees from an employee meeting for engaging in protected activity. In addition, there are no exceptions to the judge's dismissal of the allegations that: (1) two assistant managers coercively interrogated employees about their union sympathies and protected activities; and (2) the Respondent unlawfully maintained a work rule in its misconduct policy requiring employees to "treat coworkers, customers, suppliers, and visitors with courtesy and respect."

[3] We have amended the judge's conclusions of law and remedy and modified his recommended Order consistent with our findings herein. We shall substitute new notices to conform to the Order as modified.

Complaint paragraphs 16(b)–(c) and 17(b)–(c) allege that the Respondent violated Sec. 8(a)(1) by unlawfully maintaining overly broad employee handbook rules. We shall sever these complaint allegations and retain them for further consideration, except the allegations in paragraphs 16(b) and 17(b) regarding the requirement that employees treat coworkers and others "with courtesy and respect," as no exceptions were filed to the judge's dismissal of those allegations.

Facts

On June 12, 2013,[4] the Respondent acquired ownership of a Burger King in Ferndale, Michigan.[5] The Respondent immediately distributed its Employment Policies and Procedures Handbook, which included its Loitering and Soliciting policy. Employees who violated this policy were subject to discipline. Around the same time, Claudette Wilson and Romell Frazier, two employees at the Ferndale Burger King who were active members of the Michigan Workers Organizing Committee, participated in protest strikes advocating for a $15-an-hour minimum wage for fast food workers.[6]

Meanwhile, the Respondent's general manager, Charlene Pack, had seen Wilson carrying around a clipboard with a wage questionnaire and talking to off-duty employees about it. On September 19, while off duty, Wilson and her coworker Jalissa Johnson discussed their wages as they sat in Wilson's parked car in the Respondent's parking lot. Wilson had Johnson fill out the wage questionnaire. Upon seeing Wilson and Johnson talking and exchanging the questionnaire, Pack approached the car and told Wilson that she was violating the Respondent's Loitering and Soliciting policy and had to leave.[7] Wilson refused. Pack reported the incident to the Respondent's district manager, Troy Kennedy, who told Pack to write up Wilson for violating the policy.

On September 20, Pack handed Wilson a written verbal warning for "loitering and soliciting in and around the [Ferndale] Burger King building." That afternoon, an assistant store manager reported to Pack that Wilson had failed to follow the proper protocol for placing pickles on sandwiches. Pack sent Wilson home 2 to 2½ hours before her scheduled shift ended. On September 21, the Respondent conducted a mandatory employee meeting in the Ferndale Burger King's dining area, during which Pack read verbatim the Loitering and Soliciting policy and other portions of the handbook.

[4] All dates hereinafter are in 2013 unless otherwise indicated.

[5] The Respondent owns 21 other Burger King restaurants in or around Detroit.

[6] In its cross-exceptions, the General Counsel notes that the judge incorrectly stated that Wilson worked part time for the Michigan Workers Organizing Committee in June 2013 when she was hired by the Respondent. The record shows that Wilson first started working for the Michigan Workers Organizing Committee in August 2013. This inadvertent error does not affect our disposition of the case.

[7] That policy states, in relevant part: "Loitering and soliciting either inside or outside on Company premises is strictly prohibited. . . . Employees are not authorized to remain in the restaurant after work. . . . If you are off-duty and return to the store to speak with employees who are working, your conduct may be considered loitering. . . . Employees who violate this policy may be subject to discipline, up to and including termination."

In October, while on duty, employee Frazier spoke with two coworkers about how to encourage employees at other fast food restaurants to participate in the protest strikes. Pack approached Frazier and stated, "You talking about striking again. You're going to be picking up your last paycheck."

Analysis

1. For the reasons stated by the judge, we affirm his finding that the Respondent's Loitering and Soliciting policy violated Section 8(a)(1). In its exceptions, the Respondent argues that its parking lot is a "selling area" and that it can lawfully ban solicitation there under *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 493 (1978). In support, the Respondent claims that customers must drive through the parking lot to reach the drive-through window and park their cars in the parking lot to order takeout food from inside the restaurant. We find that the Respondent's exception is without merit. The fact that customers either drive through or park their cars in the parking lot does not make the parking lot a "selling area."

At retail establishments, the Board allows employers to institute a ban on employee solicitation on the selling floor, and its adjacent aisles and corridors, because active solicitation in a sales area may disrupt business. See *Marshall Field & Co.*, 98 NLRB 88, 92 (1952), modified on other grounds, 200 F.2d 375 (7th Cir. 1952). That ban on employee solicitation, however, may not "be extended beyond that portion of the store which is used for selling purposes." *McBride's of Naylor Road*, 229 NLRB 795, 795 (1977). Applying those principles, the Board has found that a parking lot is not a selling area. See *Sam's Club*, 349 NLRB 1007, 1009 (2007) ("[A]s it concerned the parking lot and smoking areas, the prohibition [on discussing the union]—which would encompass solicitation as well—was not limited either to working time or to selling areas and therefore was overly broad both as to location and to time, even if it had been limited to solicitation alone."). We see no reason not to apply that ruling to the parking lot of a fast food restaurant.

Because its parking lot is not a selling area, the Respondent violated the Act by maintaining a policy prohibiting employees from engaging in any union solicitation on its property during nonworking hours. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945) (it is "'not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property'"), quoting *Peyton Packing*, 49 NLRB 843, 843 (1943)).[8] See also *Meijer, Inc. v. NLRB*, 463 F.3d 534, 544 (6th Cir. 2006) (finding that employer unlawfully banned off-duty employees' union solicitation in parking lots and rejecting employer's "contention that all its property is a work area [a]s a contention that can be asserted by every company, thus effectively destroying the right of employees to distribute literature") (citation omitted). In addition, because the Respondent's Loitering and Soliciting policy is unlawful, we affirm the judge's findings that, on September 19, General Manager Pack violated Section 8(a)(1) by telling Wilson, who was off duty, not to solicit other off-duty employees in the parking lot and, on September 20, violated Section 8(a)(3) and (1) by issuing Wilson a written verbal warning and suspending her.[9] We also affirm the judge's finding that, on September 21, Pack violated Section 8(a)(1) by reading aloud its unlawful Loitering and Soliciting policy at a mandatory employee meeting.[10]

[8] We find it unnecessary to pass on the judge's assertion that there may be "special circumstances" other than the need to maintain production or discipline that might justify the Respondent's policy. Nevertheless, we agree with the judge that even if safety concerns were such a "special circumstance," the Respondent failed to show that its Loitering and Soliciting policy enhanced the safety of its customers or its employees. Moreover, the Respondent failed to show that it had a business reason for prohibiting access by off-duty employees to the outside, nonworking areas of its property, including its parking lot. See *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976).

Because the General Counsel did not allege that the Respondent unlawfully prohibited employees from distributing union literature inside the Ferndale Burger King, we find it unnecessary to decide in what areas of the restaurant the Respondent can prohibit employee distribution of union literature.

Member Emanuel agrees that, under *Tri-County Medical Center*, supra, the Respondent's Loitering and Soliciting policy unlawfully denied Wilson, an off-duty employee, access to its parking lot to engage in Sec. 7 activities. However, he believes that the Board should revisit *Tri-County Medical Center* to the extent that it allows off-duty employees to engage in Sec. 7 activities on an employer's parking lot and other exterior areas of the employer's property.

[9] In adopting the judge's finding that the Respondent unlawfully suspended Wilson, we agree with the judge that the General Counsel sustained his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). As set forth in *Mesker Door*, 357 NLRB 591, 592 (2011), the required elements are union activity by the employee, employer knowledge of that activity, and union animus by the employer. The judge correctly notes that the Respondent demonstrated animus by unlawfully issuing the written verbal warning to Wilson earlier that same day. Moreover, the Respondent failed to rebut the inference that it suspended Wilson for her protected activity. First, although the Respondent argues that it never suspended Wilson, the credited evidence is that Wilson was sent home early on September 20. Second, the Respondent contends that Wilson admitted that she "did not put pickles on her sandwiches in perfect squares as she was supposed to," but the Respondent offered no evidence that it had ever suspended any employee, or informed them that they could be suspended, for that reason.

[10] The General Counsel cross-excepted to the judge's dismissal of the allegation that Pack unlawfully told employees at the September 21

2. We affirm the judge's finding that Pack's October statement that Frazier would be picking up his last paycheck if he was talking about striking again was a threat of discharge that violated Section 8(a)(1). The Respondent excepts to the judge's finding by arguing that Pack lawfully told Frazier not to solicit other employees to engage in future protest strikes in customer and selling areas of the restaurant. But Pack's statement included no such limitation. Furthermore, by threatening Frazier with discharge, the Respondent unlawfully failed to treat Frazier's discussion with his coworkers in the same manner it treated employee discussions about other subjects, which the Respondent permitted. See *Sam's Club*, above at 1009 ("[B]y telling employees that they could not talk about the [u]nion on the sales floor, while allowing them to talk about other nonwork matters, the [r]espondent violated Section 8(a)(1).").

AMENDED CONCLUSIONS OF LAW

The Respondent, EYM King of Michigan, LLC d/b/a Burger King, has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act as follows:

1. By maintaining its Loitering and Soliciting policy, the Respondent violated Section 8(a)(1).

2. By General Manager Charlene Pack telling employee Claudette Wilson, in accordance with the Loitering and Soliciting policy, not to solicit other off-duty employees in its parking lot, the Respondent violated Section 8(a)(1).

3. By General Manager Charlene Pack issuing employee Claudette Wilson a written verbal warning for violating the Loitering and Soliciting policy, the Respondent violated Section 8(a)(3) and (1).

4. By General Manager Charlene Pack suspending employee Claudette Wilson for violating the Loitering and Soliciting policy, the Respondent violated Section 8(a)(3) and (1).

5. By General Manager Charlene Pack reading the Loitering and Soliciting policy to employees at a mandatory employee meeting, the Respondent violated Section 8(a)(1).

6. By General Manager Charlene Pack threatening employee Romell Frazier with discharge for discussing protest strikes, the Respondent violated Section 8(a)(1).

meeting not to discuss company business with anyone outside the company. In affirming the dismissal, we agree with the judge that the record is unclear as to what Pack did at the meeting besides recite its Loitering and Soliciting policy and other portions of its employee handbook.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by issuing Claudette Wilson a written verbal warning and then suspending her on September 20, 2013, we shall order the Respondent to make Claudette Wilson whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful suspension. The backpay due shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

We shall also order the Respondent to compensate Claudette Wilson for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Respondent additionally shall be ordered to remove from its files any references to the unlawful written verbal warning and suspension of Claudette Wilson and to notify her in writing that this has been done and that the unlawful actions will not be used against her in any way.

Having found that the Respondent maintained an unlawful Loitering and Soliciting policy, we shall order the Respondent to rescind its unlawful policy in accordance with our decision in *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).[11] We shall also issue two notices, one for the Ferndale Burger King, where all the unfair labor practices took place, and a second notice for the Respondent's 21 other restaurants where it maintained the unlawful policy.

[11] On March 12, 2014, during the General Counsel's investigation of the unfair labor practice charges in this case, the Respondent revised its Loitering and Soliciting policy. The Respondent maintained its original handbook but prepared an insert disseminated to employees that contained the revised policy. We agree with the judge that this is insufficient to repudiate its unlawful conduct of maintaining its original policy. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). It is also unclear from the record that the Respondent ever rescinded its original policy. Hence, we shall require it to do so. Moreover, the revised Loitering and Soliciting policy retains the same unlawful language prohibiting employees from soliciting outside of the restaurant on the Respondent's premises, such as in its parking lot.

ORDER

The Respondent, EYM King of Michigan, LLC d/b/a Burger King, Ferndale, Michigan, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Maintaining its Loitering and Soliciting policy.

(b) Telling employees not to violate its Loitering and Soliciting policy.

(c) Disciplining, including suspending, employees for violating its Loitering and Soliciting policy.

(d) Reading its Loitering and Soliciting policy to employees.

(e) Threatening to discharge employees for discussing protected activities.

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

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

(a) Rescind its Loitering and Soliciting policy.

(b) Make Claudette Wilson whole for any loss of earnings and other benefits suffered as a result of her suspension on September 20, 2013, in the manner set forth in the amended remedy section of this decision.

(c) Compensate Claudette Wilson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written verbal warning issued to and suspension of Claudette Wilson and, within 3 days thereafter, notify Claudette Wilson in writing that this has been done and that the written verbal warning and the suspension will not be used against her in any way.

(e) Furnish all current employees with inserts for the current Employment Policies and Procedures Handbook that (1) advise that the unlawful Loitering and Soliciting policy has been rescinded, or (2) provide the language of a lawful policy; or publish and distribute a revised Employment Policies and Procedures Handbook that (1) does not contain the unlawful Loitering and Soliciting policy, or (2) provides the language of a lawful policy.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A" at its Ferndale Burger King restaurant, and copies of the attached notice marked "Appendix B" at its other Detroit, Michigan area restaurants.[12] Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the restaurants involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 12, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that complaint paragraphs 16(b)–(c) and 17(b)–(c), except as limited in footnote 3, above, which allege that the Respondent has unlawfully maintained overly broad employee handbook rules, are severed and retained for further consideration.

Dated, Washington, D.C. August 15, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

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

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain our Loitering and Soliciting policy.

WE WILL NOT tell you not to violate our Loitering and Soliciting policy.

WE WILL NOT discipline, including suspend, you for violating our Loitering and Soliciting policy.

WE WILL NOT read our Loitering and Soliciting policy to you.

WE WILL NOT threaten to discharge you for discussing protected activities.

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

WE WILL rescind our Loitering and Soliciting policy.

WE WILL make Claudette Wilson whole for any loss of earnings and other benefits suffered as a result of her suspension on September 20, 2013, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Claudette Wilson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful written verbal warning issued to and suspension of Claudette Wilson and, within 3 days thereafter, WE WILL notify Claudette Wilson in writing that this has been done and that the written verbal warning and the suspension will not be used against her in any way.

WE WILL furnish all current employees with inserts for the current Employment Policies and Procedures Handbook that (1) advise that the unlawful Loitering and Soliciting policy has been rescinded, or (2) provide the language of a lawful policy; or publish and distribute a revised Employment Policies and Procedures Handbook that (1) does not contain the unlawful Loitering and Soliciting policy, or (2) provides the language of a lawful policy.

EYM KING OF MICHIGAN, LLC D/B/A BURGER KING

The Board's decision can be found at www.nlrb.gov/case/07-CA-118835 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain our Loitering and Soliciting policy.

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

WE WILL rescind our Loitering and Soliciting policy.

WE WILL furnish all current employees with inserts for the current Employment Policies and Procedures Handbook that (1) advise that the unlawful Loitering and Soliciting policy has been rescinded, or (2) provide the language of a lawful policy; or publish and distribute a revised Employment Policies and Procedures Handbook that (1) does not contain the unlawful Loitering and Soliciting policy, or (2) provides the language of a lawful policy.

EYM KING OF MICHIGAN, LLC D/B/A BURGER KING

The Board's decision can be found at www.nlrb.gov/case/07-CA-118835 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Robert A. Dryzga, Esq., for the General Counsel.
John L. Ross, Jason T. Weber, Esqs. (Thompson, Coe, Cousins & Irons, LLP), of Dallas, Texas, for the Respondent.
Patrick J. Rorai, Esq. (McKnight, McClow, Canzano, Smith & Radtke, P.C.), of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on July 28 and 29, 2014. The Michigan Workers Organizing Committee filed the initial charge on in this matter of December 11, 2013. The General Counsel issued the complaint on May 27, 2014.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent EYM King of Michigan operates 22 Burger King restaurants in the Detroit, Michigan area. During 2013 Respondent derived gross revenues in excess of $500,000. It purchased and received at its Michigan facilities goods valued in excess of $5000 directly from points outside of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The General Counsel alleges that Respondent, by Charlene Pack, its manager at its Ferndale restaurant (10336 West 8 Mile Road in metropolitan Detroit) violated Section 8(a)(1) of the Act by: threatening employees in retaliation for their protected activities; prohibiting employees from discussing the terms and conditions of their employment; engaging in surveillance; threatening discharge and threatening to cut employees' hours. The General Counsel also alleges that Pack violated Section 8(a)(3) and (1) by disciplining an employee for engaging in union activity and threatening to remove her from a meeting. He also alleges that Ferndale Managers Tajai Howard and Shavonna Jones violated Section 8(a)(1) by coercively interrogating employees.

The General Counsel also alleges that Respondent violated Section 8(a)(1) by maintaining illegal rules regarding loitering and soliciting, professional conduct/misconduct and confidentiality.

II. ALLEGED UNFAIR LABOR PRACTICES

Alleged ULPs other than maintaining and enforcing illegal rules

Respondent EYM became owner of the Burger King in Ferndale (10336 West 8 Mile Road) on June 12, 2013.[1] The Ferndale store, as well as many of the other 21 Burger Kings owned by Respondent, is located in a very high crime area of metropolitan Detroit.

The Ferndale Burger King had been operated by another franchisee, V & J, for at least several years prior to June 2013. EYM retained all the employees who worked for V & J, including store manager Charlene Pack, assistant store managers Shavonna Jones, and Tajai Howard and part-time employees Claudette Wilson and Romell Frazier.

Wilson and Frazier also worked part-time for the Union.[2] Pack was aware of this when she hired Wilson and Frazier for EYM. She also knew that Wilson and Frazier had engaged in a strike against V & J and other fast food restaurants in May 2013. This strike was part of an effort by the Union, called D15, to raise the minimum wage for fast food workers in Detroit to $15 dollars an hour.

Wilson and Frazier also engaged in strike activity on July 31 and August 29, however, there was no picketing at the Ferndale Burger King on those occasions. Shortly after the July strike, Wilson had a conversation about the strikes with two of Respondent's managers.

Alleged Interrogations (complaint paragraph 12)

A few days after the July strike, Shavonna Jones, an assistant manager at the Ferndale store, asked Wilson how the strike went. Another assistant manager, Tajai Howard, asked Wilson

[1] It is not clear whether EYM became owner of all 22 Burger Kings that it operates in Detroit on the same date.

[2] Wilson testified that she worked 20–30 hours a week for Respondent and 24 hours a week for the Union.

when the next strike was to take place. Wilson did not respond. Both Jones and Howard signed union WIT (whatever it takes) cards, although it is not clear from this record when Howard did so. Jones signed the card prior to May 10, 2013.

The lead Board case regarding the legality of interrogations is *Rossmore House,* 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Pursuant to the *Rossmore* test,

> Under Board law, it is [well established] that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act."

In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter, *Norton Audubon Hospital,* 338 NLRB 320, 320–321 (2002). Given Wilson's open and notorious union activities I find that neither the inquiry by Jones nor the inquiry by Howard violated the Act.

Allegations based on the testimony of Romell Frazier[3]

Romell Frazier began working for V & J at the Ferndale Burger King in February 2012. A year later he also became a part-time paid organizer for the Union. Frazier and Claudette Wilson participated in a strike against V & J and other fast food restaurants on May 10, 2013.

Frazier regularly talked about the Union and strikes at work. He testified that on one occasion in October 2013, Charlene Pack told him that him that if he was talking about striking again, he'd soon be picking up his paycheck.[4] Pack testified that very generally that she did not threaten to fire anybody for union activity. Due to her failure to specifically contradict Frazier's testimony, I credit Frazier. Respondent asserts at page 46 of its brief that it was "plainly entitled" to prohibit employees from discussing wages, unions or other protected activity during work time and to discipline them for such conduct. This assertion is simply incorrect.

It is settled law that an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with their work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, as is the case at Respondent's facilities, *Jensen Enterprises, Inc.,* 339 NLRB 877, 878 (2003); *Sam's Club,* 349 NLRB 1007, 1009–1010 (2007). Respondent did not prohibit discussion of other non-work related subjects during working time, thus it violated Section 8(a)(1) in threatening Frazier, as alleged in paragraph 11(d),

With regard to complaint paragraph 11(e), I find Charlene Pack's testimony, that she did not threaten to reduce Romell Frazier's hours of work, as credible as his testimony that she did so. For one thing, there is no evidence that his hours were in fact reduced. Therefore, I dismiss complaint paragraph 11(e).

September 19–21 events involving Claudette Wilson (complaint paragraphs 11(b) and (c); and 13)

On the afternoon of September 19, 2013, Claudette Wilson, who was not on duty for Respondent, parked in the parking lot of the Ferndale Burger King. Employee Jalissa Johnson, who had just clocked out from work joined Wilson in her car. Wilson had Johnson fill out a union questionnaire regarding wages. Shortly thereafter, Store Manager Charlene Pack came out of the store and approached Wilson. Pack told Wilson that she was violating Respondent's loitering and solicitation policy and that she would have to leave. Wilson refused to do so.

Pack reported this to District Manager Troy Kennedy, who directed her to write Wilson up. On September 20, Pack gave Wilson a written verbal warning (GC Exh. 5), for failing to follow her instructions to cease loitering and soliciting. Pack did not discipline Johnson.

Later that day, an assistant store manager noticed that Wilson was not placing pickles on sandwiches in a perfect square as she was supposed to. The assistant manager reported this to Pack who sent Wilson home at about 3:40, 2–2 ½ hours early.[5]

The team meeting on September 21

At about 9 a.m. on September 21, Pack conducted a mandatory meeting for employees in the dining room of the restaurant. Customers were present in the dining room during this meeting. She read portions of the handbook verbatim, including those portions pertaining to soliciting and loitering at page 13 of (GC Exh. 2), as well as discussing other topics. Then the meeting broke into separate sessions; the cashiers met with Pack in one customer booth. The cooks met with Assistant Manager Edward Eberhart in another booth. Before the groups split up, Pack said she would entertain questions after the breakout sessions.

At some point in the breakout meetings Pack overheard Wilson complaining loudly about being underpaid and underappreciated. Pack left the cashiers meeting and walked over to the cooks meeting. She told Wilson that she would have calm down and sit or she would have to leave. Wilson apparently sat down, calmed down and remained at the meeting for its duration. At the end of the breakout meetings, Pack entertained questions. When Wilson sought to ask a question, Pack told

[3] Tajuan McGhee testified to an occasion at which Pack threatened to reduce the hours Wilson and Frazier. At hearing McGhee read from his affidavit and had no independent recollection of this incident, particularly when it occurred. Neither Frazier nor Wilson testified about such an incident; thus I do not credit McGhee's testimony. Witness Eddie George also testified to hearing Pack make similar threats. One of these occurred while V & J owned the Ferndale restaurant; the other allegedly sometime in September 2013. Since George's testimony is not corroborated by either Frazier or Wilson, I do not credit it.

[4] This testimony relates to complaint paragraphs 11(d) and (e)..

[5] There was much discussion at hearing as to why Respondent did not have a printed work schedule for the week of September 19–25. I find this is of no consequence as Respondent admits that Wilson did not work the hours for which she was scheduled on September 20. Wilson testified that Pack sent her home early, Tr. 88; Pack could not recall if she sent Wilson home or whether Wilson requested to leave early, Tr. 529. I credit Wilson.

Wilson she already had her turn.

The Rules at Issue in pertinent part

Rules in Handbook, GC Exh. 2, distributed September 2013

Loitering and Soliciting

Loitering and soliciting either inside or outside on Company premises is strictly prohibited. You should arrive some minutes before your entry hour and leave the as soon as you finish your shift. Employees are not authorized to remain in the restaurant after work. If you are not working or eating in a store, your conduct may be construed as loitering. If you are off-duty and return to the store to speak with employees who are working, your conduct may be considered loitering. Former employees who return to the store to speak with employees who are working are loitering. This policy is designed to prevent the disruption of company business due to unnecessary interaction with non-working employees or non-employees. Employees who violate this policy may be subject to discipline, up to and including termination.

Confidential Information

EYM King of Michigan, LLC. entrusts its Employees with important information related to its businesses. The nature of this relationship requires maintenance of confidentiality. Your employment with EYM King of Michigan, LLC. obligates you to maintain confidentiality of information, even after you are no longer employed with EYM King of Michigan, LLC. For instance, you might know about company earnings, food preparation procedures and plans to buy or sell other products or property, or changes in management. These are examples of sensitive business matters considered confidential and proprietary trade secrets. If revealed the result could be the loss of a business advantage. This includes, but is not limited to, the discussion of any information relating to threatened Legal claims or lawsuits against the Company. If you are contacted by an attorney or an investigator about company business, your response should always be to refer such persons to EYM King of Michigan, LLC.s corporate office at (214) 819-3800 - Human Resources Department, even if the person states that he/she represents the Company, unless your Supervisor has given you permission to speak with the individual. Any violation of confidentiality seriously injures EYM King of Michigan, LLC.'s reputation and effectiveness. Do not discuss EYM King of Michigan, LLC. business with anyone who does not work for the Company. Never discuss business transactions with anyone who does not have a direct association with the transaction. Even casual remarks can be misinterpreted and repeated, so develop the personal discipline necessary to maintain confidentiality. If you are questioned by someone outside the company or your department and you are concerned about the appropriateness of giving that person certain information, remember that you are not required to answer, and that we do not wish you to do so. Instead, as politely as possible, refer the request to your Supervisor. No one is permitted to remove or make copies of any EYM King of Michigan, LLC. records, reports, or documents without prior management approval. Because of its seriousness, disclosure of confidential information could lead to your termination.

PROFESSIONAL CONDUCT

Misconduct

EYM King of Michigan, LLC. is committed to providing a work environment that encourages mutual respect and professionalism among employees. Every employee has the right to work without disorderly or undue interference from others. You are expected to be responsible and reasonable, and conduct yourself in a professional, business-like manner, which includes being honest, ethical and safe. We expect your behavior to be professional ¡n the workplace and whenever you are representing the company. Listed below are some examples of what we expect when we say "professional behavior.' The following is a partial list of acts that are considered misconduct and may result in disciplinary action up to and including termination:

Violations of all existing policies and regulations, as well as local, state and federal laws

Failure to perform your job duties to the best of your ability and to the standards as set forth in the job description or as otherwise established Insubordination and/or refusal to do assigned work

Failure to treat co-workers. customers, suppliers and visitors with courtesy and respect

Failure to behave in an honest and ethical manner at all times

Falsification, alteration, misrepresentation, or removal of company documents and/or records, or documents required by law

Providing false information to the Company regarding job applications, injuries, accidents or incidents in the workplace

Failure to comply with the Image Standards established for your work site, or failing to meet requirements for uniform or personal hygiene

Being under the influence of alcohol or drugs in violation of Company policy

Negligence, indifference or willful misconduct resulting in loss, damage or destruction of

Company property

Working in an unsafe or dangerous manner

Excessive absenteeism or tardiness without approval

Altering time records, allowing another employee to alter your time record

Failure to follow the Cash Register Policy

Knowingly failing to discard expired food product, or altering the holding time on food

product, or other action adversely affecting food quality or safety

Engaging in gambling, disorderly or immoral conduct while on company premises or business

Failing to work cooperatively with others to resolve conflicts in a professional manner

Verbal or physical altercations, intimidating behavior, threats of violence or any sort of unprofessional conduct toward any employee, customer, or others who you encounter in

connection with your employment

Using foul or abusive language or profanity of any sort

Unauthorized use of Company equipment, supplies, funds, or time

Sending, receiving or posting information that could be considered defamatory or disparaging to the Company
Making false, fraudulent or malicious statements about the Company, team members, customers. suppliers or visitors
Providing information or trade secrets regarding the Company or Burger King to any media representative, reporter or investigator with Company approval
Any off-duty offense which would reflect negatively on the Company
Theft of Company food, property or funds
No set of policies can apply or relate to all types and forms of conduct; therefore, the policies specified in this handbook are meant to guide you to the proper way to conduct yourself n your role as a company employee. If your conduct is contrary to the Company's best interests and is not specifically prohibited or addressed in this handbook or other policy statement, the company still reserves the right to take appropriate disciplinary action in its sole and absolute discretion.

Rules as Revised March 12, 2014

Loitering and Soliciting

Loitering and soliciting either inside or outside on Company premises is strictly prohibited. You should arrive some minutes before your entry hour and, unless dining, leave the restaurant as soon as you finish your shift. Except as customers, employees are not authorized to remain in the restaurant after work. If you are not working or eating in a restaurant, your conduct may be construed as loitering. This policy is designed to prevent interference with working employees' ability to perform their jobs, facilitate customer ingress, egress, and facility access, prevent the disruption of Company business, and ensure employee, customer, and public safety while on Company premises, both inside the facility and in the parking and drive-through areas of the restaurant.

PROFESSIONAL CONDUCT

Misconduct

EYM King of Michigan, LLC is committed to providing a work environment that encourages mutual respect and professionalism among employees. You are expected to be responsible and reasonable, and conduct yourself in a professional, business-like manner, which includes being honest, ethical and safe. We expect your behavior to be professional in the workplace and whenever you are representing the Company. Listed below are some examples of what we expect when we say "professional behavior." The following is a partial list only. The Company reserves its management prerogative as an employer-at-will to discipline or discharge employees in its sole discretion, irrespective of the following list.
Violations of local, state and federal laws
Failure to perform your job duties to the best of your ability and to the standards as set forth in the job description or as otherwise established
Insubordination and/or refusal to do assigned work
Failure to treat co-workers, customers, suppliers and visitors with courtesy and respect
Failure to behave in an honest and ethical manner at all times
Falsification, alteration, misrepresentation, or removal of Company documents and/or records, or documents required by law
Providing false information to the Company regarding job applications, injuries, accidents or incidents in the workplace
Failure to comply with the Image Standards established for your work site, or failing to meet requirements for uniform or personal hygiene
Being under the influence of alcohol or drugs in violation of Company policy
Negligence, indifference or willful misconduct resulting in loss, damage or destruction of Company property
Working in an unsafe or dangerous manner
Excessive absenteeism or tardiness without approval
Altering time records, allowing another employee to alter your time record
Failure to follow the Cash Register Policy
Knowingly failing to discard expired food product, or altering the holding time on food product, or other action adversely affecting food quality or safety
Engaging in gambling, disorderly or immoral conduct while on Company premises or business
Verbal or physical altercations, intimidating behavior, threats of violence or any sort of unprofessional conduct toward any employee, customer, or others who you encounter in connection with your employment
Using foul or abusive language or profanity of any sort
Unauthorized use of Company equipment, supplies, funds, or time
Violating fiduciary duties owed to the Company or Burger King, misappropriating or disclosing proprietary information/trade secrets in violation of applicable law, or engaging in unfair competition under applicable law.
Theft of Company food, property or funds
No set of policies can apply or relate to all types and forms of conduct; therefore, the policies specified in this handbook are meant to guide you in the proper way to conduct yourself in your role as a Company employee. The Company still reserves the right to take disciplinary action when, in its sole and absolute discretion, deemed appropriate.
Disciplinary action may be in the form of a verbal reprimand, a warning notice, suspension, or termination. lt may be progressive or immediate, as determined solely and exclusively by the management of the Company.
The Company is not obligated to follow any progressive discipline procedures. Depending on the nature and the severity of an employee's offense or violation of Company policy or rule, the Company, at its sole and absolute discretion, may take whatever action it may deem appropriate under the circumstances, including immediate termination. Disciplinary procedures are not binding on the Company and do not change your status as an "at will" employee.

Confidential Information

EYM King of Michigan, LLC entrusts its Employees with important information confidential, proprietary and trade secrets related to its businesses and the business of Burger King. Applicable state and federal laws impose various fiduciary obligations upon you as an employee (even after you are no

longer employed with EYM King of Michigan, LLC) regarding maintaining the confidentiality of such information, against misusing or misappropriating of such information, engaging in unlawful or unfair competition, using such information to engage in securities transactions, and protecting the Company's trade secrets, trade dress, trademarks, and copyrights. You are expected at all times to abide by your fiduciary obligations and other requirements of local, state, and federal statutory, regulatory, and common law.

For example, you might know about Company recipes, ingredients, food preparation processes, suppliers, pricing information, financial information, marketing proposals or plans, or anticipated changes in management. These are examples of sensitive business matters considered confidential and proprietary trade secrets. If revealed to a competitor or otherwise used in violation of your fiduciary duties or statutory, regulatory, or common law obligations ,could result in the loss of a business advantage or a violation of law.

Any violation of statutory, regulatory, or common law obligations regarding confidentiality seriously injures EYM King of Michigan, LLC's reputation and effectiveness.

No one is permitted to remove or make copies of any EYM King of Michigan, LLC records, reports, or documents without prior management approval.

No Restriction on Protected Concerted Activity

Nothing contained anywhere in this Handbook or any other Company policy is intended to or shall be construed to restrict or restrain any employee from lawfully engaging in any activity which constitutes protected concerted activity under the National Labor Relations Act or other applicable law.

Analysis

Respondent's loitering and solicitation policies violate the Act; Respondent's loitering and solicitation policies as revised on March 12, 2014, also violate the Act

An employer's rules or policies which deny access to off-duty employees to all areas of its premises and prohibits solicitation on any part of its property, violate the Act unless there is some special circumstance to justify such a rule or policy,[6] *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *Jury's Boston Hotel,* 356 NLRB 927 (2011); *Durham School Services,* 360 NLRB 694 (2014); *Saint John's Health Center,* 357 NLRB 2078 (2011); *Tri-County Medical Center,* 222 NLRB 1089 (1976).

As the Board noted in *Saint John's Health Center*, citing *Republic Aviation,* the workplace is a particularly appropriate place for the distribution of material or meetings relating to Section 7 rights, such as organizing or other protected concerted action.[7] It is the one place where employees clearly share common interests and where they traditionally seek to persuade fellow workers in matters related to their status as employees. This is particularly true in the instant case where some of the workers are lower paid individuals who commute to work via bus. Thus, barring off-duty employees and all Section 7 solicitation and distribution from the employer's premises clearly adversely impacts employees' exercise of their fundamental statutory rights.

Respondent's justification for its rules is that its restaurants are located in high-crime areas. To give credence to such an explanation would effectively deprive millions of the lowest-paid workers in the United States of the ability to assert their Section 7 rights. As I pointed out numerous times at trial, there is no material difference between security concerns in Detroit and those in every inner-city in this country.

Respondent's professed concerns regarding safety in justifying its loitering and solicitation rules are manifestly specious. The company has made no showing as to how this rule enhances safety. In this regard, it does not prohibit customers from eating food purchased at its restaurants while sitting in their cars in the restaurant parking lot. Moreover, people are just as likely to be the victims of violent crime at Respondent's drive thru windows as anywhere else on the exterior of the restaurant. Indeed, Respondent in its brief cites to one incident in which the drive-thru at a nearby McDonald's was robbed and another in which a man was shot to death at the drive-thru at a nearby Church's Chicken. Whatever concerns Respondent has with regard to violent crime and liability on the exterior of its restaurants are as applicable to customers as they are to off-duty employees.[8]

Respondent also suggests that allowing Section 7 activity on its premises is unnecessary because off-duty employees could engage in Section 7 activity in the vacant lot next to its Ferndale restaurant. Obviously, the danger to the employees of being victims of violent crime would be even greater in the vacant lot than in the parking lot of the restaurant.

Finally, Respondent cannot, in banning Section 7 activity from its entire property, rely on the incidental work performed in the parking lot. Employees and managers periodically patrol the parking lots to keep it clean and to inspect its menu boards for damage. Outside vendors deliver food to the restaurants in large trucks and an outside vendor services Respondent's dumpsters.[9]

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[6] The "special circumstances" to which the Supreme Court referred were those necessary in order to maintain production or discipline. I assume there may be other "special circumstances" which might justify such a rule or policy.

[7] The issue of where employees may distribute union or other protected literature was not fully litigated in this case. However, it seems to me that to the extent Respondent's rule prohibits employees from distributing protected literature on the exterior areas of its property, the rule is illegal. Respondent probably can prohibit distribution in the dining area, but possibly not in the crew room. Finally, Respondent can probably prohibit off-duty employees from remaining in the dining area if this is done pursuant to a rule which is nondiscriminatory on its face and in its application. Also, it is important to note that differing conditions at Respondent's 22 locations may lead to different results.

[8] To the extent there is any conflict between the NLRA and local loitering ordinances, employees' Section 7 rights prevail pursuant to the Federal preemption doctrine, *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959).

[9] Respondent, in its brief, emphasizes the extremely high percentage of its sales that are made via the drive-in windows. This shows that keeping the parking lot free for dine-in customers is not essential to Respondent's business. It also shows that it not essential to prohibit all protected activity from the dining areas of the Restaurants. These are so infrequently used that Respondent feels free to conduct business

Under *Tri-County Medical Center,* a rule which limits the access of off-duty employees to the employer's premises may be legal under certain circumstances. It must: (1) limit access solely to the interior of the workplace *and other working areas;* (2) be clearly disseminated to all employees; and (3) be applicable to off-duty employees seeking access to the plant for any purpose. However, an employer is not entitled to declare its entire property to be a working area for the purpose of excluding employee solicitation and distribution activity. Work incidental to the employer's business that is performed on the workplace exterior does not validate a policy banning off-duty employees entirely from the employer's premises, *Santa Fe Hotel & Casino,* 331 NLRB 723 (2000); *U. S. Steel Corp.,* 223 NLRB 1246, 1247–1248 (1976). The work performed in Respondent's parking lots is incidental to its main function of preparing and selling food,

A rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) that the rule was promulgated in response to protected activity; or (3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). Thus, by prohibiting solicitation by off-duty employees in its parking lots, Respondent is violating Section 8(a)(1) of the Act. Respondent's loitering and solicitation rule is illegal because it explicitly restricts protected rights and because it has been applied to restrict those rights.

The confidentiality and professional conduct rules

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). As stated above, a rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) that the rule was promulgated in response to protected activity; or (3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). The confidentiality and professional conduct rules, unlike the loitering and solicitation rule, do not explicitly restrict Section 7 rights. They must be evaluated pursuant to first criteria of the *Lutheran Heritage* decision, i.e. whether employees would reasonably construe the language to prohibit Section 7 activity.

The General Counsel alleges that Respondent's confidentiality and professional conduct rules violate the Act in numerous provisions. In undertaking this analysis, I consider the fact that in *Lutheran Heritage* the Board retreated somewhat from its prior decisions in light of the decision of United States Court of Appeals for District of Columbia in *University Medical Center v. NLRB,* 335 F. 3d 1079 (D.C. Cir. 2003). In that case the Court declined to enforce the Board's decision at 335 NLRB 1318 (2001), regarding a rule prohibiting "disrespectful conduct." In *Lutheran Heritage,* the Board stated that it would not conclude that a reasonable employee would read a rule to apply to Section 7 activity simply because the rule *could* be so interpreted.

Applying this principle I conclude the following with regard to the following provisions of Respondent's confidentiality and professional conduct rules:

> Misconduct includes a failure to treat co-workers, customers, supplier and visitors with courtesy and respect: I find this rule would not, in isolation, be reasonably read to prohibit discussion of wages, hours, working conditions or unionization.
>
> Misconduct includes falsification, alteration, misrepresentation, or removal of company documents and/or records, or documents required by law. I see nothing violative in this language other than the inclusion of word misrepresentation. This could be reasonably read to apply to verbal opinion statements about company documents, as well physical tinkering or theft of company records. Unlike the cases cited by the General Counsel, this rule does not prohibit disclosure of company documents, it prohibits material changes to such documents or theft of documents to which an employee is not entitled.
>
> Misconduct includes providing false information to the company regarding job applications, injuries, accidents or incidents in the workplace. Misconduct includes making false, fraudulent or malicious statements to the company about the company, team members, customers, suppliers or visitors. I find this rule violative in potentially exposing employees to discipline for making statements which are merely false, as opposed to being made maliciously and/or knowingly false. Such a rule restricts employee rights by subjecting them to discipline for discussing wages, hours and working conditions unless they are absolutely sure they have their facts straight, *American Cast Iron Pipe Co.,* 234 NLRB 1126, 1131 (1978) enfd. 600 F.2d. 132, 137 (8th Cir. 1979).[10]

activity other than the sale of food, such as the September 21, 2012 employee meeting, in the dining area when customers are present.

[10] The rules against falsification were not included in Respondent's March 12, 2014 revision. Respondent's revised rules in exempting protected concerted activity under the Act from their purview fails to cure their defects. It is unreasonable to expect employees to understand what constitutes protected concerted activity without further explanation. The general reference to the rights protected by the Act is insufficient to render those rules compliant with the Act, *Allied Mechanical,* 349 NLRB 1077 fn. 1, 1084 (2007); *Ingram Book Co.,* 315 NLRB 515 (1994).

In *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978) the Board set forth its criteria for curing past unfair labor practices. However, in *Claremont Resort and Spa,* 344 NLRB 832 (2005), two of the three Board members stated that they "do not necessarily endorse all the elements of *Passavant.*" In any event, by its terms the *Passavant* decision indicates that what an employer must do to cure a violation may depend on the nature of the violation. The *Passavant* case concerned a threat, which was communicated to 30–40 employees, that they would be fired if they engaged in an economic strike. In such a case, the Board found that repudiation must be (1) timely, (2) unambiguous, (3) specific to the coercive conduct, and (4) free from other prescribed illegal conduct.

I find that Respondent did not cure its violation of Section 8(a)(1) by

Misconduct includes verbal or physical altercations, intimidating behavior, threats of violence or any sort of unprofessional conduct toward any employee, customer, or others who you encounter in connection with your employment, and using foul or abusive language or profanity of any sort.

Due to unlimited scope of these rules with regard to what is "abusive" and "unprofessional", I conclude they could reasonably be read to prohibit protected activity. I therefore find these rules to violate Section 8(a)(1), *Flamingo Hilton-Laughlin,* 330 NLRB 287, 295 (1999); *2 Sisters Food Group,* 357 NLRB No. 168 (2011)

Misconduct includes sending, receiving or posting information that could be considered defamatory or disparaging to the Company. This rule is also broad enough that employees would reasonably read it as prohibiting communication about their wages, hours and working conditions. It therefore violates Section 8(a)(1). This is also true with regard to Respondent's rule stating the misconduct includes providing information or trade secrets to any media representative or investigator without company approval.[11]

Misconduct includes any off-duty offense which would reflect negatively on the Company. Since this rule could reasonably be read to cover protected activities related to the D15 campaign, it is overbroad and violative of Section 8(a)(1).[12]

The confidentiality rule

While someone could read Respondent's confidentiality rule as applying to protected conduct, I conclude it would not be reasonably read in such a manner. Taken in context the rule applies to information other than wages, hours and working conditions that would be useful to a competitor. The restrictions against copying documents would be reasonably read to apply only to documents that employees would not be entitled to possess. To the extent that NLRB investigators require access to such documents that the company claims to be confidential, they can issue a subpoena.

The conduct of Charlene Pack in interfering with protected activity on September 19, and the written warning given to Claudette Wilson on September 20 violated the Act.

Since Store Manager Pack was acting pursuant to an illegal rule in telling Claudette Wilson that she could not solicit other off-duty employees for the Union in the parking lot and in giving Wilson a written warning the next day, Respondent, by Pack, violated Section 8(a)(1) in her conversation with Wilson on September 19 and Section 8(a)(3) and (1) in giving Wilson the warning, *Double Eagle Hotel & Casino,* 341 NLRB 112, 112 fn. 3 (2004); enfd. 414 F.3d 1249 (10th Cir. 2005); cert. denied 546 U.S. 1170 (2006).

Complaint paragraph 11(b) statements made by Charlene Pack to assembled employees at the September 21, 2013 employee meeting

The General Counsel appears to allege that Charlene Pack violated Section 8(a)(1) in unscripted remarks at the September 21, 2013 mandatory employee meeting. I find that the record is insufficiently clear to determine what she said other than reading parts of the employee handbook. However, I find that by reading Respondent's illegal loitering rule verbatim to the assembled employees, Pack violated Section 8(a)(1) of the Act apart from anything else she said.

Complaint paragraph 11(c): alleged surveillance of union activity by Charlene Pack

The General Counsel alleges that store manager Pack engaged in unlawful surveillance of the union and/or protected activities of Claudette Wilson and Jalissa Johnson in Wilson's car in the Ferndale store parking lot on September 19. I dismiss this complaint allegation. It is generally not a violation of Section 8(a)(1) for an employer to observe open union activity. Also, I credit Pack's testimony that she went out into the parking lot to inspect it for cleanliness and to determine if there was any damage to Respondent's property—rather than to spy on Wilson.

Wilson's 2-2½ hour suspension on September 20 (complaint paragraph 13(c)

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983) ; *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and anti-union animus are often established by indirect or circumstantial evidence.

In order to make a sufficient initial showing of discrimination, the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action.

Wilson admits that she did not put pickles on her sandwiches in perfect squares as she was supposed to, due to her anger over the written warning she received. However, given Respondent's animus towards her protected activity, as evidence by the illegal warning given to her the same day, I find that the Gen-

simply issuing revised rules. In order to cure its violation, Respondent would have been obligated, at a minimum, to clarify for its employees that they have a Sec. 7 right to discuss wages, hours, and working conditions and that they will not be disciplined for erroneous statements which are not maliciously false. Moreover, the revocation of the overly broad rule in this case was not free from other illegal conduct.

[11] See fn. 10. To cure its violations relating to these rules Respondent must affirmatively inform employees of their right to communicate information regarding wages, hours, and working conditions regardless of whether or not it "disparages" the company and that they are free to communicate to the press and other third parties any information relating to these subjects.

[12] See fn. 10. Simply not including this rule in its March 2014 is insufficient to cure the violation created by including it in the original rules, *DaNite,* 356 NLRB 975 (2011) [Member Hayes' view: mere rescission of an illegal rule is not enough to cure a violation].

eral Counsel has made a prima facie that her discipline (being sent home early) was related to Wilson engaging in protected activity in Respondent's parking lot the day prior. Thus, the burden of proof has shifted to Respondent that it would have sent Wilson home early even if she had not engaged in protected activity.

Respondent has made no showing that it would have sent Wilson home in the absence of her protected activity. Therefore, I find that it violated the Act in so doing.

Pack's threat to remove Wilson from the September 21 meeting (complaint paragraph (13(d))

Whether an employer violates the Act in threatening to remove an employee for refusing to sit down and be quiet at a mandatory meeting depends on the circumstances. Some cases involving similar situations to the facts of the September 21 meeting are *Eagle-Picher Industries,* 331 NLRB 169 (2000); *Anheuser Busch, Inc.* 337 NLRB 3 (2001), enfd. 338 F. 3d 267 (4th Cir. 2003); *Hicks Ponder Co.,* 168 NLRB 806 (1967); *Howell Metal Co.,* 243 NLRB 1136 (1979).

I conclude that an employer has to right to maintain decorum at such meetings. Thus, I further conclude that Respondent, by Pack did not violate the Act in telling Wilson that she had to calm down and sit if she was to remain at the meeting. I also find that Respondent did not violate the Act in refusing to allow Wilson to ask questions at the end of the breakout meetings, since she had already had an opportunity to express her opinions.

SUMMARY OF CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) of the Act by:

1. Reading its illegal loitering and soliciting rule to employees at a mandatory employee meeting on September 21, 2013;

2. Enforcing and/or attempting to enforce its illegal loitering and solicitation rules against off-duty employees on September 19, 2013.

3. Threatening Romell Frazier with discharge for discussing work protests at work in October 2013;

4. By maintaining illegal rules pertaining to Loitering and Soliciting and Professional Conduct-Misconduct.

Respondent violated Section 8(a)(3) and (1) by:

1. Issuing Claudette Wilson disciplinary warnings on September 20, 2013, and suspending her for part of her shift on September 20, 2013.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, EYM of Michigan, LLC d/b/a Burger King, Texas and Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Restricting the right of employees to discuss wages, hours, and other terms and conditions of employment;

(b) Prohibiting off-duty employees from discussing wages, hours, and other terms and conditions of employment in all exterior areas of Respondent's property;

(c) Prohibiting off-duty employees from engaging in union or other protected activities in all exterior areas of Respondent's property;

(d) Prohibiting employees from misrepresenting company documents and/or records;

(e) Prohibiting employees from making false statements or providing false information about Respondent insofar as those statement are not maliciously or knowingly false, and material;

(f) Prohibiting foul or abusive language and unprofessional conduct insofar as this prohibition is so vague as to impact activity protected by the Act, including the discussion of wages, hours and other terms and conditions of employment;

(g) Prohibiting sending, receiving, or posting information that could be considered defamatory or disparaging to the company;

(h) Prohibiting any off-duty offense which would reflect negatively on the company;

(i) Threatening or disciplining employees for exercising their rights to discuss wages, hours and other terms and conditions of employment either while on duty or, off-duty in non-work areas of company facilities;

(j) Maintaining overly-broad rules as set forth above;

(k) In any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

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

(a) Rescind and/or revise Respondent's Loitering and Solicitation Policy as originally drafted and as revised in March 2014;

(b) Rescind and/or revise Respondent's Professional Conduct/Misconduct rules as originally drafted and as revised in March 2014;

(c) Cure its unfair labor practices regarding its overly broad policies in a manner consistent with In *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978).

(d) Rescind the discipline imposed on Claudette Wilson on or about September 20, 2013;

(e) Compensate Claude Wilson for any loss of earnings and other benefits due to her inability to work a full-shift on September 20, 2013, including any adverse tax consequences; with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to any and all discipline imposed on Claudette Wilson as a result of her conduct on September 19–21, 2013, including all warnings and suspensions,

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

and within 3 days thereafter notify the Claudette Wilson in writing that this has been done and that none of this discipline will be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at all its Detroit area restaurants copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 12, 2013.

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

Dated, Washington, D.C. September 29, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT restrict the right of employees to discuss wages, hours and other terms and conditions of employment.

WE WILL NOT prohibit off-duty employees from discussing wages, hours and other terms and conditions of employment in all exterior areas of Respondent's property.

WE WILL NOT prohibit off-duty employees from engaging in union or other protected activities in all exterior areas of Respondent's property.

WE WILL NOT prohibit employees from misrepresenting company documents and/or records, unless such misrepresentations are malicious and material.

WE WILL NOT prohibit employees from making false statements or providing false information about Respondent insofar as those statement are not maliciously or knowingly false, and material.

WE WILL NOT prohibit foul or abusive language and unprofessional conduct insofar as this prohibition is so vague as to impact activity protected by the Act, including the discussion of wages, hours and other terms and conditions of employment.

WE WILL NOT prohibit sending, receiving or posting information that could be considered defamatory or disparaging to the company.

WE WILL NOT prohibit any off-duty offense which would reflect negatively on the company.

WE WILL NOT threaten or discipline employees for exercising their rights to discuss wages, hours and other terms and conditions of employment either while on duty or, off-duty in non-work areas of company facilities.

WE WILL NOT maintain overly-broad rules as set forth above;

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL rescind and/or revise Respondent's Loitering and Solicitation Policy as originally drafted and as revised in March 2014.

WE WILL rescind and/or revise Respondent's Professional Conduct/Misconduct rules as originally drafted and as revised in March 2014.

WE WILL cure our unfair labor practices regarding our overly broad policies in a manner consistent with current labor law.

WE WILL rescind the discipline imposed on Claudette Wilson on or about September 20, 2013.

WE WILL compensate Claude Wilson for any loss of earnings and other benefits due to her inability to work a full-shift on September 20, 2013, including any adverse tax consequences; with interest at the rate specified by the NLRB, compounded daily.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to any and all discipline imposed on Claudette Wilson as a result of her conduct on September 19–21, 2013, including all warnings and suspensions, and within 3 days thereafter notify the Claudette Wilson in writing that this has been done and that none of this discipline

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

will be used against her in any way.

EYM KING OF MICHIGAN, LLC, D/B/A BURGER KING

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-118835 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.