343 NLRB No. 75 (N.L.R.B.), 343 NLRB 646, 176 L.R.R.M.
(BNA) 1044, 2004-05 NLRB Dec. P 16786, 2004 WL 2678632

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

MARTIN LUTHER MEMORIAL HOME, INC. D/B/A/ LUTHERAN HERITAGE VILLAGE-LIVONIA
AND
VIVIAN A. FOREMAN

Case 7-CA-44877
November 19, 2004

Summary

We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.
The Board agreed with the judge that the rules unqualified prohibitions of the release of any information regarding its partners could be reasonably construed by employees to
restrict discussion of wages and other terms and conditions of employment with their fellow employees and with UNITE. Therefore, it found the rule is unlawful under the principles set forth in Lutheran Heritage Village-Livonia, 343 NLRB No. 75 (2004).
Member Liebman dissented in part in Lutheran Heritage Village-Livonia, finding contrary to her colleagues, that certain of the employers rules were unlawful. In the present case, she found that under either the majority or dissenting view in Lutheran Heritage, the Respondents confidentiality rule is unlawfully overbroad.
The Board modified the judges recommended Order to conform with that recently issued in Guardsmark, LLC, 344 NLRB No. 97, slip op. 4.
(Chairman Battista and Members Liebman and Schaumber participated.)
Charges filed by UNITE; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Chicago, April 26‑28, 2004; at Brooklyn on May 17, 2004; and at New York on May 18‑19, 2004. Adm. Law Judge Joel P. Biblowitz issued his decision Sept. 16, 2004.

DECISION AND ORDER

****1** BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH, AND MEISBURG

On February 3, 2003, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings [1] , and conclusions [2] and to adopt the recommended Order.

Applying the Board's standard as set out in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), the judge concluded that the Respondent maintained three work rules that were unlawful, but that three other work rules challenged by the General Counsel were lawful. [3] In *Lafayette Park*, the Board explained that to determine whether mere maintenance of certain work rules violates Section 8(a)(1) of the Act, "the appropriate inquiry is whether the rules

would reasonably tend to chill employees in the exercise of their Section 7 rights." The judge found that the Respondent's "no solicitation," "no loitering," and "no unlawful strikes, work stoppages, slowdowns, or other interference" rules were unlawfully overbroad or ambiguous and that a reasonable employee could conclude that these rules proscribed Section 7 activity. We adopt the judge's conclusion that these rules violate Section 8(a)(1), for the reasons explained by the judge. [4]

In addition, the judge concluded that the Respondent's rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" were lawful because they were intended to maintain order in the employer's workplace and did not explicitly or implicitly prohibit Section 7 activity. We agree with the judge's conclusion.

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). 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 it does, we will find the rule unlawful. [5]

****2** ***647** 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.

The judge found that the Respondent's rule prohibiting "abusive or profane language" was lawful. He relied on the District of Columbia Circuit's decision in *Adtranz ABB Daimler-Benz Transp., N.A. Inc. v. NLRB,* 253 F.3d 19 (D.C. Cir. 2001), denying enf. in pert. part to 331 NLRB 291 (2000). [6] In *Adtranz*, the court found that the Board had misapplied its traditional analytic framework as set forth in *Lafayette Park Hotel* in concluding that an employer's rule banning "abusive or threatening language" was unlawfully overbroad. The court held that the rule was lawful because it was clearly intended to maintain order and avoid liability for workplace harassment and could not reasonably be read to prohibit activity protected by Section 7.

We agree with the District of Columbia Circuit's decision in *Adtranz* that a rule prohibiting "abusive language" is not unlawful on its face. We reach the same conclusion in regard to profane language. [7] The court recognized that employers have a legitimate right to establish a "civil and decent work place." *Adtranz*, 253 F.3d at 25. The court also recognized that employers have a legitimate right to adopt prophylactic rules banning such language because employers are subject to civil liability under federal and state law should they fail to maintain "a workplace free of racial, sexual, and other harassment" and "abusive language can constitute verbal harassment triggering liability under state or federal law." *Adtranz,* supra, 253 F.3d at 27. In addition, we agree with the court that there is no basis for a finding that a reasonable employee would interpret a rule prohibiting such language as prohibiting Section 7 activity.

Applying these principles, we find that the Respondent has not violated Section 8(a)(1) by maintaining the challenged rules prohibiting abusive or profane language. [8] The rules do not expressly cover Section 7 activity. Nor are verbal abuse and profane language an inherent part of Section 7 activity. *Adtranz v. NLRB,* supra, 253 F.3d at 26. The question of whether particular employee activity involving verbal abuse or profanity is protected by Section 7 turns on the specific facts of each case. Id.; see also *Atlantic Steel*, 245 NLRB 814, 816 (1979) (employee's use of abusive language may be unprotected depending on circumstances of case including nature of outburst). An employee whose Section 7 activity involves behavior of this type may be protected by Section 7 in some cases, but in other cases the conduct will be unprotected. Id. Absent application of the rule to the former conduct, we would not presume that the rule is unlawful.

****3** There is no evidence that the challenged rules have been applied to protected activity or that the Respondent adopted the rules in response to protected activity. Rather, as in *Adtranz*, the rules serve legitimate business purposes: they are designed to

maintain order in the workplace and to protect the Respondent from liability by prohibiting conduct that, if permitted, could result in such liability.

Further, a reasonable employee reading these rules would not construe them to prohibit conduct protected by the Act. *Adtranz,* supra. See also *University Medical Center v. NLRB,* 335 F.3d 1079, 1088-1089 (D.C. Cir. 2003) (a reasonable employee would not read a rule prohibiting "insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a [supervisor] or other individual" as proscribing solicitation of union support or concerted employee protest of supervisory activity because, read as a whole, the rule applied only to insubordinate activity). Where, as here, the rule does not refer to Section 7 activity, 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. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach. [9]

We agree with our colleagues that a rule can be unlawful if employees would reasonably read it to prohibit Section 7 activity. We do not consider it necessary or appropriate to decide in this case what rules in a future ***648** hypothetical case would be unlawful under this test. Suffice it to say that, in the instant case, reasonable employees would not read the rule in that way. They would realize the lawful purpose of the challenged rules. That is, reasonable employees would infer that the Respondent's purpose in promulgating the challenged rules was to ensure a "civil and decent" workplace, not to restrict Section 7 activity.

Our dissenting colleagues argue that the maintenance of the rules is unlawful because, in their view, the rules could be applied to prohibit conduct that, under certain circumstances, the Board would find protected under the Act. We disagree. The rules are designed to deter employees from resorting to abusive or profane language in the workplace. Section 7 protects the right of employees to "self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." [10] We decline to assume, as the dissent does, that employees will be deterred from engaging in protected activities simply because the use of abusive or profane language might subject them to discipline. Rather, we agree with the view expressed by the D.C. Circuit in *Adtranz* that "it is preposterous [to conclude] that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or threatening language." [11]

****4** Member Liebman suggests that the proper approach to this issue is to mandate that employers specify in their work rules that the rules do not apply to Section 7 activity. In essence, that approach requires an employer to create an exception for abusive or profane language simply because it occurs in the context of Section 7 activity. However, that is not the law. The use of abusive or profane language may be sufficiently egregious to deprive an employee of the protection of the Act even if used during the course of Section 7 activity. [12] Under our colleague's logic, an employer may not *maintain* work rules that prohibit abusive or profane language because there are some instances in which the language is not egregious. We decline to go so far. Work rules are necessarily general in nature and are typically drafted by and for laymen, not experts in the field of labor law. We will not require employers to anticipate and catalogue in their work rules every instance in which, for example, the use of abusive or profane language might conceivably be protected by (or exempted from the protection of) Section 7. Nor will we assume that the average employee would read a general prohibition on abusive or profane language as a ban on Section 7 activities. The approach we adopt strikes a far more realistic balance.

For the same reasons, we also find the rule prohibiting harassment to be lawful. Again, our dissenting colleagues say that the rule could be applied unlawfully to prohibit protected activity, e.g. an employer could unreasonably term "harassment" an effort to persuade a reluctant employee to join the union. However, our concern is whether the maintenance of the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. Our colleagues do not appear to dispute that some instances of harassment are not protected by the Act. [13] We see no justification for concluding that employees will interpret the rule unreasonably to prohibit conduct that does not rise to the level of harassment, or to presume that the Respondent will unreasonably apply it in that manner. [14]

The dissent errs in asserting that our analysis considers only the Respondent's legitimate interests in maintaining the challenged rules and ignores the rights of employees. To the contrary, employees have a right to a workplace free of unlawful harassment, and both employees and ***649** employers have a substantial interest in promoting a workplace that is "civil and decent." [15] Moreover, our conclusion that the mere maintenance of the rules is lawful does not, of course, immunize from challenge specific instances in which they are applied. Thus, the dissent's concern that the maintenance of the rules will "chill" Section 7 activity is misplaced.

For all the foregoing reasons, we agree with the judge that employees would not reasonably be discouraged from engaging in Section 7 activity for fear of contravening the Respondent's rules against "verbal abuse," "abusive or profane language," or "harassment." [16] We therefore adopt the judge's conclusion that the mere maintenance of those rules did not violate Section 8(a)(1).

ORDER

****5** The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia, Livonia, Michigan, its officers, agents, successors, and assigns, shall take the actions set forth in the Order.

****6** MEMBERS LIEBMAN AND WALSH, dissenting in part.

"The place of work is a place uniquely appropriate for dissemination of views" by employees. *NLRB v. Magnavox Co*., 415 U.S. 322, 325 (1974). We appreciate the desire of employers to maintain a civil workplace. And we appreciate the potential liabilities imposed on employers by Federal and State statutes. We also recognize that employers such as the Respondent nursing home operate in highly sensitive environments, and have a strong interest in protecting their elderly and infirm residents from abuse and inappropriate or disruptive conduct on the part of their employees. Nonetheless, we are struck by the ambiguity of certain workplace rules— intended, perhaps, to achieve decorum and peace—that use words like "abusive" and "harassment." The meaning of these words is highly subjective: as the Board has recognized, one person's abuse may be mere annoyance to another and no bother at all to a third. [1] Surely a broad reading of their terms places certain workplace rules in serious tension with Section 7 rights protected by the Act, a statute that turns on the right of employees to communicate freely about their terms and conditions of employment, at work. There will no doubt be instances when an employee may consider communicating with a co-worker, even at the risk of being unwelcome, to emphasize an opinion, or to prompt a desired course of action that he is legitimately entitled to seek under the Act. Without a defining context, or limiting language, the rules at issue here could subject to discipline—and thus inhibit—an angry conversation with a supervisor expressing dissatisfaction over an evaluation, a heated discussion between employees over the benefits of unionization, or a loud protest by employees over safety conditions. But expressions of displeasure, and even anger, are protected means of Section 7 communication.

I.

The Board has repeatedly recognized that mere maintenance of overbroad work rules can violate Section 8(a)(1). *Lafayette Park Hotel*, 326 NLRB 824, 825, 828 (1998); *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979). Moreover, a rule that prohibits, inter alia, unprotected behavior may be unlawful if it also contains prohibitions so broad that they can reasonably be understood as encompassing protected conduct. See, e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 4, 294 (1999) (rule prohibiting "false, vicious, profane, or malicious statements" unlawful because it prohibits statements that are "merely false" and might include union propaganda); *Lafayette Park Hotel*, 326 NLRB at 828 (same). Here, the majority and the judge have misapplied Board and Supreme Court law in concluding that the Respondent's "no abusive or profane language," "no harassment," and "no verbal, mental, or physical abuse" rules are lawful. [2] For the reasons discussed below, we conclude that these rules are facially unlawful. [3]

****7** ***650** In *Lafayette Park Hotel*, 326 NLRB at 825, the Board recognized that determining the lawfulness of an employer's work rules requires balancing competing interests. The Board thus relied upon the Supreme Court's view, as stated in *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945), that the inquiry involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 326 NLRB at 825. While purporting to apply the Board's test in *Lafayette Park Hotel*, the majority loses sight of this fundamental precept. Ignoring the employees' side of the balance, the majority concludes that the rules challenged here are lawful solely because it finds that they are clearly intended to maintain order in the workplace and avoid employer liability. The majority's incomplete analysis belies the objective nature of the appropriate inquiry: "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights."

Our colleagues properly acknowledge that even if a "rule does not explicitly restrict activity protected by Section 7," it will still violate Section 8(a)(1) if—among other, alternative possibilities—"employees would reasonably construe the language to prohibit Section 7 activity." On this point, of course, the established test does not require that the *only* reasonable interpretation of the rule is that it prohibits Section 7 activity. To the extent that the majority implies otherwise, it errs. Such an approach would permit Section 7 rights to be chilled, as long as an employer's rule could reasonably be read as lawful. This is not how the Board applies Section 8(a)(1). See, e.g., *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction"). [4]

The majority asserts that it has considered the employees' side of the balance, in that it has found that the purpose behind the Respondent's rules— to maintain order and protect itself from liability—is so clear that it will be apparent to employees and thus could not reasonably be misunderstood as interfering with Section 7 activity. Although the Respondent's assertedly pure motive in creating such rules may be crystal clear to our colleagues, it may not be as obvious to the Respondent's employees, especially in light of the other unlawful rules maintained by the Respondent. Rather, for reasons explained below, we find that the challenged rules are facially ambiguous. The Board construes such ambiguity against the promulgator. *Norris/O'Bannon,* 307 NLRB 1236, 1245 (1992), quoting *Paceco,* 237 NLRB 299 fn. 8 (1978). The absence of evidence that the Respondent has actually enforced the rules against employees for engaging in protected activity does not, contrary to our colleagues' view, insulate them from the proscriptions of the Act. As the judge recognized with respect to the Respondent's unlawful no-loitering rule, the mere presence of overly broad rules reasonably tends to discourage employees from engaging in protected activity that they could reasonably believe to be encompassed by the rules, regardless of the Respondent's motives or enforcement history. *NLRB v. Beverage-Air Co.,* 402 F.2d 411, 419 (4th Cir. 1968).

II.

****8** The Respondent's rule prohibiting "abusive or profane language … directed toward a supervisor" and its rule prohibiting, inter alia, "verbally … abusing … a supervisor" are ambiguous and hence overbroad. The former does not define "abusive language," and the latter does not define "verbal abuse." Neither rule provides specific examples of the prohibited speech. Thus, employees might reasonably be uncertain whether vehemently condemning a supervisor's perceived unfair treatment of a co-worker would be "abusive" in the unexplained sense of the rules. Or an employee might reasonably fear that using words like "scab" in the course of union activity would result in discipline, although such language is clearly protected under the Act. See, e.g., *Letter Carriers v. Austin*, 418 U.S. 264, 268, 277-278 (1974) (citing *Linn v. Plant Guard Workers, Local 114*, 383 U.S. 53, 60-61 (1966)). The very fact that the Respondent maintains two distinct rules prohibiting verbal abuse is likely ***651** to leave the employees in doubt as to what behavior is comprehended by the rules and whether protected activity might contravene one or both. Such uncertainty discourages employees from the kind of activity that is protected by Section 7.

The Respondent's "no harassment" rule is equally problematic. The rule expressly prohibits "[h]arassment of other employees, supervisors and any other individuals *in any way*." Nothing in the phrasing of the rule limits its breadth. Thus, contrary to our colleagues' view, it is not at all apparent that the rule targets only conduct that would result in employer liability. In fact, the rule

expressly states that "sexual harassment" is covered by a different rule. And, a separate rule prohibits "threatening, intimidating, or coercing employees." It is thus clear that the "no harassment" rule does not address that kind of conduct. Without the limiting words of "sexual harassment" or "threats" to arguably narrow the meaning of the "no harassment" rule, what is left is a very broad, vague, and highly subjective notion of "harassment" that places the rule in statutory jeopardy. *First Student, Inc.,* 341 NLRB 136, 137 fn. 4 (2004), citing *Liberty House Nursing Homes,* 245 NLRB 1194, 1197 (1979). Indeed, the language of the rule expressly insists on the broadest possible meaning of the conduct prohibited.

The term "harassment" used in this undefined way could reasonably be understood to include an employee's repetition of an unwelcome message (for example, "Vote Yes") to an unsympathetic coworker, even if the speaker has no malicious intent. See *Advance Transportation Co.,* 310 NLRB 920, 925 (1993) (employer's "no harassment, intimidation" rule unlawful because it is "vague and ambiguous and so overly broad as to fail to define permissible conduct thereby fortifying [the employer] with power to define its terms and inhibit employees in exercising rights under Section 7 of the Act"); see also *Whirlpool Corp.,* 337 NLRB 726, 727, 741 (2002) (employer's disciplining of employee for "harassment" based on his pro-union discussions with co-workers unlawful because employer "use[d] harassment and intimidation as mere shibboleths to justify interference with rights guaranteed employees under the Act"); *Frazier Industrial Co.,* 328 NLRB 717, 718-719 (1999) (employer violated Act by discharging employee who repeatedly solicited coworkers; persistent solicitation did not amount to unprotected harassment, despite co-workers' complaints), enfd. 213 F.3d 750 (D.C. Cir. 2000).[5] Compare *BJ's Wholesale Club*, 318 NLRB 684, 684 fn. 2 (1995) (warning issued to employee for violating employer's "no harassment" rule lawful where rule itself was not in dispute and the employee had previously been disciplined for harassment based on misconduct not connected with union activity). Thus, the Respondent's "no harassment" rule is unlawfully overbroad.

****9** Our colleagues insist, without real explanation, that a reasonable employee simply could not interpret the Respondent's rules to cover protected activity, at least absent enforcement. But, for the reasons we have offered, employees might well be chilled by the rules, and thus no occasion for enforcement would ever arise. This would be true even if a reasonable employee necessarily would recognize the original purpose of the rules, for he would have no assurance that the rules could not be enforced against protected activity.

III.

The majority and the judge rely on the District of Columbia Circuit's decision in *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), as the basis for their analysis of the rules at issue here. Contrary to the judge's statement, the Board has not previously embraced the District of Columbia Circuit's decision in *Adtranz*. See *Community Hospitals of Central California*, 335 NLRB 1318, 1321 (2001), enf. denied 335 F.3d 1079, 1088-1089 (D.C. Cir. 2003) (finding challenged work rule, which prohibited, inter alia, "disrespectful conduct," unlawful in part because it was even broader than the more limited rule in Adtranz). And, unlike our colleagues, we would not adopt it here. In particular, we respectfully disagree with the court's view that finding a rule against abusive language unlawfully overbroad amounts to assuming that employees cannot engage in protected activity without using such language. *Adtranz*, 253 F.3d at 26-27. Rather, such a finding reflects the workplace realities that, in the course of protected activity, tempers often flare, emotions run high, and employees sometimes do use language that is abusive but not so egregious as to cost them the protection of the Act.[6] Section 7 protection is not limited to amiable ***652** or decorous communications. Rules against abusive language could reasonably discourage employees from Section 7 activity because they inhibit communication that would be protected under the Act.

Although we agree with our colleagues and the District of Columbia Circuit that employers have a legitimate interest in protecting themselves by maintaining rules that discourage conduct that might result in employer liability, *Adtranz*, 253 F.3d at 27, that interest is appropriately subject to the requirement that employers articulate those rules with sufficient specificity that they do not impinge on employees' free exercise of Section 7 rights. Here, the Respondent has not done so.[7]

As the Supreme Court recognized in *Linn,* citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), "debate … should be uninhibited, robust, and wide-open, and … may well include vehement, caustic and sometimes unpleasantly sharp attacks."

Contrary to our colleagues, we find that the ill-defined scope of the Respondent's "verbal abuse" and "abusive language" rules, as well as its "no harassment" rule, would reasonably tend to cause employees to "steer wide of the prohibited zone" and refrain from voicing disagreement with their terms and conditions of employment or vigorously attempting to organize skeptical coworkers. See *Tradesmen International*, 338 NLRB 460, 465 (2002) (Member Liebman, dissenting). We therefore would find that the Respondent's mere maintenance of those rules violated Section 8(a)(1).

**10 *Judith A. Schulz, Esq.*, for the General Counsel.
Jeffrey N. Silveri, Esq., of Ann Arbor, Michigan, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge.

This case was tried before me on November 7, 2002, [1] in Detroit, Michigan, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board) on May 29. The complaint, based upon original and amended charges filed by Vivian A. Foreman (the Charging Party or Foreman), alleges that Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it committed any violations of the Act.

Issues

The complaint alleges that the Respondent by issuance and distribution of its Employee Work Rules in October 2001 has maintained six overly broad rules in violation of Section 8(a)(1) of the Act. Additionally, the complaint alleges that the Respondent suspended on January 9, and thereafter terminated the Charging Party on January 23, in violation of Section 8(a)(1) and (3) of the Act.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in providing extended health care at its Livonia facility, where it annually had gross revenues in excess of $1,000.000. During that same period, Respondent purchased goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Michigan, and had said goods shipped directly to its Livonia facility from points located outside the State of Michigan. 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 and that Local 79, Service Employees International Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Background

Foreman started employment with Respondent on July 12, 1999, as a Dietary Cook. Commencing in May 2000 and up to Foreman's termination on January 23, she was supervised by Food Service Director Stephanie Carter. The Union initiated

an organizing drive at the Respondent in February 2001. Foreman supported the Union and went to a number of organizing meetings but was not one of the leading union adherents during the course of the campaign. She did, however, serve as the union ***653** observer at the March 22, 2001 Board supervised election that the Union won. Foreman was selected as the union steward for the dietary employees shortly after the election. Thereafter, Foreman served on the Union's bargaining committee that commenced initial contract negotiations with the Respondent in June 2001. Respondent's Administrator, Mel Scalzi, represented the Employer during the course of these negotiations. To date, the parties have been unable to finalize a collective-bargaining agreement. Accordingly, no formal grievance procedure exists that results in binding arbitration. Rather, the parties utilize an informal grievance procedure when confronted with employee problems and disciplinary matters.

****11** At all times material, the Respondent has adhered to a series of work rules that is given to employees during their initial new-hire orientation (Jt. Exh. 1). The purpose of the work rules is to protect the rights of everyone, ensure cooperation, and define behavioral expectations to allow an atmosphere of providing good care of the residents entrusted to their care. The Rules and penalties are divided into three (3) Classes based on the seriousness of the infraction. Each class represents progressive discipline for repeated infractions. As set forth in the work rules, the penalty for Class 1 offenses, or a combination of Class 1 offenses is a written reprimand for the first and second offense, a 1-day suspension without pay for the third offense and discharge for the fourth offense. In practice however, an employee is able to incur a third written reprimand and discharge does not occur until an employee commits a fifth offense. For class III offenses, an employee can be given up to a 10-day suspension without pay pending investigation followed by discharge if the allegation is found to be valid. All penalties assessed for violations of the Work Rules will be written in an employee discipline record and one copy is provided to the employee. Each offense will be recorded in the employee's record for a period of 1 year, if the offense is a minor offense not involving suspension.

B. The Facts

On March 28, 2001, Foreman received her first Class I written reprimand for failing to punch her time card within a 30-day time period on two separate occasions. Foreman did not protest the discipline and signed the employee record form (GC Exh. 5).

On July 22, 2001, Carter gave Foreman her second class I written reprimand for not notifying her that the refrigerator was not working properly causing large quantities of food to spoil. All employees on the afternoon shift, including Foreman, were disciplined for this infraction. Foreman signed the employee record form without protest (GC Exh. 6).

On or about December 6, 2001, employee Christy Brown was terminated for receiving her fifth Class I infraction. Carter requested that Foreman represent Brown in her informal grievance protesting the termination since Foreman was not at work when Carter observed Brown sleeping in her car during duty hours. Thus, Carter believed that Foreman would not have any bias regarding the issue, as the alternate steward was present when the discipline was given to Brown and observed the events in question. A grievance meeting took place on or about December 12, 2001, in which Foreman represented Brown. After heated arguments from both sides, Carter was not persuaded that Brown should be given another chance and the termination was upheld.

On December 18, 2001, Carter conducted an in-service meeting with employees on her staff including Foreman. An agenda for the meeting was prepared and Carter memorialized a summary of the meeting noting that pots and pans should be properly washed and not left overnight, the trash should be taken out, and employees should be courteous to one another (R Exh. 1).

****12** On December 19, 2001, coworker Angela Johnson complained to Carter that Foreman left a scorched pot in the sink overnight. The pot was left in the sink on the same day of the earlier conducted in-service meeting and Carter determined that a written reprimand was appropriate. Accordingly, Foreman was given her third Class I reprimand. While Foreman refused to sign the discipline form, she did not contest the fact that she left a scorched pot in the sink overnight (GC Exh. 2). On the same day, Foreman reported to Carter that fellow employee Sandra Davis had left debris and leftovers in the sink overnight. Since this incident took place immediately after the in-service meeting held the preceding day, Carter gave Davis a written Class I reprimand (R. Exh. 6).

On January 6, Foreman was on duty as the afternoon cook. She was in a hurry to leave that day because it was her birthday and she had a church function to attend that evening. Foreman acknowledged that she might have left the garbage uncovered in the trashcan and the lid on the food service counter. Carter summoned a witness to verify that garbage had been left uncovered and noted that Foreman also left prune juice on the counter rather then placing it in the refrigerator. Accordingly, Carter issued a fourth Class I written reprimand to Foreman (GC Exh. 7).

On January 9, employee Davis informed Carter that Foreman was the cook on duty January 8, and left for the day without preparing the dessert for the residents that evening. After verifying this incident, Carter prepared a Class I written reprimand for Foreman. The discipline record form noted that this was the fifth Class I infraction with a penalty of termination (GC Exh. 8). On the same day, Foreman reported to Carter that coworker Angela Johnson left utensils in a mixing bowl rather then air drying them and putting them away at the end of the shift. Accordingly, Carter issued a Class I written reprimand to Johnson (R. Exh. 7).

On January 8, Scalzi was at company headquarters and not present at the facility. He received a telephone call from director of nursing Denise Hubbard that a hostile work environment had erupted in the kitchen and a number of employees including Foreman were involved in this incident. Scalzi returned to the facility on January 9, and after discussions with his staff decided to have a meeting with Foreman to discern the nature of the problems in the kitchen. Scalzi was also informed by Carter that she had just prepared a fifth Class I warning for an incident involving Foreman that occurred on January 8. Before the meeting could be convened, Foreman informed her supervisor that she was ill and needed to leave the facility. Instead of going directly home, Foreman proceeded to meet with her Pastor who helped console her. After the discussions with her ***654** Pastor, Foreman called the facility indicating that she felt better and was available to attend the meeting. Scalzi informed her that a union representative could attend the meeting to assist her but Foreman determined that it was not necessary.

****13** The meeting took place around 4 p.m. on January 9, in the conference room. Foreman was informed that three employees provided statements to the Respondent that asserted she had uttered profanity in their presence and was harassing them (R. Exh. 3, 4, and 5). Hubbard informed Foreman that the employees were considering filing a harassment suit against her and under the circumstances Scalzi was required to suspend her for a period of up to 10 days while an investigation was conducted. Foreman stopped Hubbard at that point so she could get someone to witness what was being said. Foreman left the meeting and returned shortly thereafter with Nurse Angela Howard to be her witness.[2] Hubbard then apprised Foreman that Respondent's records confirmed that she recently received her fifth class I written reprimand and that was grounds for termination. Scalzi gave Foreman copies of the three written employee statements that were attached to the employee discipline form (GC Exh. 4) and inquired whether she wanted to submit a written statement. Foreman thereafter submitted a written statement to Scalzi after consulting with Howard (GC Exh. 3). Hubbard showed Foreman the five previously written reprimands during the meeting and Scalzi testified that he faxed copies of these documents and the employee statements to the Union.

Before the above meeting was held on January 9, Scalzi discussed the problems in the kitchen with several employees. Based on these preliminary discussions and his review of the three employee's written statements, he decided that it was necessary to suspend Foreman pending investigation. After the suspension on January 9, Scalzi spoke to the entire kitchen staff to assess the problems in the kitchen and what role, if any, Foreman played (GC Exh. 11). Likewise, around that time, Scalzi received a telephone call from the Union seeking to schedule a meeting regarding Foreman. Initially, the meeting was set for January 15, but was rescheduled to January 23, due to a conflict in the schedule of the union representative.

While Scalzi had made a final decision to terminate Foreman on January 21, primarily based on the five infractions and her involvement with the problems in the kitchen, he waited to meet with the Union on January 23, to convey his reasons for the termination. After the meeting, Scalzi telephoned Foreman to apprise her that she would be terminated effective January 23. A letter to this effect was mailed to Foreman on January 23 (GC Exh. 9).

C. The 8(a)(1) Allegations

The General Counsel alleges in paragraph 6 of the complaint that the Respondent has maintained six overly broad Work Rules.

The Board's standard for analyzing workplace rules like these is set out in *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), as follows:

In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.

1. Class I, Rule # 1

****14** This rule provides:

Using abusive or profane language in the presence of, or directed toward, a supervisor, another employee, a resident, a doctor, a visitor, a member of a resident's family, or any other person on company property (the premises).

The subject rule is strikingly similar to a rule found unlawful in *Lafayette Park Hotel.* That rule precluded employees from making false, vicious, profane, or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees. The Board relied on *American Cast Iron Pipe Co.* 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979), which invalidated a similar provision on the ground that it prohibited and punished merely "false" statements as opposed to maliciously false statements, and was therefore overbroad.

In a later case interpreting handbook rules, however, the Board in *Community Hospitals of Central California,* 335 NLRB 1318 (2001), adopted language from the United States District of Columbia's Circuit decision in *Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB,* 253 F.3d 19 (DC Cir. 2001), vacating in pertinent part 331 NLRB 291 (2000). In that case, the Court found that a work rule banning the use of "abusive or threatening language to anyone on Company premises" was not invalid or violative of the Act. Moreover, the Court found that *abusive* language in the workplace could constitute verbal harassment, triggering employer civil liability under both federal and state law for failure to maintain a workplace that is free of harassment. Further, the Court found that *threatening* language in the workplace carries with it the potential for violent confrontations, again triggering employer liability.

Under these circumstances, I find that the Respondent's maintenance of Class I, Rule # 1 clarifies for employees that the rules are designed to prohibit serious, employment-related misconduct and not to prohibit protected Section 7 activities. Accordingly, the subject rule does not violate Section 8(a)(1) of the Act.

2. Class I, Rule # 14

This rule provides:

Selling or soliciting anything in the building or on company property (the premises) whether you are on duty or off duty, unless you have been given written permission by the Administrator.

***655** The General Counsel contends that employees may reasonably believe they must seek Employer permission to engage in Section 7 conduct while on company property. I agree with this contention. Given its present form, it is not "far-fetched" that reasonable employees could conclude that some Section 7 activity could be covered by this rule. In this regard, the rule prohibits soliciting anything in the building whether an employee is on or off duty. It makes no allowances for solicitation while an employee is on break, before or after regular duty hours and does not exclude from its coverage the cafeteria or parking areas. Moreover, the rule requires employees to obtain the employer's permission before engaging in solicitation. Such a requirement as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful.

Brunswick Corp., 282 NLRB 794 (1987). Further, the mere existence of an overly broad rule tends to restrain and interfere with employees' rights under the Act even if the rule is not enforced.

****15** In my view, such a rule has a reasonably tendency to chill employees in the exercise of their Section 7 rights and its maintenance violates Section 8(a)(1) of the Act.

3. Class I, Rule # 17

This rule provides:
Loitering on company property (the premises) without permission from the Administrator.

Section 7 of the Act protects employee communications with other employees and even customers about terms and conditions of employment. The term "loitering" is undefined and can reasonably be read to prohibit off-duty employees from engaging in protected communications with other employees in nonworking areas of the Respondent's property. Moreover, the term premises is not defined and employees could reasonably conclude that they could not engage in protected communications in the parking lot either before or after work. Even if the rule was established for legitimate business purposes, it is not so clear to define what is proscribed and eliminate any ambiguity as to whether protected activity is covered. It is this ambiguity that chills reasonable employees in the exercise of their Section 7 rights. [3]

Accordingly, I find that the Respondent's maintenance of this rule in its employee handbook is a violation of Section 8(a)(1) of the Act.

4. Class II, Rule 16

This rule provides:
Harassment of other employees, supervisors and any other individuals in any way.

In my opinion, this rule is unambiguous on it face. It does not prohibit Section 7 activity. It addresses the Respondent's business concern to maintain discipline and orderly, productive, and respectful relations between employees, managers, and supervisors. Because the rule does not explicitly or implicitly prohibit Section 7 activity, I believe that employees could not reasonably fear that their protected right to communicate their views regarding the union or their wages and conditions of employment would expose them to potential discipline pursuant to the rule. Additionally, I note that the Respondent has not enforced the rule or by any other conduct led employees reasonably to believe that the rule prohibited Section 7 activity. In this regard, the General Counsel did not present any evidence that the above rule was relied upon by the Employer to discipline employees during the union organizing campaign in February and March of 2001.

Under these circumstances, I would not find that this rule violates Section 8(a)(1) of the Act.

5. Class III, Rule 5

This rule provides:
Engaging in unlawful strikes, work stoppages, slowdowns, or other interference with production at any Martin Luther Memorial Home facility or official business meeting.

In my opinion, this rule can reasonably be read as encompassing Section 7 activity. For example, the rule as written, would prohibit employees from engaging in protected concerted activities concerning wages, conditions of employment, or safety

issues if it interfered with production or a business meeting. It could be construed to prohibit employees from voicing concerns over terms and conditions of employment during a group meeting and if the concerns escalated they could interfere with production. While the first portion of the rule regarding unlawful strikes, work stoppages, and slowdowns protects legitimate business interests, the later portion of the rule is overly broad and has a tendency to chill employees in the exercise of their protected rights. Where a rule is likely to have a chilling effect on Section 7 rights, the Board may conclude that its maintenance is an unfair labor practice, even absent evidence of enforcement. See *NLRB v. Vanguard Tours,* 981 F.2d 62, 67 (2d Cir. 1992), citing *Republic Aviation v. NLRB,* 324 U.S. 803 fn. 10 (1945).

****16** Therefore, Respondent's maintenance of this rule violates the Act.

6. Class III, Rule 10

This rule provides:
Verbally, mentally or physically abusing a resident, a member of a resident's family, a fellow employee or a supervisor under any circumstances. This Includes physical and verbal threats.

In my opinion, this rule is unambiguous on its face. It does not prohibit Section 7 activity. It addresses the Respondent's business concern to maintain discipline and orderly, productive, and respectful relations between employees, managers, and supervisors. In the particular circumstances of this case it was relied upon to discipline Foreman due to her use of profanity in front of several coworkers and verbally abusing a supervisor by ***656** using profanity in reference to her (GC Exh.4, R. Exh. 3, 4, and 5).

This rule does not expressly prohibit protected activity, nor could it reasonably be interpreted to do so. Further, there is no evidence that any employee has actually been prevented, discouraged, or restrained by this rule in any manner from exercising rights protected by Section 7.

Based on the forgoing, I would not find that Respondent's maintenance of this rule violates the Act. See *Tradesmen International,* 338 NLRB 460 (2002) (Rule Prohibiting "Slanderous or Detrimental Statements" does not chill employees in the exercise of their Section 7 rights.)

D. The 8(a)(1) and (3) Allegations

1. The suspension

The General Counsel alleges in paragraph 7 (a) of the complaint that the Respondent suspended the Charging Party on January 9.

In *Wright Line,* 251 NLRB 1083 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1993). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

****17** For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in suspending Foreman. The evidence establishes that Foreman was the union observer during the

Board-conducted election in March 2001, was elected union steward shortly thereafter and participated in collective-bargaining negotiations as a member of the Union's bargaining team. Moreover, Foreman served as the union representative of coworker Brown during heated discussions surrounding her suspension and termination.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct.

Scalzi, who was terminated from Respondent on March 5, impressed me as a credible witness who had a command of the facts and when necessary referred to a pocket calendar to confirm important dates and meetings with the Charging Party. He referred to Carter as a bright capable supervisor who was very reliable and respected by her subordinate employees. According to Scalzi, while Carter was strict she treated everyone fairly but often disciplined employees more frequently then other supervisors.

Scalzi learned about an incident in the kitchen while he was at company headquarters on January 8. Hubbard, who was acting on Scalzi's behalf, telephoned him to report that a number of employees had complained about discord and a hostile work environment in the kitchen instigated by Foreman. Upon his return to the facility on January 9, Scalzi talked to several employees in the kitchen about the problem and reviewed three written statements prepared by Carter and two employees that detailed the problems they were encountering with Foreman and her use of profanity in their presence and when referring to Carter. Since Foreman's actions, if true, clearly violated a Class III work rule (Rule # 10), Scalzi determined to suspend her pending investigation. According to Scalzi, he needed to get Foreman out of the kitchen to calm down the situation.

Scalzi convened a meeting with Foreman during the afternoon of January 9. I find that Scalzi afforded Foreman the opportunity to be represented by the Union and provided the Union and her copies of the three employee statements asserting that she had engaged in violations of the Class III work rule. During the course of the meeting, Hubbard explained both the facts surrounding the harassment allegations as well as the five Class I infractions Foreman received within a 1-year period. Scalzi also provided Foreman the opportunity to submit a written statement summarizing her version of the facts.

The General Counsel argues that the suspension was visited upon Foreman due to her engaging in representational activities on behalf of her coworkers, primarily her representation of Brown. Indeed, the General Counsel opines that the discipline given to Foreman after her representation of Brown was the cause of her suspension and subsequent termination. Foreman testified that on December 18, she spoke to Scalzi about the deteriorating relationship that existed between her and Carter and on the same day she spoke to Carter concerning their strained relationship since she represented Brown. Several days later, Foreman asserts that she again met with Carter with her union steward to discuss their strained relationship. The General Counsel did not call the union steward to confirm this second meeting. Based on my review of their overall credibility, I am inclined to believe Scalzi and Carter who both denied that they met with Foreman to discuss their deteriorating and strained relationship. Both Scalzi and Carter impressed me as reliable witnesses whose testimony had a ring of truth to it. Foreman, on the other hand, tended to blame all of her problems on Carter without accepting any responsibility for her own actions. She repeatedly denied that she was counseled about preparing desserts for the evening meal or being apprised about meal quality procedures when written records contradict her (GC Exh. 2, 7, 8, and R. Exh. 1).

****18** For all of the above reasons, I find that Foreman was suspended for legitimate business reasons unrelated to her representation of Brown. In this regard, Scalzi independently spoke to several employees who had witnessed the discord in the kitchen on January 8, and also reviewed three written statements prepared by employees who asserted that Foreman had used profanity in their presence when referring to Carter.

***657** Under these circumstances, I recommend that the allegations concerning the suspension be dismissed and that no Section 8(a)(1) and (3) violation be found.

2. The Termination

The General Counsel alleges in paragraph 7(b) of the complaint that on January 23 the Respondent terminated the Charging Party.

Applying the *Wright Line* guidelines discussed above, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in terminating Foreman.

In shifting the burden to the Respondent, I find that the same action would have been taken even in the absence of the employee's protected conduct. In this regard, I note that the first two class I infractions visited upon Foreman occurred well in advance of the General Counsel's assertions that matters went down hill after her representation of Brown in early December 2001 (GC Exh. 5 and 6). The next three written reprimands took place on December 19, 2001, January 6 and 8. With respect to the December 19, 2001, reprimand I note that it immediately followed the December 18, 2001, in-service meeting where all employees including Foreman were instructed on the correct procedures for the cleaning of pots and pans and it was brought to Carter's attention by a coworker that Foreman had left a dirty and scorched pot in the sink. Concerning the discipline given to Foreman on January 6, it involved two infractions that Carter credibly testified could have been written independently but in using her discretion they were written as one infraction, avoiding giving Foreman a fifth Class I written reprimand on that date. This represents further support that Carter was not casting about to get Foreman because of her prior representation of Brown. Lastly, a coworker apprised Carter that Foreman did not prepare her desserts for the evening meal and that led to the January 8 written reprimand for that infraction (GC Exh. 8). In my opinion, Foreman was solely responsible for her actions that resulted in the three additional written reprimands after her representation of Brown. Indeed, there was an undercurrent of animosity that existed between Foreman and a number of coworkers in the kitchen. This is evidenced by Foreman reporting these individuals to Carter for work rule infractions followed by these employees retaliating against Foreman and reporting her infractions to Carter. In order to be consistent, Carter gave written reprimands to all employees who violated the Work Rules (R. Exh. 6 and 7). Thus, it was the violation of the work rules amply supported by written documentation and coworker reports that led to the termination rather then the General Counsel's attempt to shield the infractions based on Foreman's protected activities.

****19** Based on the forgoing, I find that Foreman was terminated on January 23, for receiving five Class I written reprimands within a 1-year period and for violating class III work rule 10 when she used profane language towards her supervisor and fellow coworkers. Contrary to the General Counsel, I do not find that Foreman was terminated because of her protected activities and therefore recommend that paragraph 7(b) of the complaint be dismissed.

CONCLUSIONS OF LAW

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

2. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by maintaining overly broad work rules.

3. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act when it suspended and thereafter terminated Vivian A. Foreman.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist 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 [4]

ORDER

The Respondent, Lutheran Heritage Village-Livonia, Livonia, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the following work rules:

(1) Selling or soliciting anything in the building or on company property (the premises), whether you are on duty or off duty, unless you have been given written permission by the Administrator. (Class I, Rule # 14)

(2) Loitering on company property (the premises) without permission from the administrator. (Class I, rule 17)

(3) Engaging in unlawful strikes, work stoppages, slowdowns, or other interference with production at any Martin Luther Memorial Home facility or official business meeting. (Class III, rule 5.)

(b) 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 Rules quoted above and advise the employees in writing that the rules are no longer being maintained.

(b) Within 14 days after service by the Region, post at its facility in Livonia, Michigan, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the ***658** Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 October 1, 2001.

****20** (c) 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.

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 any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the following work rules
Selling or soliciting anything in the building or on company property (the premises), whether you are on duty or off duty, unless you have been given written permission by the Administrator. (Class I, rule 14.)

Loitering on company property (the premises) without permission from the Administrator. (Class I, rule 17.)

Engaging in unlawful strikes, work stoppages, slowdowns, or other interference with production at any Martin Luther Memorial Home facility or official business meeting. (Class III, rule 5.)

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.

****21** WE WILL rescind the Work Rules quoted above and advise the employees in writing that the rules are no longer being maintained.

LUTHERAN HERITAGE VILLAGE-LIVONIA

Footnotes

1 The General Counsel has 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 of 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.

2 The judge dismissed the allegations that dietary employee Vivian Foreman was unlawfully suspended and discharged in violation of Sec. 8(a)(3), finding that, although the General Counsel had met his *Wright Line* burden of showing that these adverse actions were unlawfully motivated, the Respondent had established that it would have taken the same actions in the absence of Foreman's protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Neither party has excepted to the judge's finding that the General Counsel met his burden of demonstrating unlawful motivation. In adopting the judge's conclusion that the suspension and discharge were not unlawful, we assume that the General Counsel did meet his burden and we agree with the judge that, in any event, the Respondent showed that it would have taken the same action absent Foreman's protected conduct.

3 The rules that the judge found unlawfully overbroad expressly prohibit:
Class I Offenses: 14. Selling or soliciting anything in the building or on company property (the premises) whether you are on duty or off duty, unless you have been given written permission by the Administrator. … 17. Loitering on company property (the premises) without permission from the Administrator.… Class III Offenses: 5. Engaging in unlawful strikes, work stoppages, slowdowns, or other interference with production at any Martin Luther Memorial Home facility or official business meeting.
The rules that the judge found lawful prohibit:
Class I Offenses: 1. Using abusive or profane language in the presence of, or directed toward, a supervisor, another employee, a resident, a doctor, a visitor, a member of a resident's family, or any other person on company property (the premises). (Threats and intimidation are covered by Class III, Rule 6. Verbal abuse is covered by Class III, Rule 10.)
....

Class II Offenses: 16. Harassment of other employees, supervisors and any other individuals in any way. ("Sexual harassment" is covered by Class III, Rule 15.)

Class III Offenses: 10. Verbally, mentally, or physically abusing a resident, a member of a resident's family, a fellow employee or a supervisor under any circumstances. This includes physical and verbal threats.

4 As noted infra, Chairman Battista finds the "no loitering" rule to be lawful.

5 For example, a rule prohibiting employee solicitation, which is not by its terms limited to working time, would violate Sec. 8(a)(1) under this standard, because the rule explicitly prohibits employee activity that the Board has repeatedly found to be protected by Sec. 7. *Our Way,* 268 NLRB 394 (1983).

6 The General Counsel has excepted to the judge's finding that the Board embraced the court's *Adtranz* decision in *University Medical Center*, 335 NLRB 1318 (2001), enf. denied 335 F.3d 1079 (D.C. Cir. 2003). We find it unnecessary to pass on this exception in light of our disposition of this case.

7 We recognize that, in some workplaces, the use of profane language may be commonplace. If an employer, notwithstanding the rule, generally tolerates such profanity, but then applies the rule to profanity in a Sec. 7 context, such disparity may make the rule unlawful.

8 The analysis that follows also applies to the rules prohibiting "verbal, mental and physical abuse."

9 We do not pass on the validity of *Lafayette Park Hotel*, supra, insofar as it held unlawful a rule prohibiting "false, vicious, profane, or malicious statements." The rule there was in the disjunctive, and thus false statements were prohibited even if they were not malicious. The Supreme Court has held that nonmalicious false statements can be protected in the context of a union/management dispute. *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966).

10 Sec. 7 also guarantees the right to refrain from those activities.

11 *Adtranz*, supra, 253 F.3d at 26.

12 See, e.g., *Trus Joist MacMillan*, 341 NLRB 369, 370-372 (2004) (employee lost the protection of the Act because of his indefensible and abusive conduct during a meeting with managers); *Aluminum Co. of America*, 338 NLRB 20(2002) (employee's profane conduct caused him to lose the protection of the Act).

13 Sec. 7 does not give employees an unlimited right regardless of the circumstances to repeatedly solicit coworkers who have asked them to desist. Our colleagues cite no cases in which such a right has been recognized and we decline to do so here.

14 In Member Meisburg's view, if conduct constitutes harassment under the law, it is improper and an employer may ban it in the workplace. Harassment is not protected by Sec. 7 or any other employment statute.

What constitutes harassment and, therefore, unprotected conduct under the Act, may not be the same as conduct constituting harassment prohibited under employment statutes. Harassment in any given context must be determined based on the facts and by balancing the respective legal rights to be protected or vindicated.

Under the Act, rights guaranteed by Sec. 7 must be balanced against the reasonable expectations of employees not to be harassed. The reasonableness of those expectations is judged, in turn, by the fact that persons exercising Sec. 7 rights must be given the freedom to do so in a manner that renders those rights real, not just theoretical. Such determinations, however, are properly made only on the basis of allegations of harassment backed up by a factual record, neither of which we have here.

Here, we have only a rule prohibiting harassment. It is clear that the rule is not targeted solely at union supporters, but rather directed to all employees, regardless of their position on the issue of unionization. There is no evidence that the rule has either the purpose or effect of dissuading individuals from engaging in lawful union solicitation activity. The rule addresses only the Respondent's legitimate business concern of preventing its employees from being harassed or engaging in harassment.

15 *Adtranz,* supra, 253 F.3d at 25.

16 As noted above, we have adopted the judge's finding that the Respondent's loitering rule violated Sec. 8(a)(1). The word "loiter" embraces both "to remain in or near a place in an idle or apparently idle manner," and "to be unnecessarily slow in leaving." Webster's Third New International Dictionary. The Supreme Court has recognized that prohibitions against loitering raise more questions than they answer. See, e.g., *City of Chicago v. Morales,* 527 U.S. 41, 66 (1999) (O'Connor, concurring) ("any person standing on the street has a general 'purpose'—even if it is simply to stand"). We therefore agree with the judge that employees could reasonably interpret the rule to prohibit them from lingering on the Respondent's premises after the end of a shift in order to engage in Sec. 7 activities, such as the discussion of workplace concerns. We do not suggest, however, that a more narrowly tailored rule might not survive scrutiny. Chairman Battista concludes that the rule is lawful. It does not explicitly forbid Sec. 7 activity. Further, it was not promulgated in response to Sec. 7 activity, and it has not been applied to such activity. Finally, employees do not ordinarily, or reasonably, refer to their organizing activities as "loitering." Accordingly, Chairman Battista would not condemn the rule.

1 See, e.g., *Ryder Transportation Services*, 341 NLRB 761, 761-762 (2004).

2 We agree with the majority and the judge that the Respondent's maintenance of its "no solicitation," "no loitering," and "no interference with production" rules violated Sec. 8(a)(1).

3 The Rules at issue describe the prohibited conduct as follows:

Class I Offenses: 1. Using abusive or profane language in the presence of, or directed toward, a supervisor, another employee, a resident, a doctor, a visitor, a member of a resident's family, or any other person on company property (the premises). (Threats and intimidation are covered by Class III, Rule 6. Verbal abuse is covered by Class III, Rule 10.)

....

Class II Offenses : 16. Harassment of other employees, supervisors and any other individuals in any way. ("Sexual harassment" is covered by Class III, Rule 15.)

Class III Offenses : 10. Verbally, mentally, or physically abusing a resident, a member of a resident's family, a fellow employee or a supervisor under any circumstances. This includes physical and verbal threats.

4 Thus, to the extent the majority construes our dissenting view as "requir [ing] the Board to find a violation whenever the rule [at issue] could conceivably be read to cover Sec. 7 activity," the majority is mistaken. As explained below, we rely not only on the fact that the overbroad rules at issue here could reach activity that is protected, but also on the particular language of the rules, the Respondent's maintenance of other facially unlawful rules, and the existence of seemingly duplicative rules as providing a context in which employees would *reasonably* construe the rules as interfering with their Sec. 7 activity.

5 The majority asserts that "Sec. 7 does not give employees an unlimited right regardless of the circumstances to repeatedly solicit coworkers who have asked them to desist." Whether or not employees' rights are "unlimited … regardless of the circumstances"—a claim we certainly do not make—Board law has long been clear that "[p]ersistent union solicitation is an activity protected by the Act even when it disturbs or annoys the individuals being solicited." *RCN Corp.,* 333 NLRB 295, 300 (2001). See, e.g., *Arcata Graphics,* 304 NLRB 541, 542 (1991) (holding unlawful employer's request that employees report "abusive treatment" by union solicitors because it was tantamount to a request to report "persistent attempts to persuade"); *Bank of St. Louis*, 191 NLRB 669, 673 (1971), enfd. 456 F.2d 1234 (8th Cir. 1972) (holding unlawful employer's request that employees report "constant badgering" by union solicitors).

6 See, e.g., *Winston-Salem Journal*, 341 NLRB 124 (2004); *Felix Industries, Inc.*, 339 NLRB 195, 197 fn. 8 (2003); *Thor Power Tool Co.,* 148 NLRB 1379, 1380-1381 (1964). In addition to the impassioned exchanges that, experience teaches, regularly occur in the heat of participation in Sec. 7 activity, profanity and abusive language are common occurrences in many workplaces. See, e.g., "On-the-Job Cursing: Obscene Talk is Latest Target of Workplace Ban," *Wall Street Journal* (May 8, 2001). In turn, cases are legion in which employers have seized on profanity as a pretext for getting rid of employees who engage in protected activity. We need not cite them all here. See, e.g., *Wal-Mart Stores, Inc.,* 341 NLRB 796, 801, 806-808 (2004); *United Parcel Service*, 340 NLRB 776, 777-778 (2003); *Sunbelt Mfg., Inc.*, 308 NLRB 780, 787 (1992), enfd. mem. in part 996 F.2d 305 (5th Cir. 1993); *Smith Auto Service*, 252 NLRB 610, 613 (1980). Contrary to our colleagues' view then, it is the realities of the workplace, rather than any unreasonable presumption on our part, which suggest that employees reasonably would be constrained in their protected activity by a workplace rule that broadly prohibits profane or abusive language.

7 Member Liebman observes that if the prohibited conduct is of a kind so general as to imply that protected activity may be encompassed, an employer can easily eliminate the ambiguity by adding a statement to its rule that the prohibition does not apply to conduct that is protected under the National Labor Relations Act. See *Safeway, Inc.*, 338 NLRB 525, 528 (2002) (Member Liebman, dissenting). Here, the Respondent has not done so.

1 All dates are in 2002 unless otherwise indicated.

2 Although Scalzi informed Foreman that Howard could not represent her in the role of a union representative because she was a supervisor, he nevertheless permitted Howard to remain in the meeting to assist Foreman and serve as her witness.

3 The fact that there is no evidence of enforcement is irrelevant where, as here, the mere presence of the rule would reasonably tend to chill the employees in the exercise of their Section 7 rights. See *NLRB v. Beverage-Air Co.,* 402 F.2d 411, 419 (4th Cir. 1968) ("mere existence" of an overbroad but unenforced no-solicitation rule is unlawful because it "may chill the exercise of the employees' [Sec.] 7 rights").

4 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.

5 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."

343 NLRB No. 75 (N.L.R.B.), 343 NLRB 646, 176 L.R.R.M. (BNA) 1044, 2004-05 NLRB Dec. P 16786, 2004 WL 2678632