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

CHIPOTLE SERVICES LLC
d/b/a CHIPOTLE MEXICAN GRILL

and **Cases 04–CA–147314**
04–CA–149551

PENNSYLVANIA WORKERS ORGANIZING COMMITTEE,
A PROJECT OF THE FAST FOOD WORKERS COMMITTEE

David Rodriguez, Esq.,
for the General Counsel.
Kathleen J. Mowry and Steven E. Fine, Esqs., (Messner Reeves LLP),
for the Respondent.
Michael J. Healey, Esq., (Healey and Hornack, PC),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on August 31, 2015. The Union filed the first charge on March 2, 2015,[1] and the amended charge on April 30. The Union filed the second charge on April 6, 2015 and the amended charge on July 14. The General Counsel issued the complaint in the first case on May 29, 2015, and the complaint in the second case on July 21, 2015. On July 21, an Order was issued consolidating the cases for hearing.

The complaints allege that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it maintained an unlawful social media code of conduct; directed an employee to delete certain tweets he had posted on his Twitter account; prohibited that employee from engaging in protected concerted activity; prohibited that employee from circulating a petition among coworkers regarding the Respondent's denial of breaks; terminated that employee's employment for protected concerted activity; and maintained in its handbook four unlawful work rules.

[1] All dates are in 2015 unless otherwise indicated.

At trial, I denied the Respondent's motion for summary judgment regarding the social media code of conduct allegation. The Respondent asserts that the social media policy issued to an employee on January 29, 2015 was an outdated policy that had been replaced on January 1, 2014. The General Counsel does not dispute that. Nor does the General Counsel contend that the current social media policy is unlawful in any respect. The Respondent argues that the allegation concerning issuance of the outdated social media code of conduct is moot: the old policy was erroneously given to a Havertown employee on January 29, 2015; he, as well as all other employees, had been issued the new policy either on its effective date or upon their hire; and, to find a violation of the Act based on a policy that is no longer in effect does not effectuate the purpose of the Act, but would serve only to punish Respondent with no benefit to the public interest. I denied the motion since, although the allegation pertains to an outdated policy provision, that policy provision was in fact issued to an employee and it remained to be seen whether that policy played any role in the actions taken against that employee.

I granted the General Counsel's motion to amend the complaint regarding the social media code of conduct. The allegation initially pertained only to issuance of the outdated policy to one employee in Havertown on January 29, 2015. The amendment charges that the Respondent has maintained that outdated social media code of conduct by issuing it to employees at five locations across the country, including Havertown, since October 16, 2014.

Additionally, the parties agreed that it was not necessary to present testimony as to the four handbook work rules at issue, since the allegation pertains to maintenance, not enforcement, of those rules.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, operates a chain of casual restaurants throughout the country, including one in Havertown, Pennsylvania. During the 12-month period ending April 30, 2015, the Respondent received gross revenues in excess of $500,000 and purchased and received at that facility goods valued in excess of $5,000 directly from points outside the Commonwealth of Pennsylvania. The 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.

[2] There are a few obvious typographical errors in the transcript. On page 20, line 16, "snow" should be inserted between "on" and "days." On page 30, "she was she" should read "where was she." On page 38, line 13 should read "mitigation" rather than "litigation." On page 60, line 17 should read "Never," and line 31 "Why didn't you . . .".

The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Background

Chipotle operates casual restaurants nationwide. At the relevant time, Shannon Kyllo was the Respondent's national social media strategist and Thomas Clark was patch manager or area/regional manager for the region including the Havertown restaurant. Jennifer Cruz was general manager of the Havertown restaurant, and Melanys Santos was the assistant manager/apprentice.

James Kennedy was a crew member at the Havertown restaurant, responsible for food preparation, serving food to customers, washing dishes, and restocking supplies. He was hired in August 2014.

Social Media Policy

One of Kyllo's responsibilities was to review social media postings by employees for violations of company policy. On January 28, 2015, she saw tweets posted by Kennedy regarding the working conditions of Chipotle's employees. One of Kennedy's tweets included a news article concerning hourly workers having to work on snow days when certain other workers were off and public transportation was shut down. (GC Exh. 7) . His tweet addressed Chris Arnold, the communications director for Chipotle, stating: "Snow day for 'top performers' Chris Arnold?" (GC Exh. 3.). In the other tweets, Kennedy replied to tweets posted by customers. In response to a customer who tweeted "Free chipotle is the best thanks," Kennedy tweeted "nothing is free, only cheap #labor. Crew members only make $8.50hr how much is that steak bowl really?" Then, replying to a tweet posted by another customer about guacamole, Kennedy wrote "it's extra not like #Qdoba, enjoy the extra $2" (referring to the fact that, unlike the restaurant chain Qdoba, Chipotle charges extra for guacamole).

Kyllo emailed Clark, forwarding the tweets, and requested that he ask Kennedy to delete the tweets, and discuss the social media code of conduct with him. (GC Exh. 3). Attached to that email was a copy of the company's social media policy. (GC Exh. 4).

The next day, January 29, 2015, Cruz approached Kennedy in the kitchen and said she wanted to talk to him in the dining room. They went out and sat with Clark. Clark asked Kennedy whether he had a Twitter account and whether McMac was his Twitter name; Kennedy replied yes. Clark showed Kennedy copies of the tweets and asked whether he had posted them. Kennedy said he had. Clark then passed over to Kennedy a copy of the social media policy and asked whether Kennedy was familiar with it. Kennedy pushed it aside and said he was. Clark asked Kennedy whether he would delete the tweets at issue, and Kennedy agreed to do so. Later that same day, Kennedy did remove the tweets, and then texted Santos to advise her that he had.

The social media policy that Clark handed to Kennedy read as follows:

Social Media Code of Conduct

We are dedicated to our Food With Integrity mission and take pride in our commitment to using ingredients that are sustainably grown and naturally raised. One way to share our mission is through social networking sites, blogs, and other online outlets (social media). Chipotle's social media team is solely responsible for the company's social media activity. You may not speak or write on Chipotle's behalf.

Social media is also a quick way for you to connect with friends and share information and personal opinions. If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information. To avoid this, our Social Media Code of Conduct applies to you. Chipotle will take all steps to stop unlawful and unethical acts and behavior and may take disciplinary action, up to and including termination, against you if you violate this code or any other company policy, including Chipotle's Code of Conduct.

Outside the workplace and on your own personal time when you are not working, you may participate in social media linked to your personal email address (not your Chipotle email address) and publish personal opinions and comments online. Do be courteous and protect yourself and your privacy. What you publish online is easy to find and will exist for a long time. Think before posting.

Your social media activities are outside the course and scope of your employment with Chipotle. This means that you may not use Chipotle's computers, telephones and equipment for social media when you are working. You may not make any statements about Chipotle's business results, financial condition, or any other matters that are confidential. You must keep confidential information confidential and you may not share it online or anywhere else. For the safety of our employees and property, you may not post online pictures or video of any non-public area of our restaurants. You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors. You alone are personally responsible for your online activity.

Please do report any complaints or concerns you have about Chipotle's business by talking with your supervisor or contacting Chipotle Confidential any time at 1–866–755–4449 or www.chipotleconfidential.com.

This code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws, or other privacy rights.

(GC Exh. 4).

The above Social Media Policy that Clark handed to Kennedy was an outdated policy that officially was no longer in effect. It had been provided to Clark by Kyllo in her email. The current policy, effective January 1, 2014, is in the Crew Handbook at p 20. (GC Exh. 2).

Termination of Employee Kennedy

Chipotle's policy provides that employees are provided breaks in accordance with applicable state law. (GC Exh. 4, p. 23). Kennedy testified that employees at the Havertown restaurant had two types of breaks: food breaks and rest breaks. An employee is entitled to a 30-minute food break if s/he works over 5 hours. An employee is also entitled to a 10-minute rest break if s/he works 3 ½ hours, and two such rest breaks if s/he works over 6 hours. Kennedy was concerned that management did not permit all employees to take all their breaks. He felt that the breaks were "hit or miss," that some people took them and others did not. He testified that he never saw anyone sit down for a 10-minute rest break. He sought advice from a labor organizer at McDonald's that he met on Twitter. She suggested that he write a letter to management explaining the problem and setting forth his proposed solution. As a result, on February 14, Kennedy drafted a petition for employees to sign, in the form of a letter addressed to Havertown Chipotle.

> We the undersigned crew members of Chipotle Mexican Grill, Havertown are aware of the company policy on breaks:
>
> > An employee must take one uninterrupted 30-minute meal break if he or she works over five hours and two breaks if he or she works over 10 hours. If an employee works three and one-half hours or more, managers must provide him or her a 10-minute rest break and if the employee works more than six hours, the manager must provide two 10-minute rest breaks.
>
> We have all been denied breaks by management (at least once) due to "not getting our work done" on time. This is an unacceptable excuse for prohibiting crew members from taking their allotted break. Working an eight hour shift without a meal break or rest break is exhausting. It reduces productivity and increases the stress level in an already fast-paced work environment. In order to be the "top performers" that Chipotle encourages us to be, we need the breaks to which we are entitled.
>
> We want to work with management to create a more positive workplace. We hope this allows us to start a genuine dialogue without fear of reprisal.

(GC Exh. 5).

Kennedy talked to other employees, soliciting their signatures on the petition. In the early mornings, some employees would wait next door, at Panera Bread, until a manager arrived to let them into Chipotle, to prepare the restaurant for opening. On the morning of February 15, Kennedy took that opportunity to talk to other employees who waited at Panera, and obtained two or three signatures. He was off on February 16. Then, on February 17, he talked to employees in the grill area at Chipotle about signing the petition. The discussion occurred before

the restaurant opened for business, and took approximately 2 minutes. He obtained four or five signatures that day.

Cruz testified that she observed Kennedy talking to an employee in the food prep area and handing him a piece of paper. She said that later, that individual and another employee approached her and asked her about the letter that Kennedy was circulating, expressing confusion. Cruz said they thought they might be in trouble for not taking their breaks at a particular time, and Cruz told them not to worry.

Later, when Kennedy was working on the serving line, Cruz asked to talk to him in the office, and he complied. She told him she had noticed him passing around a sheet of paper to employees, and asked him what it was about. Kennedy asked if she would like to see it, and gave her a copy with no signatures on it. Cruz again asked him what it was about, and he explained that employees were not all getting their breaks. She pointed out that he had just taken a food break. She asked if she had ever told him he couldn't take his break, and he said no. She further stated that some employees occasionally opt not to take their breaks in order to complete tasks and take their breaks at the end of the day, and that she cannot compel them to take breaks. Cruz told Kennedy that if everyone were to take a break, all the work must be done first. She thought he was asking her to fire employees who did not take their breaks because they were low performers and could not timely complete their duties. Kennedy tried to explain that was not his position, and that the right to take a break was based on the hours worked, not on job performance. Cruz told Kennedy to stop circulating the petition. Kennedy refused, saying he would continue to circulate the petition, and that she would have to fire him to get him to stop. Cruz told him "Okay, just leave;" he said okay and left the office. Kennedy collected his belongings, said "goodbye" or "nice working with you" to other employees, and left the restaurant.

The meeting occurred in the office, which is located at the back of the restaurant. The room is fairly small. Therefore, during their exchange, Cruz and Kennedy were seated facing each other, and in close proximity, a couple of feet apart. The door to the office was left ajar. In their testimony, Cruz and Kennedy agreed that Kennedy raised his voice to her. She said he pointed his finger at her and leaned in toward her, while he said he waved his arm holding the petition and leaned toward her. I credit Kennedy's testimony on this point, as well as in general with regard to the meeting, as Kennedy's version of the discussion makes more sense than Cruz's. Cruz testified that she felt intimidated by Kennedy and was fearful that he might hurt her, for several reasons. First, Kennedy is much taller than she. Second, she was aware that he had PTSD as a result of his military service in Iraq. And third, she felt he had demonstrated that he may be prone to violence based on certain behavior at work. For example, when breaking down boxes for the recycling bin, he punched them with his fists. (He said it was fun, and relieved stress.) Cruz recalled an instance when she forgot to put the lid on the blender so liquid splattered, and Kennedy was irritated about the mess, saying he would clean it up. (He does not recall that incident, but another similar one in which neither Cruz nor he was involved.) Cruz testified that on another occasion, she asked Kennedy to assist her in replacing a fluorescent light bulb and he refused because he was on break. (He does not recall that, either.) It is undisputed that Cruz was shaking by the end of the discussion; she testified it was because she was frightened while Kennedy thought she was emotional due to their disagreement.

Before her discussion with Kennedy and just before Assistant Manager Santos left the restaurant on break, Cruz had told Santos that she planned to talk to Kennedy about the petition. When Santos returned to the restaurant, she walked past the office and saw the two still talking but she could not hear what either was saying. She testified that although the door was closed, she could see them, seated, through the small window in the door from a few feet away.

Cruz testified that, when she told Kennedy to leave, she only wanted him to leave the office, not the restaurant, and that she did not fire him. In fact, when she heard him saying goodbye to coworkers, she wondered what he was doing. Further, if she had intended to fire him, she would have called Melanys Santos in as a witness. However, upon reflection, she decided that she could not tolerate his attitude and no longer felt safe working with him. Cruz testified that when she did decide to fire Kennedy, it was not because of the petition or because he discussed it with employees while they were on duty, but because of his demeanor during their conversation. After Kennedy left, Cruz briefly talked to Santos about their discussion. Cruz then called Clark to explain what had happened. He asked what she wanted to do, and she said she did not feel safe working with Kennedy and would let him go. The following day, Kennedy was not scheduled to work, but Cruz thought he might come in to discuss the situation. She intended to tell him he was fired if he did come to the restaurant. He did not come in, so she put the termination through on the computer. Cruz testified that there are limited options to select from as reasons for termination in the computer program, and she chose insubordination in order to reflect that he was fired rather than quit.

Kennedy testified that, on the drive home, he wondered whether Cruz had indeed fired him or only intended him to take the rest of the day off to calm down. He recalled that Cruz had once sent another employee home for the day after she had an altercation with a kitchen supervisor, and had not fired her. Kennedy was not scheduled to work the next day, February 18, but returned to work the following day, February 19. However, Cruz was not working that day. Upon his arrival, Kennedy asked kitchen supervisor Sieh whether he was fired. Sieh called Cruz at home and asked whether Kennedy still had his job. Cruz told her that Kennedy should go home, as he was already off the books. Sieh then told Kennedy he had been fired.

Handbook Rules

The Respondent has a Crew Handbook that advises employees of its work rules. (GC Exh. 2.) Employees are not issued written copies of the handbook, but have access to the handbook online, via the "work day" program. That program is an internal website where employees can access various types of company information and documents such as the crew handbook and employees' schedules.

At issue are the following handbook provisions:

> Solicitation Policy
> . . . Employees are not to solicit or be solicited during their working time anywhere on company property, nor are they to solicit during non-working time in working areas if the solicitation would be within visual or hearing range of our customers. . .
>
> Chipotle's Confidential Information

> . . . The improper use of Chipotle's name, trademarks, or other intellectual property is prohibited. . .
>
> Ethical Communications
> As an aspect of good judgment and adherence to this policy, it is always appropriate to raise questions and issues, even if they are difficult. Likewise, avoid exaggeration, colorful language, guesswork, and derogatory characterizations of people and their motives. Whether in your everyday work conversations, in your exchange of e-mail, or otherwise, your communications should be thoughtful and ethical. Think before you speak and write. Be clear and objective.
>
> Political/Religious Activity and Contributions
> While any political or religious affiliation you may have is up to you, any activity in those areas needs to remain outside of the work environment. It is said that to avoid arguments, one should never discuss politics or religion in public—and in this case at work. . .
> . . . It is strictly prohibited to use Chipotle's name, funds, assets, or property for political or religious purposes or endorsement, whether directly or indirectly.

(GC Exh. 2, p. 19, 34, and 35).

III. DISCUSSION AND ANALYSIS

A. Did the Respondent maintain an unlawful social media policy?

When evaluating whether a work rule violates Section 8(a)(1), the National Labor Relations Board (the Board) has held that:

> [A]n 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). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. . . . If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Lutheran Heritage Village-Livonia, 343 NLRB 646, 646–647 (2004); see *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd mem., 203 F.3d 52 (D.C. Cir. 1999).

> The two challenged sections of the Respondent's social media policy are:
> "If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information."

> "You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors."

When evaluating the appropriateness of rules, the Board balances the legitimate interests of the employer against the Section 7 rights of employees. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). When work rules are overly broad or ambiguous, they may reasonably read by employees to prohibit lawful Section 7 activity, and may serve to chill employees in the exercise of their Section 7 rights. Ambiguous rules are construed against the employer. *Lafayette Park Hotel*, above.

Neither of the challenged provisions explicitly prohibits Section 7 activity. However, as explained below, employees would reasonably construe portions of these provisions to restrict the exercise of their Section 7 rights, and certain of these prohibitions have been found by the Board to be unlawful. Further, the rule was applied to restrict Kennedy's exercise of Section 7 rights.

An employer may not prohibit employee postings that are merely false or misleading. Rather, in order to lose the Act's protection, more than a false or misleading statement by the employee is required; it must be shown that the employee had a malicious motive. *Lafayette Park Hotel*, above (rule prohibiting making false, vicious, profane or malicious statements toward or concerning the hotel or any employee was a violation); *Cincinnati Suburban Press, Inc.,* 289 NLRB 966, 975 (1988) (statements are protected absent a showing of reckless disregard for the truth or maliciousness); *American Cast Iron Pipe Co.,* 234 NLRB 1126, 1131 (1978) (false and inaccurate statements that are not malicious are protected); *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250 (2007). Statements are made with malicious motive if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. See, e.g., *TNT Logistics North America, Inc*., 347 NLRB 568, 569 (2006); *Sprint/United Management Co*., 339 NLRB 1012, 1018 (2003).

This analysis applies to the policy prohibitions against false, misleading, inaccurate, and incomplete statements. Therefore, those prohibitions are unlawful.

The prohibition against disclosing confidential information is also problematic. The policy does not define confidential, even when it is discussed two paragraphs down. While the Respondent certainly has a valid interest in protecting private company information, and it is inappropriate to engage in speculation or presumptions of interference with employees' rights, the undefined word "confidential" is vague and subject to interpretation, which could easily lead employees to construe it as restricting their Section 7 rights. See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292 (1999); *Lafayette Park Hotel*, above.

"Disparaging" is a synonym for derogatory. The prohibition against disparaging statements could easily encompass statements protected by Section 7, and the Board has found rules prohibiting derogatory statements to be unlawful. See *Southern Maryland Hospital Center*, 293 NLRB 1209, 122 (1989), enfd. in rel. part, 916 F.2d 932 (4th Cir. 1990) (unlawful rule

against "derogatory attacks"). Similarly, in *Costco Wholesale Corp*.,[3] the Board determined that a rule prohibiting statements "that damage the Company, defame any individual or damage any person's reputation" was overbroad and violated the Act. Thus, disparaging statements would reasonably be construed to include matters protected by Section 7.

The policy prohibits harassing or discriminatory statements. These are legal terms and are not defined anywhere in the policy. The Board found prohibitions against verbal abuse, abusive or profane language, or harassment to be lawful in *Lutheran Heritage*, above. The mere fact that the rule could be read to address Section 7 activity does not make it illegal. See *Lutheran Heritage* at 647 ("we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way"). Similarly, in *Palms Hotel and Casino*,[4] the Board found lawful a rule that prohibits employees from engaging in conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing or interfering with other employees. "Nor are the rule's terms so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace. . . . We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it." Id at 1368. Following this rationale, I find that the prohibitions against harassing or discriminatory statements do not violate the Act.

Finally, the social media policy concluded with a disclaimer, stating that "This code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws, or any other privacy rights." That sentence does not serve to cure the unlawfulness of the foregoing provisions. See *Allied Mechanical*, above, at 1084.

Thus, I find that the prohibitions against spreading incomplete, confidential, or inaccurate information and those against making disparaging, false, or misleading statements violate Section 8(a)(1). However, I find that the prohibitions against harassing or discriminatory statements are lawful.

Although it is undisputed that the Respondent had replaced this policy with a new one in the 2014 crew handbook, the old policy was the one that formed the basis for Kyllo requesting Clark to meet with Kennedy, it was the policy given to Kennedy at that meeting, and it was the basis for Clark's request that Kennedy remove his tweets. It was sent to Clark by Kyllo, who was the company's social media strategist. Further, Kyllo referenced the old policy in similar emails that she sent to managers for several other restaurants across the country. (CP Exh. 2–9). In those emails, Kyllo also asked those managers to address employees' Twitter or Instagram postings with them, as violative of the social media policy. It can only be concluded, then, that this policy was indeed maintained by the Respondent.

The Respondent argues that it is purely punitive to find a violation based on an outdated policy that is no longer in use. That might be true if it were not for the fact that the Respondent did, in fact, use the outdated policy as the reason for corrective action involving nine employees,

[3] 358 NLRB 1100 (2012).
[4] 344 NLRB 1363 (2005).

including Kennedy, nationwide between October 16, 2014 and February 13, 2015. It is immaterial whether those employees' postings constitute protected concerted activity or whether their postings would violate the current policy; the question is simply whether the policy was maintained. The fact that Kyllo erroneously relied on the old policy does not relieve the Respondent of responsibility for her actions and the actions of managers in reliance on her guidance.

Therefore, I find that the Respondent violated Section 8(a)(1) when it maintained the old social media policy provisions prohibiting spreading incomplete, confidential, or inaccurate information and those provisions prohibiting making disparaging, false, or misleading statements, but did not violate the Act with respect to the prohibitions against harassing or discriminatory statements.

B. Did the Respondent violate the Act by directing an employee to delete tweets and not engage in protected concerted activity in the future?

Section 7 protects employees' right to engage in concerted activities for the purpose of mutual aid or protection. The two prongs—whether the activity was concerted and whether it was for mutual aid or protection—are analyzed separately, and objectively. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3.

Employee communications to the public that are part of and related to an ongoing labor dispute are protected by the Act. See, e.g., *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979); *Allied Aviation Service Co. of New Jersey, Inc*., 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980); *Valley Hospital Medical Center Inc.*, 351 NLRB 1250, 1252 (2007). Employees do not lose the protection of the Act when they seek to improve terms and conditions of employment through channels outside the immediate employee-employer relationship.

Kennedy's tweets did not pertain to any current dispute between Chipotle's employees and its management, nor did Kennedy consult or discuss with other employees any intention to post these tweets.

Kennedy's tweets concerned wages and working conditions—employees' pay rates and being required to work on snow days. Wages and working conditions are matters protected by the Act. The issues raised in Kennedy's tweets are not purely individual concerns, pertaining only to Kennedy. He was not seeking a pay raise for himself,[5] or requesting that he be excused from work when it snows heavily. Receiving low hourly wages and being required to report to work despite heavy snow are issues common to many of Chipotle's hourly workers nationwide, and certainly to those at the Havertown restaurant.

The fact that Kennedy did not consult with coworkers before posting these tweets does not make them individual concerns. It is not necessary that two or more individuals act together in order for the activity to be concerted. In *Meyers II*,[6] the Board stated that concerted activities

[5] He testified that he had already been given a raise.

[6] *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d

include individual activity where "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." In *Fresh and Easy*, above, the Board engaged in an extensive discussion of what constitutes concerted activity, and noted that it is not necessary that coworkers agree about the complaint or its objective. *Fresh and Easy* at 4. Kennedy's tweet concerning snow days was directed to Chipotle's communications director but visible to others; Kennedy's other two tweets were in response to customer postings, and likewise visible to others. All these postings had the purpose of educating the public and creating sympathy and support for hourly workers in general and Chipotle's workers in specific. They did not pertain to wholly personal issues relevant only to Kennedy but were truly group complaints. I conclude that Kennedy's postings constitute protected concerted activity.

Also in *Fresh and Easy*, above, the Board discussed the breadth of "mutual aid or protection" in light of the Supreme Court's decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). In *Eastex*, one section of a union newsletter criticized a presidential veto of an increase in the Federal minimum wage and urged employees to register to vote to "defeat our enemies and elect our friends." There was no current wage dispute between the employees and their employer, and in fact those employees were paid more than the minimum wage. Rather, the union was acting on behalf of the employer's employees in the future and other employees generally. The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Fresh and Easy* at 3, citing *Eastex*. The Court noted that although the union's newsletter article did not pertain to a matter that related directly to a dispute between the employees and the employer, it was reasonably related to the employees' jobs or their status or condition as employees, and therefore "for mutual aid or protection." The Court held that portion of the newsletter to be protected even though petitioner's employees were paid more than the vetoed minimum wage, citing the Board's language that, as the "minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum," and that the petitioner's employees' concern "for the plight of other employees might gain support for them at some future time when they might have a dispute with their employer." *Eastex* at 570. "(T)he analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees." *Fresh and Easy*, above at 3. Applying this rationale, I find that Kennedy's postings were for the purpose of mutual aid or protection.

The Respondent asserts that Kennedy's tweets, especially the one regarding Chipotle's $2 charge for guacamole, violate the new social media policy (that policy is not at issue in this case) in that one tweet promotes a competitor (Qdoba) and that all of Kennedy's tweets disparage Chipotle's products and business. I disagree. The tweets are simple statements of fact and do not attack the quality of Chipotle's food. See, e.g, *Richboro Community Mental Health Council,* 242 NLRB 1267 (1979).

Having determined that Kennedy's tweets satisfy both prongs of the analysis—they were protected concerted activity and were for the purpose of mutual aid or protection—I further find that the Respondent's request that Kennedy delete those tweets was unlawful, although no

1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

discipline was imposed on him. While Clark asked Kennedy to remove the tweets and did not direct him to do so, under the circumstances, it amounts to an order from a higher level manager, and the Respondent does not contend otherwise.

I find, therefore, that the Respondent violated Section 8(a)(1) when Clark asked Kennedy to delete his tweets.

I now turn to the question of whether the Respondent violated the Act by prohibiting Kennedy from engaging in protected concerted activity. No evidence was presented that Clark explicitly told Kennedy not to post similar tweets in the future. However, by handing Kennedy the social media policy and asking Kennedy to delete those specific tweets, Clark implicitly directed him not to post similar content in the future. Since I have found that the tweets are protected concerted activity, I conclude that Clark's action implicitly prohibited Kennedy from posting similar tweets in the future and thus prohibited him from engaging in protected concerted activity.

I find, therefore, that Clark's implicit direction not to post tweets concerning wages or working conditions constitutes a violation of Section 8(a)(1).

C. Did the Respondent violate the Act by directing an employee to stop circulating a petition among coworkers?

Section 7 guarantees employees the right to engage in protected concerted activities. The petition that Kennedy drafted objected to employees being denied certain of their breaks. He did not draft it on his own behalf, but on behalf of all employees at Chipotle's Havertown restaurant, as Kennedy had observed that employees were not taking all the breaks to which they were entitled. He circulated it among other employees, seeking their signatures in support of opening a dialogue with management to change the situation. He did, in fact, obtain the signatures of approximately 6–8 employees.

The copy of the petition that Kennedy gave Cruz to read was a clean copy, with no signatures. Cruz told Kennedy to stop circulating the petition, period. She did not direct Kennedy to stop circulating the petition while employees were working, or otherwise propose restrictions on circulating the petition. Whether employees were working or not was apparently of no concern to her. Rather, she testified that her concern was that two employees who talked to her about the petition said they were confused by and worried about its contents. That is not a valid basis to prohibit Kennedy from engaging in protected concerted activity.

I find, therefore, that the Respondent violated Section 8(a)(1) when Cruz directed Kennedy to stop circulating the petition.

D. Did the Respondent violate the Act by terminating an employee's employment?

When an employee is disciplined or discharged for conduct that occurs while engaging in concerted activity, it must be determined whether the otherwise protected conduct is sufficiently egregious to remove it from the protection of the Act. The Board applies the *Atlantic Steel* analysis to these situations. The four factors considered are: (1) the place of the discussion; (2)

the subject matter of the discussion: (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.,* 245 NLRB 814, 816–17 (1979).

When weighing these factors, the Board has found some impulsive behavior protected, especially if the conduct was provoked by an unfair labor practice. The Board has found an employee to have forfeited the protection of the Act only in cases where the behavior is "truly insubordinate or disruptive of the work process." Further, "unpleasantries" in the course of otherwise protected concerted activity do not remove the Act's protection. *Timekeeping Systems*, 323 NLRB 244, 248–49 (1997). Protected speech remains protected "unless found to be so violent or of such serious character as to render the employee unfit for further service." *Timekeeping* quoting *Dreis & Krump Mfg. Co. v. NLRB,* 544 F.2d 320, 329 (7th Cir. 1976). See also *Stanford Hotel,* 344 NLRB 558, 558–559 (2005) (the discussion occurred in a secluded room, the discussion concerned the employee's assertion of a fundamental right under the Act, and the employer provoked the employee by unlawfully threatening to discharge him). In *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), remanded in relevant part 664 F.3d 286, the Board explained that "the Act allows some latitude for impulsive conduct by employees in the course of protected concerted activity, but, at the same time, recognizes that employers have a legitimate need to maintain order."

Kennedy engaged in protected concerted activity when he drafted and circulated a petition among employees, challenging the Respondent's denial of breaks to which employees were entitled. Although the Respondent argues that Kennedy's activity was not protected because he solicited coworker support while they were working and in the work area, I do not agree. First, Kennedy had solicited employees at Panera Bread before they were working. Second, the employees at Havertown routinely discussed non work-related topics while they worked. Further, the discussion Cruz observed, of Kennedy talking to two coworkers, occurred while they were working but Kennedy was on break, before the restaurant opened, and took only approximately two minutes. No evidence was presented that it interfered in any way with their work. It would be expected that Cruz would have intervened and directed them to return to their duties had it been otherwise. More importantly, Kennedy was engaged in protected concerted activity when he was in the meeting with Cruz. She asked him to come to the office to talk about the petition, and she asked him questions about the contents of the petition. He responded and tried to explain the nature of the problem. Cruz attempted to narrow the denial of breaks problem to Kennedy, but he explained that it wasn't about him but about all employees who were denied any of the breaks to which they were entitled.

Cruz was aware of Kennedy's activity, and called him into the office to discuss his circulation of the petition. The office was in the back of the restaurant, apart from the work and dining areas. Cruz asked Kennedy about the contents of the petition, and they disagreed about how breaks were handled. Kennedy raised his voice in that discussion. Finally, Cruz told Kennedy to stop circulating the petition. He refused, telling her she would have to fire him to get him to stop. Cruz then told him to "get out." Kennedy assumed that he had been fired and left the premises. He later thought Cruz only meant for him to leave for the rest of the day. However, when he returned to the restaurant for his next scheduled shift, he was told he had been fired.

Cruz testified that she did not fire Kennedy in that meeting, but did make the decision to fire him shortly thereafter and officially did so the next day. She inputted the reason for the termination into the company's computer program as "insubordination," as she testified she felt that "was the correct thing."

I believe Cruz when she said she did not intend to fire Kennedy in their meeting. Rather, I believe she intended to tell him to stop circulating the petition, and she expected he would agree, as he had when Clark asked him to remove his tweets a few weeks earlier. She was taken aback when Kennedy objected to her order. Kennedy testified that he had raised his voice when he felt Cruz did not understand the problem about breaks, and she was misdefining his concern. However, in her testimony, Cruz stated that she became concerned when Kennedy said she would have to fire him to get him to stop circulating the petition. She testified that it was at that point that she felt a switch flipped in Kennedy, and she "was like whoa." (Tr. at 78–79.) This belies her asserted justification for the firing, and supports the General Counsel's position that Kennedy was fired due to his protected activity.

Santos testified that, after Kennedy left the office and she went in to talk to Cruz, Cruz said she had tried to talk to him about the petition. She told Santos she was firing Kennedy "because of his reaction." Based on Cruz' testimony as to when she became concerned about Kennedy's behavior, I can only conclude that "his reaction" refers to Kennedy telling her he was going to continue to circulate the petition unless she fired him. Santos further testified that, when she saw the two talking in the office a few feet away from her, she could not hear what either one was saying. Therefore, while Kennedy admittedly raised his voice, he could not have been shouting.

Cruz testified that although she inputted "insubordination" as the reason for the termination, the real reason was that she feared Kennedy would become violent. That purported fear was based on Kennedy raising his voice, pointing his finger and leaning toward her in the meeting, combined with three prior incidents, and her knowledge that Kennedy was diagnosed with posttraumatic stress disorder (PTSD).[7] I find that Cruz's purported fear of Kennedy was neither justified nor true, and was fabricated after the fact. Cruz gave three examples of Kennedy's behavior during his roughly six month employment that was symptomatic of PTSD and supported her fear. First, he punched boxes when breaking them down for recycling. The second time he was "mad" and said he would clean up the mess created when Cruz forgot to put the lid on a blender before turning it on. The third was when he declined to help her replace a light bulb while he was on break. How these are in any way demonstrative of PTSD symptoms, much less justification for Cruz's fear of violence by Kennedy, escapes me entirely. If it weren't such blatant disability discrimination, Cruz's testimony would be laughable. Cruz was surprised that Kennedy argued with her and surprised that he raised his voice. While I have credited

[7] I note that a "history of inappropriate behavior" constitutes a proper ground for discharge. *Consolidated Biscuit Co*., 346 NLRB 1175, 1181 (2006). No such pattern has been established here. Kennedy had no prior discipline. Cruz gave Kennedy an outstanding performance appraisal in October 2014. (GC Exh. 6). Therein, she noted that "he provides excellent customer service and elevates so many around him. He cares about his team and is open to criticism so that he can get better." More significantly, not a week or two before the termination, Cruz had discussed with Kennedy the possibility of him moving up in the organization by learning the grill, a prerequisite for kitchen manager.

Kennedy's testimony that he did not point at her but waved his hand around, he admitted that he leaned toward her, and he agreed that he raised his voice. Whether Kennedy pointed his finger at her or waved his hand around with the petition in it, neither is indicative of potential violence. Raising his voice, likewise, does not indicate that an assault was likely. Kennedy having a strong reaction is not surprising under the circumstances, and his behavior hardly rises to such a level of egregiousness that he forfeits the protection of the Act. He did not threaten Cruz, nor curse at her, nor engage in other serious misconduct, but argued with her about the problem with breaks, at her instigation. Cruz probably was upset by Kennedy's response; she was a relatively new manager and not accustomed to employees disagreeing with her or challenging her. However, Kennedy's conduct was fairly mild under the circumstances, and no reasonable person could possibly construe it as potentially violent or rendering him unsafe or unfit for further service.

The Respondent's reliance on this defense is, frankly, ludicrous. Insubordination was, in fact, the reason for the termination, and that insubordination was Kennedy's refusal to comply with Cruz' order that he cease circulating the petition. That was his last statement before Cruz told him to leave.

Cruz testified that "we only got the insubordination option is only when you do it, when the manager is doing the firing." Her meaning is unclear. If she was trying to say that insubordination is the only basis for termination in the computer program, I do not believe it. There are a multitude of reasons an employee can be fired, such as poor performance, theft, assault, undependability, among others. It would make no sense whatsoever for the computer program to contain insubordination as the only reason a Chipotle employee could be fired.

In sum, I find that the Respondent terminated Kennedy's employment due to his refusal to cease engaging in protected concerted activity. I further find that, applying *Atlantic Steel*, Kennedy's behavior during his discussion with Cruz was not so egregious as to lose the protection of the Act.

I find, therefore, that the Respondent violated Section 8(a)(1) when it terminated Kennedy's employment.

E. Did the Respondent violate the Act by maintaining certain work rules in its employee handbook?

An employer's work rule violates Section 8(a)(1) when the rule reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd mem., 203 F.3d 52 (D.C. Cir. 1999). The rule must be read reasonably, not in isolation but in context, and it must not be presumed to interfere with employees' rights. Determination of the legality of a work rule requires a balancing of competing interests: the right of employees to engage in protected activity against the right of employers to maintain discipline in the workplace. Id at 825, 827; *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004). Further, vague or ambiguous rules may chill employees in the legitimate exercise of their Section 7 rights, and are construed against the employer. *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132, 2 (2012); *Norris/O'Bannon, Dover Resources Co*., 307 NLRB 1236, 1245 (1992); *Paceco,* 237 NLRB 399, 399 fn. 8 (1978).

Where the rules are likely to have a chilling effect on employees' Section 7 rights, mere maintenance of the rules may be an unfair labor practice even absent evidence of enforcement. *Farah Mfg. Co*., 187 NLRB 601, 602 (1970), enfd. 450 F.2d 942 (5th Cir. 1971).

The challenged portions of the Respondent's Code of Conduct do not explicitly restrict Section 7 activities, nor were they promulgated in response to union activity, nor have they been applied to restrict Section 7 activities. Thus, the issue at hand is whether employees would reasonably construe these sections of the Code of Conduct to prohibit Section 7 activity.

Solicitation Policy

The portion of the policy at issue reads "…Employees are not to solicit or be solicited during their working time anywhere on company property, nor are they to solicit during non-working time in working areas if the solicitation would be within visual or hearing range of our customers . . ." (GC Exh. 2, p. 19).

This work rule is overbroad. The Board permits solicitation in work areas during nonworking hours, except in special circumstances. *Food Services of America, Inc.*, 360 NLRB No. 123, slip. op at 5 (2014). In *Sam's Club*, 349 NLRB 1007 (2007), the Board noted that, in a retail business, it is appropriate to prohibit solicitation only on the sales floor where solicitation would interfere with sales and disrupt business. The Board did not approve any restriction merely because customers could see or hear the solicitation. As pointed out by the General Counsel, the Respondent's prohibition against solicitation if it "would be within visual or hearing range of our customers" extends to any working area where customers may see the employees, and this may include restrooms, the parking lot (where trash bins are located), and other inside areas such as the food prep and dishwashing sections, due to the layout of the restaurant. It also includes the dining room, where employees may sit to take breaks. Solicitation in those areas would have no impact on customers' purchasing of or eating food.

I find that maintenance of the rule prohibiting solicitation in work areas during nonworking hours violates Section 8(a)(1) of the Act.

Chipotle's Confidential Information

The section at issue reads ". . . The improper use of Chipotle's name, trademarks, or other intellectual property is prohibited. . ." (GC Exh. 2, p. 34.)

Section 32 of the Lanham Act, 15 U.S.C. § 1114(a), imposes liability for trademark infringement on any person who, without the consent of the owner of the trademark, uses it for any number of enumerated commercial purposes. An employer may protect its proprietary interest, including its trademarks and logo.

General Counsel cites *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1020 (1991) (rule unlawful that prohibits employees from wearing uniforms bearing company logo or trademarks while engaged in union activity during nonworking time) to support his position regarding the logo. However, the Board subsequently distinguished that case in *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). There, the Board upheld an administrative law judge's dismissal of an

allegation that a rule prohibiting wearing hotel uniforms off company premises constituted an excessive impediment to union activity. In *Pepsi Cola*, the rule had been promulgated in response to a union organizing campaign, in violation of *Lutheran Heritage Village-Livonia*.

The Respondent's rule does not define what constitutes "improper use" of the Respondent's name or trademarks. Most of the section pertains to confidentiality and does not explain in what respect use of the Respondent's name or trademarks may be confidential. Nor does it explain any uses of the Respondent's name or logo that are permissible. On its face, then, it chills employees from using the Respondent's name and logo. Although employees who use the logo and trademark while engaged in Section 7 activities are using them in a non-commercial manner, I do not find that prohibiting such use is an unreasonable restriction on Section 7 activity. However, barring employees from using the company name is altogether different. It is often necessary for employees to identify their employer when they are engaged in Section 7 activities and the Respondent presented no evidence to support the need for such a restriction.

Since I find that employees would reasonably interpret any non-work-related use of Respondent's name to be improper, I conclude that this portion of the rule violates Section 8(a)(1).

Ethical Communications

The entire section reads:

> As an aspect of good judgment and adherence to this policy, it is always appropriate to raise questions and issues, even if they are difficult. Likewise, avoid exaggeration, colorful language, guesswork, and derogatory characterizations of people and their motives. Whether in your everyday work conversations, in your exchange of e-mail, or otherwise, your communications should be thoughtful and ethical. Think before you speak and write. Be clear and objective.

(GC Exh. 2, p. 35).

The General Counsel contends that the sentence beginning "Likewise, avoid exaggeration. . ." violates the Act.

As discussed earlier in this decision, an employer may not prohibit employee statements that are merely false or misleading. Rather, in order to lose the Act's protection, it must be shown that the employee had a malicious motive.

"Colorful language" is undefined in the rule but, generally speaking, is language considered to be vulgar, rude, or offensive. In general, work rules that prohibit employees from using offensive, demeaning, abusive, or other similar language in the workplace are not facially invalid under Section 8(a)(1), as employers have a legitimate interest in establishing a "civil and decent work place," free from racial, sexual, and other harassment that can subject them to legal liability under State or Federal law. *Lutheran Heritage Village*, above at 647, citing *Adtranz ABB Daimler-Benz v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), denying enf. in pertinent part to 331 NLRB 291 (2000). The Board found prohibitions against verbal abuse, abusive or profane

language, or harassment to be lawful in *Lutheran Heritage*, above, stating that the mere fact that the rule could be read to address Section 7 activity does not make it illegal. See *Lutheran Heritage* at 647 ("we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way"). Therefore, I find this portion of the rule does not violate the Act.

"Derogatory characterizations of people and their motives" covers everyone, and would apply to supervisors and managers. In fact, the reference to "motivation" is highly suggestive of supervisors and managers, although it may apply to other coworkers as well. That prohibition would reasonably be construed by employees to bar them from discussing supervisory and managerial decisions, thereby chilling them from engaging in protected activities.

"Exaggeration" can be applied to a statement simply because one disagrees with it. "Guesswork" can easily prohibit any discussion about the basis for managerial decisions. The prohibitions in this rule against exaggeration and guesswork would, therefore, reasonably be construed by employees to bar them from discussing complaints about their supervisors and their working conditions, thereby chilling them from engaging in protected activities. These prohibitions are similar to many rules that have been found by the Board to be unlawful, absent a showing of malice on the part of the employee.

Therefore, I find that the portions of this rule prohibiting exaggeration, guesswork, and derogatory characterizations of people and their motives violate Section 8(a)(1).

Political/Religious Activity and Contributions

The portion of the policy at issue reads:

> While any political or religious affiliation you may have is up to you, any activity in those areas needs to remain outside of the work environment. It is said that to avoid arguments, one should never discuss politics or religion in public—and in this case at work . . .
>
> . . . It is strictly prohibited to use Chipotle's name, funds, assets, or property for political or religious purposes or endorsement, whether directly or indirectly.

(GC Exh. 2, p. 35).

General Counsel does not challenge the portions of this rule pertaining to religious activity, but only those pertaining to political activity.

The exercise of Section 7 rights often involves political activity. In *Eastex*,[8] one section of a union newsletter criticized a presidential veto of an increase in the Federal minimum wage and urged employees to register to vote to "defeat our enemies and elect our friends." The Court upheld the Board's ruling that the employer unlawfully prevented its employees from distributing the newsletter.

[8] *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

The Respondent's prohibition on discussing politics in the workplace would prevent employees from engaging in a wide variety of protected activities, including discussing obvious topics such as legislation aimed at improving employees' working conditions, candidates' positions on work-related matters, increasing the Federal minimum wage, right to work legislation, and the benefits of unionization, to name a few.

I find that the Respondent's prohibition against discussing politics in the workplace violates Section 8(a)(1).

While the Respondent certainly has an interest in protecting its name from being used improperly or even fraudulently in the political arena, the blanket prohibition against using the Chipotle name for political purposes is too restrictive The General Counsel notes that employees who participate, for example, in the "Fight for 15" movement that lobbies for legislation increasing the minimum wage to $15 per hour, could reasonably interpret this rule to prohibit them from carrying signs identifying their employer as Chipotle. Employees often need to identify their employer while they are engaged in Section 7 activities and the Respondent presented no evidence to support the need for such a restriction.

I find that the prohibition against any use of the Chipotle name for political purposes violates Section 8(a)(1).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a social media code of conduct with prohibitions against posting incomplete, confidential, or inaccurate information and prohibitions against making disparaging, false, or misleading statements, the Respondent has violated Section 8(a)(1) of the Act.

3. By directing an employee to delete certain tweets and not engage in similar protected concerted activity in future, the Respondent has violated Section 8(a)(1) of the Act.

4. By prohibiting an employee from circulating among coworkers a petition challenging the Respondent's break policy, the Respondent has violated Section 8(a)(1) of the Act.

5. By terminating James Kennedy's employment for his protected concerted activity in circulating a petition challenging the Respondent's break policy, the Respondent has violated Section 8(a)(1) of the Act.

6. By maintaining overbroad work rules in the crew handbook regarding solicitation, confidential information, ethical communications, and political activities, the Respondent has violated Section 8(a)(1) of the Act.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent has not otherwise violated the Act.

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.

The Respondent, having discriminatorily discharged James Kennedy, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), 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).

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Kennedy for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated. *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014).

The General Counsel has requested that, in addition to ordering the Respondent to post notice at the Havertown restaurant covering all issues (Appendix A), I order the Respondent to post notice nationwide regarding maintenance of the old social media code of conduct as well as the unlawful work rules in the current crew handbook. No evidence was presented that the old social media policy was issued nationwide. Rather, the evidence presented supports only that the old policy was issued to employees at eight or nine facilities other than Havertown. Therefore, I will order the Respondent to post a notice regarding the social media policy at those additional restaurant locations only: Union Springfield #1275, Oak Park #316, Pipers Alley #1401, Santa Fe Springs #1812, Thompson Peak #357, Corpus Christie #2343, Potomac Yard #2217, Westbrook #1749, and Wilton #1278 (Appendix B). Appendix C is to be issued to the remaining restaurants nationwide, and covers the four unlawful work rules in the current crew handbook.

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

ORDER

The Respondent, Chipotle Mexican Grill, Havertown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing employees to delete social media postings regarding employees' wages or other terms or conditions of employment;

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

(b) Prohibiting employees from posting on social media regarding employees' wages or other terms or conditions of employment;

(c) Prohibiting employees from circulating petitions regarding the company's adherence to its break policy or any other terms or conditions of employment;

(d) Discharging employees because they engage in protected concerted activity by circulating a petition concerning Respondent's nonadherence to its break policy or any other terms or conditions of employment;

(e) Maintaining a work rule entitled "Social Media Code of Conduct" that unlawfully limits employees' rights to engage in Section 7 activity;

(f) Maintaining a work rule entitled "Solicitation Policy" that unlawfully limits employees' rights to engage in Section 7 activity;

(g) Maintaining a work rule entitled "Chipotle's Confidential Information" that unlawfully limits employees' rights to engage in Section 7 activity;

(h) Maintaining a work rule entitled "Ethical Communications" that unlawfully limits employees' right to engage in Section 7 activity;

(i) Maintaining a work rule entitled "Political/Religious Activity and Contributions" that unlawfully limits employees' rights to engage in Section 7 activity; and

(j) 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 the work rule entitled "Social Media Code of Conduct" that unlawfully limits employees' rights to engage in Section 7 activity.

(b) Rescind the work rule entitled "Solicitation Policy" that unlawfully limits employees' rights to engage in Section 7 activity.

(c) Rescind the work rule entitled "Chipotle's Confidential Information" that unlawfully limits employees' rights to engage in Section 7 activity.

(d) Rescind the work rule entitled "Ethical Communications" that unlawfully limits employees' rights to engage in Section 7 activity.

(e) Rescind the work rule entitled "Political/Religious Activity and Contributions" that unlawfully limits employees' rights to engage in Section 7 activity.

(f) Within 14 days from the date of the Board's Order, offer James Kennedy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(g) Make James Kennedy whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(h) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of James Kennedy, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(i) Compensate James Kennedy for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated.

(j) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(k) 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.

(l) Within 14 days after service by the Region, post at its facility in Havertown, Pennsylvania, copies of the attached notice marked "Appendix A;" post at its facilities in Union Springfield #1275, Oak Park #316, Pipers Alley #1401, Santa Fe Springs #1812, Thompson Peak #357, Corpus Christie #2343, Potomac Yard #2217, Westbrook #1749, and Wilton #1278, copies of the attached notice marked "Appendix B;" and post at its remaining facilities nationwide copies of the attached notice marked "Appendix C."[10] Copies of each notice, on forms provided by the Regional Director for Region 4, 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

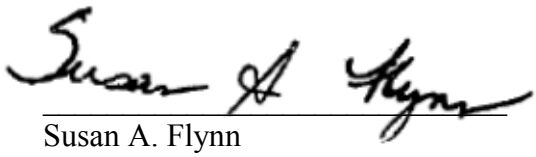
[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations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

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 January 29, 2015.

(m) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 14, 2016



Susan A. Flynn
Administrative Law Judge

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 work rules which employees would reasonably construe to discourage them from engaging in protected concerted activity.

WE WILL NOT direct you to delete social media postings regarding your wages or other terms or conditions of employment.

WE WILL NOT prohibit you from posting on social media regarding your wages or other terms or conditions of employment.

WE WILL NOT prohibit you from circulating petitions regarding the company's nonadherence to its break policy or any other terms or conditions of employment.

WE WILL NOT discharge or otherwise discriminate against you for circulating a petition challenging the Respondent's break policy or engaging in other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act, listed above.

WE WILL rescind the work rule entitled "Social Media Code of Conduct" that provides "If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information." and "You may not make disparaging, false, misleading. . . statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors."

WE WILL rescind the work rule entitled "Solicitation Policy" that provides "…Employees are not to solicit…. . . non-working time in working areas if the solicitation would be within visual or hearing range of our customers. . ."

WE WILL rescind the work rule entitled "Chipotle's Confidential Information" that provides "…The improper use of Chipotle's name. . . . is prohibited. . .

WE WILL rescind the work rule entitled "Ethical Communications" that provides "…. . ., avoid exaggeration. . . guesswork, and derogatory characterizations of people and their motives."

WE WILL rescind the work rule entitled "Political/Religious Activity and Contributions" that provides "While any political or religious affiliation you may have is up to you, any activity in those areas needs to remain outside of the work environment. It is said that to avoid arguments, one should never discuss politics or religion in public-and in this case at work. . . " . . . and ". . . It is strictly prohibited to use Chipotle's name…for political…purposes or endorsement, whether directly or indirectly."

WE WILL, within 14 days from the date of this Order, offer James Kennedy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James Kennedy whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate James Kennedy for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of James Kennedy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CHIPOTLE SERVICES, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

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

NLRB, 615 Chestnut Street, Suite 710, Philadelphia, PA 19106–4404
Tel: (215) 597–7601, Fax: 215–597–7658
Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-147314 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.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597–5354

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 work rules which employees would reasonably construe to discourage them from engaging in protected concerted activity.

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

WE WILL rescind the work rule entitled "Social Media Code of Conduct" that provides "If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information." and "You may not make disparaging, false, misleading…statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors."

WE WILL rescind the work rule entitled "Solicitation Policy" that provides ". . . Employees are not to solicit…during non-working time in working areas if the solicitation would be within visual or hearing range of our customers. . . "

WE WILL rescind the work rule entitled "Chipotle's Confidential Information" that provides ". . . The improper use of Chipotle's name.. . . is prohibited. . . "

WE WILL rescind the work rule entitled "Ethical Communications" that provides ". . . Likewise, avoid exaggeration, . . . guesswork, and derogatory characterizations of people and their motives."

WE WILL rescind the work rule entitled "Political/Religious Activity and Contributions" that provides "While any political or religious affiliation you may have is up to you, any activity in those areas needs to remain outside of the work environment. It is said that to avoid arguments, one should never discuss politics or religion in public-and in this case at work. . . " . . . and ". . .

It is strictly prohibited to use Chipotle's name…for political…purposes or endorsement, whether directly or indirectly."

CHIPOTLE SERVICES LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

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APPENDIX C

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