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Costco Wholesale Corporation *and* United Food and Commercial Workers Union, Local 371. Case 34–CA–012421

September 7, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On August 11, 2010, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief. Additionally, the Acting General Counsel filed limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief.[1]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

I. INTRODUCTION

For the reasons stated by the judge, we adopt his findings that the Respondent violated Section 8(a)(1) of the Act by maintaining rules[4] stating that:

> (a) "unauthorized posting, distribution, removal or alteration of any material on Company property" is prohibited;
>
> (b) employees are prohibited from discussing "private matters of members and other employees . . . includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc.";
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> (c) "[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval"; and
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> (d) employees are prohibited from sharing "confidential" information such as employees' names, addresses, telephone numbers, and email addresses.

We also adopt, for the reasons stated in his decision, the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) by maintaining a rule requiring employees to use "appropriate business decorum" in communicating with others.

Contrary to the judge, however, and as explained below, we find that the Respondent violated Section 8(a)(1) by maintaining a rule prohibiting employees from electronically posting statements that "damage the Company . . . or damage any person's reputation." Further, and also contrary to the judge, we find that the Respondent did not violate Section 8(a)(1) by maintaining a rule prohibiting employees from "[l]eaving Company premises during working shift without permission of management."

II. RULE PROHIBITING STATEMENTS THAT DAMAGE THE COMPANY OR ANY PERSON'S REPUTATION

The judge found that the Respondent's maintenance of the following rule, in section 11.9 of its employee handbook (Employee Agreement), did not violate Section 8(a)(1):

> Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to]online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

In dismissing this allegation, the judge found that employees would not reasonably construe this rule as regulating, and thereby inhibiting, Section 7 conduct. Citing *Lutheran Heritage Village-Livonia,* 343 NLRB 646

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[1] The Respondent also filed a motion to reopen the record and/or for rehearing, and the Acting General Counsel filed an opposition to that motion. In its motion, the Respondent seeks to introduce evidence of revised rules that it issued in March 2010, after the close of the hearing. The Respondent contends that this evidence is relevant to the remedy for any rules we find unlawful herein. We deny the Respondent's motion, as there has been no showing that the evidence it seeks to introduce would require a different result, as required under Sec. 102.48(d)(1) of the Board's Rules and Regulations. Our denial of the motion, however, is without prejudice to the Respondent's ability to introduce any such evidence in the compliance stage of this proceeding.

[2] There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) of the Act by interrogating two employees.

[3] We shall modify the judge's recommended Order in accordance with our findings, and shall include the Board's standard remedial language for the violations found. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

[4] In considering the lawfulness of the Respondent's work rules, we do not rely on *Crowne Plaza Hotel*, 352 NLRB 382 (2009), a case issued by two Board Members and cited by the judge. See *New Process Steel, L.P. v. NLRB,* 130 S.Ct. 2635 (2010); *Hospital Pavia Perea*, 355 NLRB 1300, 1300 fn. 2 (2010) (recognizing that two Board Members "lacked authority to issue an order").

(2004), the judge instead found that employees would reasonably infer that the Respondent's purpose in promulgating the rule was to ensure a "civil and decent workplace."

Contrary to the judge, we find employees would reasonably construe this rule as one that prohibits Section 7 activity.

In determining whether the maintenance of a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia,* supra. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

Here, the Respondent's rule does not explicitly reference Section 7 activity. However, by its terms, the broad prohibition against making statements that "damage the Company, defame any individual or damage any person's reputation" clearly encompasses concerted communications protesting the Respondent's treatment of its employees. Indeed, there is nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule. In these circumstances, employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (i.e., those that are critical of the Respondent or its agents). See *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990) (rule prohibiting "derogatory attacks on . . . hospital representative[s]" found unlawful); *Claremont Resort & Spa*, 344 NLRB 832 (2005) (rule prohibiting "negative conversations about associates and/or managers" found unlawful); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000), enfd. 297 F.3d 468 (6th Cir. 2002) (rule that prohibited "[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates" found unlawful).

The cases relied on by the judge are distinguishable. Most involved rules addressing conduct that is reasonably associated with actions that fall outside the Act's protection, such as conduct that is malicious, abusive, or unlawful. See, for example, *Lutheran Heritage Village-Livonia*, supra, 343 NLRB at 647–649 (rule addressing "verbal abuse," "abusive or profane language," and "harassment"); *Palms Hotel & Casino,* 344 NLRB 1363, 1367–1368 (2005) (rule addressing "conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees).[5]

In *Tradesmen International,* 338 NLRB 460, 460-463 (2002), also cited by the judge, the Board found lawful a rule that prohibited "statements which are slanderous or detrimental to the company or any of the company's employees." We note however, that this rule was among a list of 19 rules which prohibited egregious conduct such as "sabotage and sexual or racial harassment." In finding that the maintenance of the rule did not violate Section 8(a)(1), the Board's analysis followed the dictates of *Lutheran Heritage*, which require that the rule be considered in context. 343 NLRB at 647 fn. 6.

In contrast, the Respondent's rule does not present accompanying language that would tend to restrict its application. It therefore allows employees to reasonably assume that it pertains to -- among other things -- certain protected concerted activities, such as communications that are critical of the Respondent's treatment of its employees. The Respondent's maintenance of the rule thus has a reasonable tendency to inhibit employees' protected activity and, as such, violates Section 8(a)(1).[6]

III. RULE PROHIBITING EMPLOYEES FROM LEAVING PREMISES

Section 11.3 of the Respondent's handbook lists a number of actions that may lead to an employee's immediate discharge. One such action is "[l]eaving Company premises during working shift without permission of management." The judge found that the Respondent's maintenance of this rule violated Section 8(a)(1) because it "inhibits the employees' rights to engage in Section 7 activity (i.e., strike)." We disagree.

In *2 Sisters Food Group*, 357 NLRB No. 168 (2011), the Board held that the maintenance of a similar rule, prohibiting "[l]eaving a department or the

[5] Other cases cited by the judge are similarly distinguishable, as they addressed conduct rather than merely addressing statements, or because they addressed the use of abusive, threatening or slanderous statements. See *Lafayette Park Hotel*, supra, 326 NLRB at 825–826; *Adtranz ABB Daimler Bentz v. NLRB*, 253 F.3d 19, 25–28 (D.C. Cir. 2001); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1291–1292 (2001), enfd. 334 F.3d 99 (D.C. Cir. 2003); *Albertson's, Inc.*, 351 NLRB 254, 258-259 (2007).

[6] Although no party argues its applicability, we note that this rule does not implicate the Board's holding in *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part 571 F.3d 53 (D.C. Cir. 2009). The issue in *Register Guard* was whether employees had a statutory right to use their employer's email system for Sec. 7 purposes. The Board found that the employer did not violate Sec. 8(a)(1) by prohibiting the use of the employer's email for "nonjob-related solicitations." Here, the rule at issue does not prohibit using the electronic communications system for all non-job purposes, but rather is reasonably understood to prohibit the expression of certain protected viewpoints. In doing so, the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1).

plant during a working shift without a supervisor's permission," did not violate Section 8(a)(1). The Board found that this rule was not unlawful on its face and that employees would not reasonably construe it to prohibit Section 7 activity.[7] The Board explained that the rule was distinguishable from a rule, found unlawful in *Labor Ready, Inc.*, 331 NLRB 1656, 1656 fn. 2 (2000), prohibiting employees from "walk[ing] off" the job. The Board found that whereas a rule's reference to a term similar to "walk out" (a synonym for a strike) would reasonably lead employees to believe that the rule prohibited a strike, the mere reference to leaving a department or plant would not be similarly construed as pertaining to Section 7 activity. *2 Sisters*, supra, slip op. at 2–3.

Here, the Respondent's rule is similar to the rule found lawful in *2 Sisters*, as it prohibits "[l]eaving Company premises during working shift without permission," and does not include a reference to any term that would reasonably be construed as similar to the term strike or "walk out." In these circumstances, the reference to leaving the premises during worktime would be reasonably understood as pertaining to employees leaving their posts (for reasons unrelated to concerted activity) without first seeking permission. Accordingly, there is no meaningful distinction between the Respondent's rule and the rule in *2 Sisters*.[8] Therefore, we shall dismiss this complaint allegation.[9]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 3.

"3. The Respondent has violated Section 8(a)(1) of the Act by maintaining rules in its "Employee Agreement" that prohibit the unauthorized posting, distribution or alteration of any material on Company property, that may reasonably be interpreted as prohibiting employees from discussing their wages and other terms and conditions of employment with other employees and third parties, including union representatives, that may reasonably be interpreted as prohibiting employees from sharing or storing wage information or information relating to other terms and conditions of employment of employees without permission of management, that prohibit employees from posting messages that "damage any person's reputation," and that prohibit the removal of confidential material from Company premises, which Respondent has defined as conduct that may reasonably be interpreted as including wages and other terms and conditions of employment of its employees."

ORDER

The National Labor Relations Board orders that the Respondent, Costco Wholesale Corporation, Milford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining provisions in its Employee Agreement that prohibit the unauthorized posting, distribution, or alteration of any material on company property.

(b) Maintaining provisions in its Employee Agreement that may reasonably be interpreted as prohibiting employees from discussing their wages and conditions of employment with other employees and third parties, including union representatives.

(c) Maintaining provisions in its Employee Agreement that may reasonably be interpreted as prohibiting its employees from sharing or storing wage information or information relating to other terms and conditions of employment of employees without permission of management.

(d) Maintaining provisions in its Employee Agreement that prohibit employees from electronically posting statements that damage any person's reputation.

(e) Maintaining provisions in its Employee Agreement that prohibit the removal of confidential material from company premises, which the Respondent has defined as conduct that may reasonably be interpreted as including wages or other terms and conditions of employment of its employees.

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

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

(a) Rescind or modify the language in the following provisions of its Employee Agreement.

1. Sections 11.3.4 and 4(a) and 11.3.22.

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[7] The Board considered that rule together with a rule prohibiting employees from "stopping work before shift ends or taking unauthorized breaks." Id.

[8] Our dissenting colleague contends that the absence of references to other prohibitions, such as those found in the *2 Sisters* handbook, makes it more likely that employees would understand that the rule restricts protected activity. We disagree. Because employees would not typically refer to a protected strike as "leaving the premises," we find no basis to conclude that employees would reasonably construe the rule to prohibit Sec. 7 activity.

[9] Contrary to his colleagues, Chairman Pearce would adopt the judge's finding that the Respondent's rule violated Sec. 8(a)(1). He agrees with the judge that employees would reasonably construe the reference to leaving the premises without management permission as a rule prohibiting employees from engaging in a protected strike. In the Chairman's view, the instant rule is distinguishable from the rule found lawful in *2 Sisters*, supra. In that case, the prohibition against leaving the plant was presented together with references to terms not typically used when referencing strike activity, specifically, leaving the department and taking unauthorized breaks. By considering these prohibitions together, employees would not reasonably construe them as encompassing strike activity. Conversely, the instant rule broadly references leaving the "premises," without any accompanying language of limitation. In these circumstances, employees would reasonably read the rule as one that covers a concerted walkout or other strike activity and, as such, it would tend to inhibit employees from exercising their Sec. 7 right to engage in a strike.

2. Section 11.7 to the extent that it defines the names, addresses, phone numbers and email addresses of employees as confidential and prohibits disclosure of such information to any third parties.

3. The portions of Section 11.7 that provide that "[a]ll Costco employees shall refrain from discussing private matters of other employees. This includes topics such as, but not limited to sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers' comp. injuries . . . etc."

4. Section 11.9 to the extent that it prohibits employees from making statements that damage the Company or damage any person's reputation.

5. Section 11.9 to the extent that it provides that all information relating to Costco's employees must not be disseminated, that payroll information may not be shared or transmitted and unauthorized removal of confidential material (as defined over broadly by the Respondent in its Employee Agreement) from Company premises is prohibited.

(b) Furnish all current employees with inserts for the current Employee Agreement that

1. advise that the unlawful provisions have been rescinded, or

2. provide the language of lawful provisions or publish and distribute revised Employee Agreements that

a. do not contain the unlawful provisions, or

b. provide the language of lawful provisions.

(c) Within 14 days after service by the Region, post at each of its facilities in the United States, where its Employee Agreement is in effect, copies of the attached notice, in English and Spanish, marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed 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 May 3, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 34 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 7, 2012

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain provisions in our Employee Agreement that prohibit the unauthorized posting, distribution or alteration of any material on company property.

WE WILL NOT maintain provisions in our Employee Agreement that may reasonably be interpreted as prohibiting you from discussing your wages and conditions of employment with other employees and third parties, including union representatives.

WE WILL NOT maintain provisions in our Employee Agreement that may reasonably be interpreted as prohibiting you from sharing or storing wage information or information relating to other terms and conditions of employment of employees without permission of management.

[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."

WE WILL NOT maintain provisions in our Employee Agreement that prohibit you from electronically posting statements that damage any person's reputation.

WE WILL NOT maintain provisions in our Employee Agreement that prohibit the removal of confidential material from Company premises, which we have defined as conduct that may reasonably be interpreted as including your wages or other terms and conditions of employment.

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

WE WILL rescind or modify the language in the following provisions of our Employee Agreement.

1. Sections 11.3.4 and 4(a) and 11.3.22.

2. Section 11.7 to the extent that it defines your names, addresses, phone numbers and email addresses as confidential and prohibits disclosure of such information to any third parties.

3. The portions of Section 11.7 that provide that "[a]ll Costco employees shall refrain from discussing private matters of other employees. This includes topics such as, but not limited to sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers' comp. injuries . . . etc."

4. Section 11.9 to the extent that it prohibits you from making statements that damage the Company or damage any person's reputation.

5. Section 11.9 to the extent that it provides that all information relating to Costco's employees must not be disseminated, that payroll information may not be shared or transmitted and unauthorized removal of confidential material (as defined overbroadly by the Respondent in its Employee Agreement) from Company premises is prohibited.

WE WILL furnish all of you with inserts for the current Employee Agreement that

1. advise that the unlawful provisions, above, have been rescinded, or

2. provide the language of lawful provisions or publish and distribute revised Employee Agreements that

a. do not contain the unlawful provisions, or

b. provide the language of lawful provisions.

COSTCO WHOLESALE CORPORATION

Rick Concepcion, Esq., for the General Counsel.
Paul Galligan, Esq. (Seyfarth Shaw LLP), of New York, New York, for the Respondent.

DECISION

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by United Food and Commercial Workers, Local 371 (the Union), the Regional Director for Region 34 issued a complaint and notice of hearing on November 30, 2009,[1] alleging that Costco Wholesale Corporation (Respondent or Costco), violated Section 8(a)(1) of the Act.

On March 4, 2010, a hearing was held before me in Hartford, Connecticut, with respect to the allegations in said complaint. At the hearing, the General Counsel amended the complaint by withdrawing an 8(a)(1) interrogation allegation concerning Manager Jeff Dawson and added on allegation that Respondent violated the Act by maintaining Rule 11.3.24 in its employee agreement. Briefs have been filed and have been carefully considered.[2]

Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a Washington State corporation engaged in the retail operation of wholesale club stores at various facilities throughout the United States, including a facility in Milford, Connecticut, herein called the Milford facility.

During the 12-month period ending November 30, 2009, Respondent derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 at its Milford warehouse directly from points located outside the State of Connecticut.

It is admitted, and I so find, that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background

Respondent's facility in Milford, Connecticut, is a warehouse employing various employees, including a meat department consisting of eight employees. Jeff Dawson was the general warehouse manager, who was in charge of the facility. Reporting to Dawson was Jim Mager, assistant general warehouse manager, who was responsible for overseeing the meat, bakery, and deli departments. Dave Simpson, the meat department manager, reported to Mager, as well as to Dawson. Mager, in the course of his duties, visits the meat department four to five times a day to "check and make sure everything is going all right back there, running smoothly." During these visits, Mager will speak with Simpson and/or the employees about various work related issues.

B. The Alleged Interrogation

The Union began a campaign to organize the meat department employees at Respondent's Milford warehouse in June or July. A petition was filed by the Union to represent such employees on August 4. There is little dispute that the

[1] All dates hereinafter referred are in 2009, unless otherwise indicated.

[2] Respondent also filed a supplemental brief, without objection from the General Counsel, which has also been considered.

chief union supporter was Anthony Chiepello, who openly expressed his union support in the presence of Simpson.

Eddie Ramirez, a meat cutter, testified that on either Monday, July 27, or Monday, August 3, he attended a union meeting at the Stonebridge Restaurant.[3]

Ramirez also testified that he signed a union authorization card at that meeting,[4] and that on the day after the meeting, August 4, he had a conversation with Mager about the meeting and the cards. According to Ramirez, in the early afternoon, he observed Mager speaking with Simpson. Ramirez could not hear what they were saying to each other. About 5 minutes later, Ramirez asserts that Mager entered the meat room, and addressed Ramirez and Jack Voss, another meat cutter. Ramirez contends that Mager said, "Oh, I hear that you guys are trying to get the union in the meat room." Voss then allegedly answered, "Yeah, we've been talking about it." Ramirez then asserts that Mager said to him, "Oh, Eddy, I hear that you signed a paper for the union." Ramirez claims that he responded, "Yeah, I signed the paper because I think we need a little security back here and signing such a paper is not illegal." Mager then allegedly replied, "Do you know that the union only takes your money; they don't do anything for you."

Ramirez also testified that on the day after the alleged conversation, Mager again entered the meat room. One of the packages of sausage was upside down in the case. Mager started to fix it but then stopped, and said to Ramirez, "Oh, Eddy, I can't touch this because the union won't let me. The union won't let me straighten this out." Ramirez himself straightened out the package, and Mager then walked away.

On cross-examination, at one point, Ramirez testified that employees, including Chiepello did not talk openly about the Union in the meat department. However, at another point, Ramirez testified that he and other employees did discuss the Union in front of Simpson. More specifically, Ramirez testified in regard to Simpson and union discussions by employees as follows: "Oh, yes, he knew about it. Yeah, we used to talk about it in the bench there."

At another time in his testimony, Ramirez testified that on the day that Mager allegedly spoke to him and Voss about the Union and the signing of cards, Simpson heard Ramirez and Voss discussing the Union, and then had a conversation with Mager, 5 minutes before Mager allegedly spoke to the employees.

Upon further questioning by the undersigned, Ramirez asserted that he and Chiepello were discussing the Union when Simpson allegedly walked by and possibly overheard the employees' discussion about the Union.[5]

Ramirez was also, as noted, uncertain about the date of the alleged conversation. In his affidavit taken on August 17, Ramirez asserted that the conversation took place about a month ago. The complaint alleges that the incident occurred in "late July." In his testimony, Ramirez admitted that the affidavit must be wrong about the date but he was sure that it was a day after the Union meeting. He further testified that the conversation was on the same day as the incident where Respondent alleged that Chiepello and Ramirez "trashed" the meat room, which ultimately led to their suspensions and discharges.[6]

Mager testified that sometime in June, Simpson informed him that there was some union activity in the meat department, and that some employees in the department were trying to form a union.[7] Mager further testified that this information was not a concern to him because if a union came in "we'd just be business as usual." He denied making any efforts to determine who was organizing the union or who was signing cards because "it wasn't a concern of mine." Mager denied asking Ramirez or any employee whether they had signed union cards. Mager also denied making the comments attributed to him by Ramirez. ("I hear that you want the Union in here" or "I hear you signed a paper for the Union.")

Mager did admit that he had one conversation with employees concerning the Union in early July. According to Mager, at that time, he walked into the meat room and heard Chiepello talking to Ramirez and employee Mark Lindquist, and Chiepello said that when a union comes in here, he won't have to work nights. Mager asserts that he commented, "You know you're working for a good place here, you know, if you get the union in, that's fine, in my opinion it's just the union taking money out of your check and you're working for a good organization here." According to Mager, this was the only conversation that he ever had with any employee concerning the Union.

On cross-examination, Mager admitted that he had conversations with Ramirez on August 4, as he does every day, but could not recall what he said to Ramirez on that day. Mager also testified that neither Ramirez nor Lindquist made any comments during the July conversation, discussed above, and that he did not know anything about Ramirez's position on the Union. Mager also testified that he was unaware of any conversations between Simpson and Ramirez regarding the Union. Finally, Mager also denied telling Ramirez (as Ramirez testified) that he (Mager) couldn't touch meat because union rules wouldn't allow it or any type of conversation along these lines.

Jack Voss was called as a witness by Respondent. Voss is still employed by Respondent and is still under the supervision of Mager and Simpson. According to Voss, Chiepello was the primary employee attempting to bring in the Union, but that Ramirez "worked together" with Chiepello in organizing union meetings and talking to employees about bringing the union into the meat department. Voss added that Chiepello and Ramirez did not try to hide the organizing from anyone and that it "was all out in the open."

Voss was asked about Ramirez's testimony that in Voss' presence, Mager told Ramirez "I hear you signed a paper for the Union" or any words to that effect. Voss testified, "No, not that I am aware of. That wasn't said in front of me."

On cross-examination, Voss admitted that he was not in favor of the Union, and he had neither signed a card nor at-

[3] Although Ramirez was uncertain about the date of the meeting, other record evidence indicates, and I find, that the date was August 3.

[4] The authorization card was not introduced into the record.

[5] I note that this was the first time, and the only time, Ramirez mentioned that Chiepello was present at the time of Mager's alleged questioning.

[6] The Union's charges alleged that the suspensions and discharges were in violation of the Act. The Region disagreed, apparently concluding that the discharges were caused by the conduct of the employees in connection with damage to the meat in the meat room.

[7] Mager did not testify whether Simpson informed him of which employees were involved in trying to bring in a union.

tended any union meetings. Further, on the last union meeting, presumably on August 4, he saw a text message announcing the union meeting, inviting everyone to attend except for the "two scabs," Voss and another employee. Further, Voss admitted that both Ramirez and Chiepello made derogatory comments about Voss.

Voss was also asked on cross-examination about his testimony that everyone in the meat room talked openly about the union in the presence of management. Voss continued to insist that both Chiepello and Ramirez spoke about the Union in the presence of Simpson. However, his affidavit states only that he recalled one time that Chiepello spoke about the Union in Simpson's presence, and that the affidavit made no mention of whether Voss had observed Ramirez discussing the Union in the presence of Simpson or any other management representative.

Voss also testified that he spoke with both Simpson and Mager about the Union in July and August. In each of these discussions, Voss initiated the conversations and informed both Simpson and Mager that he (Voss) was not interested in the Union and/or that he didn't sign any papers for the Union. Neither Simpson nor Mager made any response to Voss's comments other than "Ok, it's your decision."

C. The Allegedly Unlawful Rules

1. The employee handbook

Respondent maintains a nationwide employee agreement entitled "Costco's Employee Agreement," which sets forth terms and conditions of employment at all its nationwide facilities, including its Milford facility, but not at its facilities where the employees are represented by a union and where a union contract is in effect.[8]

The employee agreement, hereinafter referred to as the agreement, provides for an "open door policy," which encourages employees "access to ascending levels of management to resolve issues." The agreement is also a comprehensive document that spells out all the terms and conditions of employment for all Costco employees, including rights under various Federal statutes, holidays, vacations, breaks, meal periods, paid sick leave, leave of absence, scheduling, transfers, and promotions.

Section 5 of the agreement is entitled "How do I get paid? Compensation and Payroll." It then references "see tab in back for specific wages."[9] Section 5 then defines the workweek, scheduling, travel, supplemental pay, premium pay, overtime, double time, breaks, and meal periods.

The complaint alleges and the General Counsel contends that several sections of the agreement are unlawful. Section 11.3 is entitled "Causes for Termination," which lists actions that can result in immediate termination. Three of these "causes" are alleged to be unlawful.

> 4. Unauthorized collection, disclosure or misuse of confidential information relating to Costco, its members, employees, suppliers or agents including, but not limited to:
>
> a. Unauthorized removal of confidential information from Company premises.
>
> 22. Unauthorized posting, distribution, removal, or alteration of any material on Company property.
>
> 24. Leaving Company premises during working shift without permission of management.

Section 11.7 is entitled "Privacy Policy." Portions of this section alleged to be unlawful reads as follows:

> Costco respects our members' and employees right to privacy, and it is up to each employee to take every precaution to make sure we respect this right.
>
> - In the course of our business, we collect from our members and employees a substantial amount of personal information (such as name, address, phone number, e-mail address, social security number, membership numbers and credit card numbers). All of this information must be held strictly confidential and cannot be disclosed to any third party for any reason, unless (1) we have the person's prior consent or (2) a special exception is allowed that has been approved by the legal department.
>
> All Costco employees shall refrain from discussing private matters of member and other employees. This includes topics such as, but not limited to, sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers' comp injuries, personal health information, etc.

Section 11.9 is entitled "Electronic Communications and Technology Policy." The portions of this section alleged to be unlawful are as follows:

> Costco recognizes the benefits associated with electronic communications for business use. All employees are responsible for communicating with appropriate business decorum whether by means of e-mail, the Internet, hard-copy, in conversation, or using other technology or electronic means. Misuse or excessive personal use of Costco technology or electronic communications is a violation of Company policy for which you may be disciplined, up to and including termination of employment. Your use of Costco technology and electronic communication systems represents your agreement with the following policies:
>
> - Every employee is responsible for ensuring that all information relating to Costco, its members, suppliers, employees, and operations is secure, kept in confidence, and not disseminated or misused.
>
> - Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

[8] Respondent's counsel modified the above stipulation at the hearing by stating that in some of Respondent's unionized facilities, parts of the employee agreement are in effect, where they do not conflict with union contracts in existence.

[9] This apparently refers to sec. 10 entitled "How much am I paid?," which includes wage rates for all titles and classifications.

- Sensitive information such as membership, payroll, confidential financial, credit card numbers, social security numbers, or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval. Additionally, unauthorized removal of confidential material from Company premised is prohibited.

III. ANALYSIS AND CONCLUSIONS

A. The Alleged Interrogation

The General Counsel asserts, consistent with the complaint's allegation, that Respondent unlawfully interrogated its employees by Mager's alleged comment to Ramirez and Voss that he (Mager) said "I hear that you signed a paper for the Union." *Continental Bus System*, 229 NLRB 1262, 1264–1265 (1977) ("I heard that you (were) getting people signed-up for the union); *Ready Mix Inc.*, 337 NLRB 1189, 1190 (2002) ("I heard that you were passing out union cards").

However, before assessing whether Mager's alleged comments were coercive or unlawful, consistent with the above precedent, it is essential to resolve the significant credibility dispute between Mager and Ramirez as to whether or not Mager made the quoted comment to Ramirez.

I am not persuaded that the General Counsel has met its burden of proof that Mager made the statement to Ramirez, as Ramirez so testified. In addition to comparative demeanor considerations, I rely on several other factors in coming to that conclusion. The principal factor that I have relied upon is the testimony of Voss, who did not corroborate Ramirez's testimony, and in fact corroborated Mager's testimony that the alleged statement by Mager, was testified to by Ramirez, was not made. I recognize, as argued by the General Counsel that Voss, not a union supporter, is still employed by Respondent and is under the supervision of Mager. I have considered these factors, but, nonetheless, found Voss to be an impressive and credible witness. He is still in my view a "neutral" witness with no stake in the proceeding, and I believe that he was candid and believable in his testimony.

I also found Mager to be a more credible witness than Ramirez for several reasons. I found his testimony sincere and believable, that while he did find out about the fact that the meat department employees were trying to organize from Simpson, "it was not a concern" to him, and I find that it is not likely that he would ask Ramirez or any employee whether they signed union cards. I also rely on the fact that Mager was candid in his testimony that he had been told about the organizers in June by Simpson, as well as his admission that in July, after hearing Chiepello and Ramirez discussing the Union, he (Mager) told the employees that in his opinion the Union "just takes money out of you're [sic] check" and that the employees were working for a good organization here." While the General Counsel does not, as he should not, allege that these comments are violative of the Act, these admissions could, in some circumstances, reflect negatively upon Respondent. Thus, I conclude that Mager's candid admissions that he made such comments, and that he was told about the union organizing by another supervisor, reflects positively on his testimony in general and on his denial that he made the statement to Ramirez, as Ramirez testified.

I have also considered the General Counsel's arguments that Mager and Voss should not be credited because their memory was hazy, as to precisely what conversations Mager had with Ramirez on August 4. I find little significance to these alleged "deficiencies" in the recollections of Mager and Voss. The evidence reveals that Mager and Ramirez have conversations every day, usually about work related matters. Thus, it is not surprising that they would not be able to recall precisely what was said in these conversations on August 4. What is significant is that Mager and Voss were unequivocal and corroborative in stating that Mager did not say anything to Ramirez about signing cards or "papers" for the Union.[10]

I was, on the other hand, less impressed with Ramirez's testimony. His testimony was uncertain as to the date of the alleged interrogation. This is important since Ramirez insisted that the conversation took place the day after the union meeting and that at said meeting, he (Ramirez) allegedly signed a union card. However, the card, allegedly signed by Ramirez on August 3 (so argued by the General Counsel) was not introduced as evidence, which tends to shed some doubt on Ramirez's testimony. Further, the comments that Mager allegedly made to Ramirez accompanying the alleged interrogation (i.e. Mager's opinion that the Union only takes dues out of the employees' salaries and that the employees were working for a good organization) were made by Mager to Ramirez (and two other employees) in July. This evidence suggests that Ramirez might have been confused about the date, as well as the substance of the conversation with Mager about the Union.

Further, Ramirez was also inconsistent in his testimony concerning the "presence" of Chiepello during the events in question. In his direct testimony, as well as on cross and redirect, he made no mention of Chiepello being present at all on that day or at any of the events in question. However, when pressed during an examination by undersigned concerning the details on the discussions about the Union that Simpson allegedly overheard on August 4, and allegedly immediately communicated to Mager 5 minutes before the alleged interrogation, Ramirez for the first time asserted that he was speaking with Chiepello about the Union. Thus, Ramirez's credibility is further undermined by this inconsistency.

Accordingly, based on the foregoing, I do not credit Ramirez's testimony vis-a-vis Mager's denials, corroborated by Voss, and therefore shall recommend dismissal of the complaint that Respondent unlawfully interrogated its employees.

B. The Allegedly Unlawful Rules

1. Applicable law

The analytical framework for assessing whether the maintenance of a work rule violates Section 8(a)(1) of the Act is set forth in *Crowne Plaza Hotel*, 352 NLRB 382, 383 (2008), quoting from *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

> [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 deter-

[10] Voss testified that in response to whether he heard Mager make such a comment to Ramirez, "No, not that I am aware of. That wasn't said in front of me."

> mining 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.
>
> 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.
>
> 352 NLRB at 383, citing 343 NLRB at 646–647.

Here, there is no contention by the General Counsel that any of Respondent's rules that are alleged to be unlawful were promulgated in response to union activity or that any of the rules have applied to restrict the exercise of Section 7 rights.

Thus, the issues are whether any of the rules in question *explicitly* restricts Section 7 activity and/or whether the employees would reasonably construe the language to prohibit Section 7 activity.

It is to these issues that I now turn.

2. Rule 11.3.22

This rule, as detailed above, provides that one of the causes for immediate termination is the "unauthorized posting, distribution, removal or alteration of any material on Company property."

The General Counsel contends that this rule is unlawful since it explicitly prohibits protected activity, such as posting or distribution of any material on company property and such a prohibition is overbroad. *MTD Products*, 310 NLRB 733 (1993); *Brunswick Corp.*, 282 NLRB 794, 795 (1987); *Crowne Plaza Hotel*, supra, 352 NLRB at 384–385.

Respondent does not dispute the general principles cited above that establishes that restrictions on distribution or posting must be confined to "work areas." Thus, Respondent argues that since no evidence was adduced regarding what areas of the Milford warehouse are not "work areas," the General Counsel has not satisfied its burden of proof since company property could well be synonymous with its work area. I disagree. When a rule, such as Respondent's is presumptively unlawful on its face, the employer has the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution in nonworking areas during nonworking time. *Ichikoh Mfg. Inc.*, 312 NLRB 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994); *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465 (1987); *J. C. Penney*, 266 NLRB 1223, 1224 (1983). Further, where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees, who are required to obey it. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992) (rule prohibiting distribution "anywhere on the company premises" overbroad and unlawful).

Accordingly, based on the above precedent and analysis, I conclude that by maintaining this rule in its employee agreement, Respondent has violated Section 8(a)(1) of the Act.[11]

3. Rule 11.3.24

Respondent also prohibits employees from "leaving company premises without permission of management."

It is well-settled that employees, who concertedly refuse to work in protest over wages, hours or working conditions, are engaged in "concerted activities" for "mutual aid or protection" within the meaning of Section 8(a)(1) of the Act. *Odyssey Capital Group LP III*, 337 NLRB 1110, 1111 (2002); *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962). It is also clear that the Act protects the right of employees to strike without notice. *Bethany Medical Center*, 328 NLRB 1094 (1999). Finally, it is equally well-settled that an employer may not require an employee to obtain permission from management before engaging in protected activity since such a requirement is an impediment to the full exercise of an employee's Section 7 rights. *Trump Marina Casino Resort*, 354 NLRB No. 123, slip op. at 3 (2009); *Brunswick*, supra, 282 NLRB at 798; *Enterprise Products*, 265 NLRB 544, 553–554 (1982); *American Cast Iron Pipe*, 234 NLRB 1126, 1131 (1978).

Therefore, Respondent's rule requiring the permission of management before employees leave "Company premises" inhibits the employees' rights to engage in Section 7 activity (i.e. strike) and is violative of Section 8(a)(1) of the Act. *Crowne Plaza Hotel*, supra, 352 NLRB at 386–387 (rule prohibiting employees from leaving their work area without authorization before the completion of their shifts); *Labor Ready Inc.*, 331 NLRB 1656, 1656 fn. 2 1657 (2000).

Respondent, however, relies on *Wilshire at Lakewood*, 343 NLRB 141, 144 (2004), vacated in part in other grounds 343 NLRB 1050 (2005), reversed and remanded sub nom. *Jochims v. NLRB*, 480 F.3d 1161 (DC Cir. 2007), and argues that an "almost identical rule" was found to be lawful. Respondent is correct that the rule in *Wilshire*, supra, was nearly identical to the rule here.[12] Respondent is also correct that the Board found such a provision lawful because in the context of that case "employees could not reasonably read the rule as prohibiting them from engaging in all strikes or similar protected concerted activity." Id at 144.

However, Respondent conveniently ignores that the context of the rule therein was that the employer was "a nursing home with many elderly patients, who are sick or infirm." Id. Therefore, the Board concluded "employees would necessarily read the rule intended to insure that nursing home patients are not left without adequate care during an ordinary workday . . . Considering the fact that the respondent's mission is to ensure adequate care for its patients, employees would necessarily read the rule as intended to avert such imminent danger, not to prohibit protected conduct." Id.

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[11] Respondent also asserts in its brief that "since Complaint was issued, Costco has revised the language to conform with applicable Board case law, only restricting distribution of materials in work areas." I note that no record evidence has been adduced confirming this assertion. In any event, even if true, it would not preclude the finding of a violation. Respondent's alleged revision of the language in its agreement will be dealt with in the compliance phase of this case.

[12] The rule prohibited employees from "abandoning your job by walking off the shift without permission of your supervisor or administrator."

Here, of course, Respondent is not a nursing home or a health care facility so the considerations relied upon by the Board in *Wilshire*, supra, are not present. Therefore, *Wilshire*, supra, is clearly distinguishable and not dispositive. *Crowne Plaza*, supra, 352 NLRB at 387, distinguishing *Wilshire*, supra on that basis.

Accordingly, I find that Respondent has further violated Section 8(a)(1) of the Act by maintaining Rule 11.3.24.

4. Rule 11.7

Under this rule, Respondent states that "All Costco employees shall refrain from discussing private matters of members and other employees. This includes topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc."

The General Counsel contends, and I agree, that this rule explicitly prohibits the exercise of Section 7 activity and therefore is unlawful. I note that Respondent defines "private matters" of members and other employees as including sick calls, leaves of absence, FMLA call-outs, ADAD accommodations, workers compensation injuries, which cannot be discussed with anyone. All of these "private" matters clearly are terms and conditions of employment of Respondent's employees, and Respondent's explicit prohibition of employees discussing these matters with anyone, which would include other employees or union representatives, is overbroad and unlawful. *Double Eagle Hotel & Casino*, 341 NLRB 112, 113–116 (2004), enfd. as modified 414 F.3d 1249 (10th Cir. 2005) (rule explicitly restricts discussion of terms and conditions of employment as defined by employer as "confidential information").

Alternatively, I also conclude that employees would reasonably conclude that Respondent's rule prohibits them from discussing terms and conditions of their employment with other employees or with a union. *NLS Group*, 352 NLRB 744, 745 (2008) (rule states that terms of employment including compensation are confidential and disclosure of such terms to other parties may constitute grounds for dismissal); *Cintas Corp.*, 344 NLRB 943 (2005), enfd. 482 F.3d 463 (DC Cir. 2007) (employer deemed any information concerning its "partners"[13] confidential and prohibited disclosure); *Flamingo Hilton–Laughlin*, 330 NLRB 287, 288 fn. 3 (1999) (prohibition on employees revealing confidential information about "fellow employees" overbroad and unlawful); *IRIS U.S.A. Inc.*, 336 NLRB 1013 (2001) (rule in handbook instructing employees to keep information about employees strictly confidential).

Respondent argues, however, that its policy says nothing about Section 7 rights and that its privacy policy "simply codifies Costco's obligations (in some cases, legal obligations) to its members and employees, who have given personal information to Costco." It argues that the rule must be read in context, and that the privacy policy (11.7) mentions information that Respondent collects from employees, which must be kept strictly confidential and additional rules apply to personal health information collected in its pharmacies and centers, as well as personal health information related to employees, such as benefits and leaves of absence for medical reasons. Since these sections immediately precede the allegedly offending paragraph, Respondent argues that a reasonable employee would read its policy to prohibit only the disclosure of information such as medical information about himself that he has given to Respondent and that is now stored on Respondent's database or in the employee's medical or personnel file. I cannot agree.

While all of the terms and conditions of employment listed in the rule can be construed as relating to medical issues, that does not change the fact that the rule explicitly prohibits employees from discussing terms and conditions of employment. Thus, an employee would reasonably be constrained by this rule from discussing any complaint that he may have about how Respondent is interpreting or enforcing its policies with regard to these issues with other employees or a union, or indeed informing a union of what Respondent's policies are concerning these items.

The best that can be said for Respondent's position is that its rule is somewhat ambiguous, but in my view, if Respondent intended to prohibit only discussion of private medical information in its files, it could easily have done so. Instead, it included a separate paragraph precluding discussions of topics, including terms and conditions of employment. Thus, even if the rule could be considered ambiguous, any ambiguity must be construed against Respondent as the promulgator of the rule. *Lafayette Park Hotel*, supra, 326 NLRB at 828; *Norris/O'Bannon*, supra, 307 NLRB at 1245; *Crowne Plaza Hotel*, supra, 352 at 386. ("At the very least, the second sentence renders the rule ambiguous, and as such, it is susceptible to the reasonable interpretation that it bars Section 7 activity.")

Respondent cites a number of cases, which it asserts are dispositive. It argues that *Windstream Corp.*, 352 NLRB 510 (2008), "could not be more directly on point" and the facts therein are "impossible to distinguish from the facts involved here." Respondent notes that in *Windstream*, as here, the rule in question referred to information collected by employees through the employer's records. It also asserts that the Board held that the rule as modified by the employer "clearly identifies the target audience of the rule and makes it clear as well that employees can discuss among themselves personnel information so long as that information did not come into their possession through access to company records in the course of their job duties." 352 NLRB at 514.

However, Respondent's reliance is misplaced for several reasons. Firstly, the Board did not "hold" what Respondent claims in *Windstream* since there "no party has excepted to the judge's findings with respect to the underlying complaint allegations." fn. 3 at 510. Therefore, the case has no precedential value concerning the portions cited by Respondent, which come from the ALJ's decision. *Trump Marina*, supra, 354 NLRB No. 123, fn. 2 at p 1.

More importantly, an examination of the facts in *Windstream*, even considering the judge's decision as persuasive, does not support Respondent's reliance on the opinion. To the contrary, the facts there support the finding of a violation here. The judge relied on the employer's modification of its original rule, which he viewed as clearly identifying the target audience, and making it clear that employees can discuss among themselves personnel information, as long as that information did not come into their possession through access to company records in the course of their job duties. The precise "modification" referred to by the judge added the following to the rule, previously found by the judge to be

[13] Partners at said employer were its employees.

unlawful. "This does not prohibit you from disclosing or discussing personal, confidential information with others, so long as you did not come into possession of such information through access, which you have as a part of your formal company duties."

Here, Respondent, unlike the employer in *Windstream*, did not issue any such modification, which clarifies the intent of the rule and makes clear to employees that they are free to discuss their terms and conditions of employment with others. Indeed, as I observed below, it was Respondent's obligation to clarify any ambiguities in its rule, which it has not done. Thus, I find that *Windstream*, supra is supportive of my finding that Respondent's rule is overbroad and unlawful.[14]

Respondent also places considerable reliance on *Palms Hotel & Casino*, 344 NLRB 1363 (2005). Once again, its reliance on *Palms Hotel & Casino* is misplaced. While Respondent argues that the Board upheld the judge's finding that the employer's confidentiality rule was lawful,[15] this assertion is incorrect. In fact, there were no exceptions to the judge's dismissal of the complaint allegations pertaining to this rule. 344 NLRB at 1363 fn. 1. Thus, the judge's decision concerning this rule, as well as language cited by Respondent in discussing this rule, has no precedential value. *Trump Marina*, supra. Therefore, the judge's reliance on the fact that the employer there, similar to Respondent here, published information concerning its wages and benefits to conclude in part that therefore employees would not reasonably conclude that they are prohibited from discussing these matters is not persuasive precedent. Moreover, in my view, this fact, contrary to Respondent's contentions, has little significance in assessing what an employee would reasonably believe was being prohibited by Respondent's rules. The fact that Respondent publishes in its manual its employees' wages and benefits, including the benefits that it specifically prohibited employees from discussing, says nothing about whether it was appropriate for employees to discuss these benefits with other employees or outsiders, such as a union. Notably, in this regard, there is no evidence that Respondent's manual is available to outsiders, such as a union. Thus, it is quite reasonable for employees to conclude that they are prohibited from discussing these benefits with outsiders, such as a union, notwithstanding the fact that these benefits were published in the manual and made available to all employees.[16]

Respondent also relied on the finding of the judge in *Palms Hotel & Casino*, supra, which is consistent with several Board cases[17] that the fact that Respondent's confidentiality provision has never been enforced to prohibit employees from discussing their terms and conditions of employment reinforces the view that such conduct is not covered by the rule. 344 NLRB at 1389.

While as I have observed above, the precedential value of *Palms Hotel & Casino*, supra is nonexistent with respect to any analysis of the confidentiality rule, the issue of whether the rule was ever enforced to prohibit protected conduct is a factor to be considered. (See cases cited in preceding footnote.) However, I note that in none of these cases were there an explicit prohibition on discussing terms of conditions of employment as we have here. Further, the lack of enforcement was only one factor in assessing whether employees would reasonably construe the prohibitions as including protected conduct. Indeed, as I have observed above, there are numerous cases where, supported by the courts, the Board has found rules to be unlawful even in the absence of evidence that it was ever enforced to punish protected conduct. *Cintas*, supra, 344 NLRB at 946, *Cintas v. NLRB*, supra, 482 F.3d at 468; *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 375–378 (D.C. Cir. 2007), enforcing 344 NLRB 809 (2005); *Flamingo Hilton*, supra, 330 NLRB at 288; *Palms Hotel & Casino*, supra, 344 NLRB at 1363 fn. 3 (rule with respect to loitering); *Double Eagle Hotel*, supra, 341 NLRB at 115; *Main Street Terrance Care Center*, 327 NLRB 522, 525 (1999); *Franklin Iron & Metal Co.*, 315 NLRB 819, 820 (1994); *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993) (Board reverses judge, who dismissed allegation based primarily on finding that rule was never enforced); *Pontiac Osteopathic Hospital*, supra, 284 NLRB at 465.

Accordingly, based upon the foregoing analysis and precedent, I conclude that the portion of Respondent's Rule 11.7 that prohibits employees discussing "private" matters and specifics topics covered by the ban, which includes terms and conditions of employment, explicitly restricts Section 7 activity. Alternatively, I also find that employees would reasonably construe the language of the rule to prohibit Section 7 activity. Therefore, I find that Respondent has further violated Section 8(a)(1) of the Act by maintaining this rule in its employee agreement.[18]

5. Rule 11.9
(Prohibition on Sharing Payroll Information)

Rule 11.9 of the agreement entitled "Electronic Communications and Technology Policy," includes the following section. "Sensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted or stored for personal or public use without prior management approval. Additionally, unauthorized removal of confidential material from Company premises is prohibited."

The General Counsel asserts that two portions of this rule are unlawful. The first concerns the prohibition against sharing payroll information. Secondly, it is asserted that the portion of the rule prohibiting "unauthorized removal of confidential information" is also unlawful. The latter conten-

[14] I express no opinion on precisely what "modification" of Respondent's rule would be sufficient to render its rule lawful. I therefore do not necessarily conclude that the modification issued by the employer in *Windstream* would be sufficient to lawfully clarify Respondent's rule. I shall leave that issue to compliance.

[15] The rule in question prohibited employees from "revealing, distributing or discussing such matters with outsiders or non-privileged team members." The matters referred to were the "company's operational, financial and business affairs and activities."

[16] Further, as I observed above, a reasonable employee would infer from the prohibition that he was precluded from discussing with fellow employees any complaints that he may have about any of these benefits or how Respondent has implemented such benefits.

[17] *Safeway Inc.*, 338 NLRB 525, 526 (2002); *Lafayette Park*, supra at 826; *Super K-Mart*, 330 NLRB 263 (1999).

[18] The General Counsel also attacks other portions of Rule 11.7 in connection with Respondent's definition of "confidential information" in connection with Rules 11.3.4 and 11.9. I shall discuss these contentions below.

tion will be dealt with below when the issue of Respondent's definition of confidential information and its effect on various rules are discussed.

With regard to the rule's prohibition against sharing payroll information, it does not define with whom such information can be shared. Thus, it is clear, and I find, that a reasonable employee would construe the rule as prohibiting sharing (or discussing) payroll information with other employees or with outsiders, such as a union. However, that is not the end of the inquiry. The meaning of the term "payroll" in this context is in dispute and must be determined.

I agree with the General Counsel that a reasonable employee would read that term as encompassing their wages or other terms and conditions of employment and that the rule inhibits the exercise of Section 7 conduct. Indeed, similar rules have been found to be unlawfully broad, and to be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the union. *Cintas*, supra, 344 NLRB at 943 (prohibition on disclosing any information concerning its partner employees); *NLS Group*, 352 NLRB 744, 745 (2008) (rule states that terms and conditions of employment including compensation are confidential and may not be disclosed to "other parties"); *Double Eagle Hotel & Casino*, supra, 341 NLRB at 115 (information concerning "any of its employees"); *Flamingo Hilton*, supra, 330 NLRB at 288 (prohibiting disclosing information about "fellow employees"); *Bigg's Food*, 342 NLRB 425 fn. 3 (2006) (prohibiting disclosure of salaries to anyone outside the company); *Pontiac Osteopathic Hospital*, supra, 284 NLRB at 466 (rule bans discussion of employee problems).

Respondent argues that the term "payroll" in its rule refers only to "the confidential business information component of payroll, such as budgeted payroll and expenses and the like, which Costco does not wish to share with its competitors and has nothing to do with terms and conditions of employment of its employees." Respondent also cites a number of cases, where it contends that the Board, as well as the courts, has found rules similar to Respondent's rule not to be unlawful. *Aroostook County Regional Ophthalmology*, 81 F.3d 209, 213 (D.C. Cir. 1996) (rule prohibiting discussion of "official business"); *Mediaone of Greater Florida*, 340 NLRB 277, 279 (2003) (rule prohibits disclosure of "employee information"); *Safeway, Inc.*, 338 NLRB 525, 527 (2002) (rule prohibiting providing "sensitive information" to others, which includes "financial information" and "personal information"); *Lafayette Park*, supra, 326 NLRB at 826 (prohibition on divulging "hotel-private information"); *Super K-Mart*, supra, 330 NLRB at 263–269 (disclosure of "company business and documents").

Respondent also asserts that viewing the rule in the context of other portions of the rule makes it clear that Section 7 rights are not implicated by its prohibition on discussion of "payroll." *Aroostook v. NLRB*, supra, 81 F.3d at 212–213 (rule read in context designed only to prevent employees from providing medical information, relying on placement of term "office business" in manual in relation to discussion of confidential medical information); *Mediaone*, supra, 340 NLRB at 229 (term "employee information" appears within larger provision prohibiting disclosure of "proprietary information"; thus, Board concludes that employees "reading rule as a whole would reasonably understand that it was designed to protect the confidentiality of respondent's proprietary business information rather than to prohibit discussion of employee wages"); *Safeway*, supra, 338 NLRB at 527 ("personal records" and "payroll data" must read in context of entire rule, which included numerous categories that do not implicate any Section 7 rights; Board finds it improbable that employees would infer that the rule referred to their own wages or working conditions).

While I agree with Respondent that the rule must be read in the context of other portions of the Agreement, I do not agree that such an analysis supports Respondent's contention that employees would reasonably view the prohibition on disclosure of "payroll" information as referring only to the "confidential business information component of payroll," which Respondent does not want to share with its competitors. While some portions of Rule 11.9 are clearly non-Section 7 items, such as "confidential financial," "credit card numbers," "social security numbers" or "employee personal health" in the same sentence as "payroll," other portions of the rule and the agreement shed a different light on how employees would perceive the term "payroll." Thus, another portion of Rule 11.9 states that employees are responsible for ensuring that "all" information relating to Respondent, its "*employees*" (emphasis supplied) is secure and not be disseminated. This overbroad provision would reasonably be construed to cover wages or working conditions of its employees. *Cintas*, supra.

Further and more importantly, Section 5.0 of the agreement is entitled as follows: "How do I get Paid? Compensation and Payroll." It then makes reference to tab in the back for specific wages and goes on to state "for payroll and accounting purposes, the work week is Monday through Sunday and the workday is midnight to midnight." The agreement then goes on to define scheduling, minimum work hours and work schedule. Thus, Respondent's agreement itself links the term payroll with compensation. In these circumstances, considering the term "payroll" in the context of the agreement, I find that employees would reasonably construe the language to prohibit Section 7 activity. *Cintas*, supra;[19] *Flamingo Hilton*, supra; *Double Eagle Hotel & Casino*, supra.

The above findings demonstrate that Respondent's reliance on *Aroostook County*, supra,[20] *Mediaone*, supra and *Palms Hotel & Casino*,[21] is misplaced since in each of these

[19] I note the Court of Appeal's decision affirming the Board approved the Board's reliance therein on the principle that "any ambiguity must be construed against the promulgator of the rule." 482 F.3d at 469 citing *Lafayette Park*, supra, 326 NLRB at 828. That principle is equally applicable here. At best, the rule is "ambiguous" and must be construed against Respondent.

[20] I note that *Aroostook County*, supra is a Court of Appeals case reversing the Board's decision in 317 NLRB 218 (1995), that the rule therein was overbroad and unlawful. Ordinarily, I am bound by the Board's view notwithstanding the Court of Appeals' reversal. However, the court decision in *Aroostook County*, supra was favorably discussed and relied upon by the Board in *Lafayette Park*, supra, 326 NLRB at 826. I find that the court's views on this issue to be more reflective of current Board law, although the Board decision in *Aroostook County* was not specifically overruled. Nonetheless, as detailed above and below, *Aroostook County* is clearly distinguishable from the instant case.

[21] As I observed above in discussing earlier rules, the portion of the judge's decision dismissing the complaint allegation concerning

cases, the context and placement of the rules in question were substantial reasons for finding them lawful.

Respondent's reliance on *Safeway*, supra is also misplaced. Respondent is correct that the rule in question therein did include prohibition on disclosure of "payroll data" and "salary information." However, *Safeway*, supra was a representation case, and the Board was reviewing a hearing officer's decision that the rule was overbroad and that its maintenance warranted the setting aside of the election. The Board decision found it unnecessary to pass on the hearing officer's finding that the rule was overbroad. See footnote 3, 338 NLRB at 526.

The Board did reverse the hearing officer's decision concerning the effect of the maintenance of the rule on the election. In that connection, the Board majority[22] principally relied on the fact that the employees were represented by a union in a RD election. It also stressed that the rule was never enforced and that to the extent that any employee was confused about their statutory right to discuss terms and conditions of employment with the union or with other employees, "the union was ideally placed to advise employees of their rights." Further, when making some of the comments quoted by Respondent, where it rejected finding that the rule had a chilling effect on Section 7 rights because it depended on "a chain of inferences upon inferences," the majority concluded that "that it is highly improbable that the employees in this unit, who have been represented by the union for several years would draw these inferences[23] under the circumstances of this case." Id at 327. Therefore, it is clear the basis for the majority's decision in *Safeway* that the rule in question did not warrant setting aside the election, was the presence of the union on the scene, which could advise the employees about any confusion concerning the meaning of the rule. Since there is no union here, *Safeway*, supra, has minimal precedential significance and is not dispositive.

Respondent also argues, as it did in regard to other rules in issue, that there is no evidence that it ever enforced the rule to prohibit or punish protected activity. As I have observed above, Board precedent supported by the courts consistently find that such evidence does not preclude a finding that employees would reasonably conclude rules inhibit Section 7 activity. *Cintas v. NLRB*, supra, 482 F.3d at 375; *Guardsmark v. NLRB*, supra at 374–376 (D.C. Cir. 2007); *Double Eagle Hotel*, supra, 341 NLRB at 115; *Radisson Plaza*, supra. I so find.

Accordingly, based on the foregoing analysis and precedent, I conclude that employees would reasonably construe Respondent's prohibition on disclosure of "payroll" to inhibit their exercise of Section 7 activity and that its maintenance by Respondent is violative of Section 8(a)(1) of Act.

6. Rule 11.9

(Requiring Employees to use "Appropriate Business Decorum"
in Communicating with Others and Precluding Employees from Damaging Another Employee's Reputation)

The General Counsel argues that Respondent's rules requiring employees to use "appropriate business decorum" in communications (including conversations) and prohibiting employees from posting messages that "damage any person's reputation" are overbroad and unlawful because they do not define the term "appropriate business decorum" or explain actions that that might "damage any person's reputation." The General Counsel argues that the failure of the rules to define what conduct is prohibited leads to the conclusion that employees could reasonably view various protected activities[24] as violative of Respondent's policies. *Lutheran Heritage Village*, supra, 343 NLRB at 650;[25] *University Medical Center*, 335 NLRB 1318, 1321 (2001), enfd. denied 335 F.3d 1079 (D.C. Cir. 2003); *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in pertinent part 916 F.2d 932, 940 (4th Cir. 1990); *Ridgeview Industries*, 353 NLRB 1096 (2009) (rule prohibiting employees from engaging in behavior designed to create discord or lack of harmony found unlawful).

Respondent, on the other hand, argues that employers are entitled to establish rules to maintain a civil workplace, and that a reasonable employee would view such rules as supporting that proposition, and would not view either of these rules as proscribing Section 7 activity. With respect to the General Counsel's assertion that the rules "could" be interpreted to prohibit Section 7 activity, this assertion is contrary to current law. Respondent cities *Lutheran Heritage Village*, "Where as here, the rule does not refer to Section 7 activities, 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 that reading is unreasonable. We decline to take that approach." 343 NLRB at 647. (Board finds rule prohibiting "abusive and profane language," "harassment" and "verbal, mental and physical abuse" to be lawful.)

In this instance, I agree with Respondent's analysis of relevant precedent, and that the General Counsel has not met its burden of proof that employees *would* (emphasis supplied) reasonably construe these rules as regulating or inhibiting Section 7 conduct. It is quite significant that the General Counsel cites the dissenting opinion of Members Liebman and Walsh in *Lutheran Heritage Village*, supra. The General Counsel seems to be anticipating that the views expressed in this dissenting opinion, which is consistent with dissenting opinions filed by these and other members in several cases,[26] will now be changed in view of the new compo-

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the rule cited by Respondent was not excepted to. Thus, it has no precedential value. *Trump Marina*, supra. However, even considering it for even persuasive authority, it is distinguishable since there the rule in question preceded items precluded from disclosure, such as customer or marketing lists or strategies, financial information, computer files or programs. Therefore, the judge concluded that employees would reasonably understand that what respondent desires to maintain as confidential is proprietary business information, and that they are not precluded from "disclosing their wage information." No such finding can reasonably be made here.

[22] Member Liebman vigorously dissented from the majority opinion and would have adopted the hearing officer's report.

[23] The inferences referred to are that employees would infer that the references to personnel and payroll records in the context of the rule referred to their own wages and working conditions.

[24] Such protected activities include (1) protests about the company during a walkout; (2) a concerted protest about a supervisor; or (3) calling a coworker a "scab" during a strike.

[25] Dissenting opinion of Members Liebman and Walsh.

[26] *Palms Hotel & Casino*, supra, 344 NLRB at 1368–1370; *Tradesman International*, 338 NLRB 460, 463–465 (2002); *Fla-*

sition of the Board. Whether the General Counsel is correct or not in that assumption is not for me to decide. I must and shall apply current law and not rely upon dissenting opinions. The essence of these dissents is, as argued by the General Counsel, that where employers maintain rules that "could" be perceived as inhibiting Section 7 conduct, that there is an obligation to define permissible conduct and clarify for employees that the rule does not prohibit employees from engaging in Section 7 activities. *Lutheran Heritage Village*, supra at 647, 650; *Palms Hotel & Casino*, supra at 1369–1370; *Flamingo Hilton*, supra at 287; *Tradesman International*, supra at 463–465; *Lafayette Park*, supra at 831. However, as the majority opinions in these and other cases makes clear, that is not the law. Indeed, these decisions have considered rules similar to the rules here and concluded, contrary to the General Counsel and the dissenting opinions therein, that where the rules in question on their face are clearly intended to promote "a civil and decent workplace," even though in some circumstances protected conduct might be restricted, reasonable employees *would* (emphasis supplied) not infer that the rules restrict Section 7 activity. *Lutheran Heritage Village*, supra at 647–649 (rule prohibiting "abusive and profane language," "harassment" and "verbal, mental and physical abuse"); *Palms Hotel & Casino*, supra at 1367–1368 (rule forbids employees from engaging in "any type of conduct, which is or has the effect of being injurious, offensive, coercing or interfering with fellow team members or patrons"); *Tradesmen International*, supra at 460–463 (rule prohibiting "disloyal, disruptive, competitive or damaging" conduct and prohibiting "verbal or other statements, which are slanderous or detrimental to the company or any of the company's employees"); *Lafayette Park*, supra at 825–826 (rules prohibit engaging in conduct that does not meet employer's "goals and objectives" and "improper conduct, which affects the employee relationship with the job, fellow employees, supervisors or the hotel's reputation or good will in the community"). See also *Ark Law Vegas Restaurant Corp.*, 335 NLRB 1284, 1291–1292 (2001) (rule prohibiting "conducting oneself unprofessionally or unethically with the potential of damaging the reputation or a department of the company" and "participating in any conduct that tends to bring discredit to or reflects adversely on yourself, fellow associates, the company or its guest, or that adversely affects job performance"); *Adtranz ABB Daimler Benz v. NLRB*, 253 F.3d 19, 25–28 (DC Cir. 2001), reversing 331 NLRB 291, 293 (2000) (rule prohibiting use of "abusive or threatening language to anyone on company premises").[27]

I additionally rely on *Albertson's Inc.*, 351 NLRB 254, 258–259 (2007), where the Board dismissed complaint allegations that rules prohibiting "disclosing confidential information or any other similar act constituting disregard for the company's best interest," and prohibiting employees from engaging in conduct, which has a negative effect on the company's reputation or operation or employee morale or productivity, were overbroad or violative of the Act. The Board emphasized that neither rule expressly covers Section 7 activity, and there is no evidence that the employer applied the rules to protected activity or that it was adopted in response to protected activity. The Board went on to observe that it "did not believe that either rule can reasonably be read as encompassing Section 7 activity. To ascribe such a meaning to these words is quite simply far-fetched. Employees would reasonably believe that these rules were intended to reach serious misconduct but not conduct protected by the Act." Id at 259. I find the above language applicable to the rules here that the General Counsel is attacking. I find in agreement with Respondent that a reasonable employee would infer that Respondent's purpose in promulgating the challenged rules was to ensure a "civil and decent" workplace and not to restrict Section 7 activity. *Lutheran Heritage*, supra at 648.

The General Counsel's reliance in *University Medical Center*, supra, and *Ridgeview Industries*, supra, is unpersuasive. *University Medical Center*, supra did find, as the General Counsel correctly points out, that a rule prohibiting employees from engaging in "insubordination . . . or other disrespectful conduct toward a service investigator, service coordinator or other individual" was unlawful. 335 NLRB at 621. However, that decision was reversed by the D.C. Circuit in *Community Hospitals v. NLRB*, 335 F.3d 1079, 1088–1089 (D.C. Cir. 2003). The court agreed with the employer relying on *Adtranz*, supra that the rule was lawful. The court viewed that the rule prohibiting disrespectful conduct applied to "incivility and outright insubordination" and that the Board's suggestion that employees would consider such conduct prohibitive of Section 7 activity "is misplaced." The court added, "In short, to quote the Board itself in a more realistic moment 'any arguable ambiguity' in the rule 'arises only through parsing the language of the rule, viewing the phrase . . . in isolation and attributing to the (employer) an intent to interfere with employee rights.' *Lafayette Park Hotel*, 326 NLRB at 825." 335 F.3d at 1089.

While again, I am cognizant of the fact that ordinarily I am bound by Board rather than court law, once more later Board precedent establishes that the court's view in *University Medical Center*, has been adopted by the Board. See *Lutheran Heritage Village*, supra at 647, where the Board relied on the court's decisions in *University Medical*, as well as *Adtranz*, to conclude that "a reasonable employee reading these rules would not construe them to prohibit conduct protected by the Act."

Finally, the General Counsel relies on the relatively recent case of *Ridgeview Industries*, supra. While the General Counsel is correct that the judge found therein that a rule prohibiting employees from "engaging in behavior designed to create discord or disharmony" was unlawful, 353 NLRB 1096, slip. op at 17, that finding has no precedential value here. Thus, there were no exceptions to the judge's finding that the employer violated Section 8(a)(1) of the Act by maintaining rules prohibiting employees from engaging in behavior designed to create discord or lack of harmony. See 353 NLRB 1096 fn. 2. Thus, the judge's finding, although affirmed by the Board, cannot be cited as authority for find-

mingo Hilton, 330 NLRB at 287 fn. 2, 289 fn. 7; *Lafayette Park*, supra, 326 NLRB at 830–831.

[27] While ordinarily I am bound by the Board's decision rather than the court's reversal, that is not the case with respect to *Adtranz*, supra. Thus, the Court's decision in *Adtranz* was relied on heavily on both *Palms Hotel & Casino*, supra at 1367–1368, and *Lutheran Village*, supra at 647, agreeing with the court's view (rather than the Board's) that a reasonable employee would not construe language prohibiting "threatening or abusive language" as prohibiting Section 7 conduct. Thus, the court's decision in *Adtranz* represents current Board law.

ing the rule unlawful. *Trump Marina*, supra. Moreover, an examination of the facts in *Ridgeview Industries*, supra, establish that even under the judge's analysis, *Ridgeview* does not support a finding of a violation here.

Thus, the judge emphasized in applying *Lutheran Heritage Village*, supra, that the rule in issue was utilized as a partial basis to discipline employee Balczak for his sarcastic remark to another employee vis-a-vis Company President Nykamp's earlier antiunion argument. Further, the rule was highlighted in disciplinary notices given to Balczak, and Plant Manager MacLaren told Balczak that his rule violations were highlighted (or circled). The judge then concluded that "Balczak's conversations or attempt at a conversation with a fellow employee was clearly protected in that Balczak's comments were directed at Nykamp's earlier antiunion propaganda. Thus, inasmuch as the rule has been applied to restrict Section 7 rights, I conclude that it tends to chill the exercise of Section 7 rights and violates Section 8(a)(1)." Id at 17. Therefore, it is clear that the judge in *Ridgeway Industries*, supra, based his finding of a violation solely on the fact that the rule has been applied to restrict Section 7 activity. That finding has no applicability here, where there is no evidence that Respondent applied these rules to restrict protected conduct.

Accordingly, based on the foregoing analysis and precedent, I recommend dismissal of these complaint allegations.

7. Rules relating to disclosure of confidential information (because of how respondent defines "confidential" information)

Rule 11.3.4 cites one of the causes for termination as "unauthorized collection, disclosure, or misuse of confidential information relating to Costco, its members, employees, suppliers or agents, including but not limited to: a) Unauthorized removal of confidential information.

Section 11.7, entitled privacy policy, and Section 11.9, entitled electronic communications and technology policy, read as follows:

> 11.7 Privacy Policy
>
> Costco respects our members' and employees' right to privacy, and it is up to each employee to take every precaution to make sure we respect this right.
>
> *In the course of our business, we collect from our members and employees a substantial amount of personal information (such as name, address, phone number, e-mail address, social security number, membership numbers and credit card numbers). All of this information must be held strictly confidential and cannot be disclosed to any third party for any reason, unless (1) we have the person's prior consent or (2) a special exception is allowed that has been approved by the legal department.
>
> 11.9 Electronic Communications and Technology Policy
>
> Every employee is responsible for ensuring that all information relating to Costco, its members, suppliers, employees, and operations is secure, kept in confidence, and not disseminated or misused.
>
> - Sensitive information such as membership, payroll, confidential financial, credit card numbers, social security numbers, or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval. Additionally, unauthorized removal of confidential material from Company premised is prohibited.

The General Counsel asserts that under all three rules employees would reasonably construe each rule dealing with confidentiality to prohibit activity protected by Section 7. In this connection, the General Counsel argues that Respondent defines "confidential" to include employees' names, addresses, phone numbers and email addresses, which they otherwise have a protected right to share with each other or with outside entities, such as unions, in the course of protected activities.

I agree with the General Counsel that this provision is overly broad and would reasonably be perceived by employees as inhibiting Section 7 conduct. *Albertson's*, supra, 351 NLRB at 259, 366 (unlawful to discipline employee for disclosing work schedule, including list of names of employees to the union). *Ridgely Mfg. Co.*, 207 NLRB 193, 197 (1973), enfd. 510 F.2d 185 (D.C. Cir. 1975) (employee engaged in protected conduct by obtaining names of employees on timecards).

Thus, the applicable rule is that employees are entitled to use for organizational purposes information and knowledge that comes to their attention in the normal course of their work activity but are not entitled to their employer's private or confidential records. *Ridgely Mfg.*, supra at 197; *Answerphone of Michigan*, 184 NLRB 305, 306 (1970) (employee obtained names and addresses of employees from office manager, who was rightly in possession of such information); Cf. *Roadway Express*, 271 NLRB 1238, 1239–1240 (1984) (employee not engaged in protected activity when he removed business records from employer's files not in the normal course of his work activity).

Here, this portion of Respondent's rule is overbroad since it does not distinguish between information obtained in the normal course of work or information obtained from Respondent's files or even between information obtained by employees from contact with or discussions with other employees. For example, as in *Ridgely*, supra, or *Albertson's*, supra, an employee obtained information concerning names of employees and possibly addresses from timecards or posted work schedules or other sources in the regular course of their employment. Yet, employees would reasonably perceive that Respondent's rule prohibits them from disclosing such information to other employees or to the union.

Respondent cites *Asheville School*, 347 NLRB 877 (2006), for the proposition that disclosure of confidential wage and salary information by a payroll accountant is unprotected. However, in that case, the judge concluded that the payroll accountant possessed special custody of such records and was aware that her job duties included keeping that information confidential. However, Respondent's rule is still overbroad as it is not restricted to such an employee or to such information. It is, as I observed above, broad enough to include prohibiting any employee from disclosing information to the union concerning names and addresses of employees even where the employee obtained such information from respondent's work schedule or timecards, and employees would, in my view, construe the rule.

The General Counsel also noted that Rule 11.9 defines confidential to include "all information relating to Costco and its employees." I have concluded above that this rule is overbroad and unlawful. *Cintas*, supra; *Double Eagle Hotel*, supra; *IRIS USA*, supra. Similarly, I also concluded above that the mention of "payroll" in the rule is also overbroad and unlawful since a reasonable employee would believe that it prohibits him from engaging in Section 7 conduct. *Cintas*, supra; *Bigg's Foods*, supra. In view of these findings, Respondent's definition of confidential impinges on Section 7 rights. Therefore, its rule prohibiting the "unauthorized removal of confidential material from Company premises" is unlawful and violative of Section 8(a)(1) of the Act. *Double Eagle Hotel*, supra, 341 NLRB at 115 (communication rule unlawful in light of link between unlawful confidentiality rule and the communication rule); *Bigg's Foods*, supra at 436 (consideration of confidentiality policy and confidentiality statement together).

Similarly, Section 11.3's listing as one of the causes for termination as "unlawful removal of confidential information from Company premises" is also unlawful and violative of Section 8(1)(a) of the Act. I so find. *Double Eagle Hotel*, supra; *Bigg's*, supra.

THE REMEDY

Having found that Respondent has violated Section (1) of the Act. I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the purposes and policies of the Act.

Where an employer's overbroad or unlawful rules are maintained on a companywide basis, the Board will generally order the employer to post a notice at all of its facilities where the unlawful policy has been or is in effect. *Longs Drug Stores California*, 347 NLRB 500, 501 (2006); *Cintas*, supra at 943, 962; *Guardsmark LLC*, 344 NLRB 809, 812 (2005); *Albertson's Inc.*, 300 NLRB 1013 fn. 2 (1990), enf. denied on other grounds, mem. *NLRB v. Albertson's Inc.*, 17 F.3d 395 (9th Cir. 1994).

Such an order is appropriate here since the rules found unlawful are in effect in most of Respondent's facilities nationwide. I shall therefore recommend that the notice be posted at all facilities of Respondent's, where the portions of its employee agreement that contain the unlawful rules are in effect.[28]

I shall also recommend that Respondent's obligation to rescind or modify the rules found to be unlawful shall be governed by the Board's analysis and order in *Guardsmark LLC*, supra.[29]

CONCLUSIONS OF LAW

1. The Respondent is and has been an Employer engaged in commerce of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) of the Act by maintaining rules in its "Employee Agreement" that prohibit the unauthorized posting, distribution, or alteration of any material on Company property, that may reasonably be interpreted as prohibiting employees from discussing their wages and other terms and conditions of employment with other employees and third parties, including union representatives, that may reasonably be interpreted as prohibiting employees from sharing or storing wage information or information relating to other terms and conditions of employment of employees without permission of management, that prohibit the removal of confidential material from Company premises, which Respondent has defined as conduct that may be reasonably be interpreted as including wages and other terms and conditions of employment of its employees and that prohibit employees from leaving Company premises during their work shift without permission of management.
4. The Respondent has not violated Section 8(a)(1) of the Act in any other manner as alleged in the complaint.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended[30]

ORDER

The Respondent, Costco Wholesale Corporation, Milford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining provisions in its Costco Wholesale employee agreement (the employee agreement) that prohibit the unauthorized posting, distribution, or alteration of any material on Company property.

(b) Maintaining provisions in its employee agreement that prohibit its employees from leaving Company premises during their work shift without permission of management.

(c) Maintaining provisions in its employee agreement that may reasonably be interpreted as prohibiting employees from discussing their wages and conditions of employment with other employees and third parties, including union representatives.

(d) Maintaining provisions in its employee agreement that may reasonably be interpreted as prohibiting its employees from sharing or storing wage information or information relating to other terms and conditions of employment of employees without permission of management.

(e) Maintaining provisions in its employee agreement that prohibit the removal of confidential material from Company premises, which Respondent has defined as conduct that may

[28] The record reflects that the agreement is not in effect at some of Respondent's unionized facilities.

[29] "The Respondent may comply with our Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees." *Guardsmark,* supra at 812 fn. 8. Consistent with *Guardsmark*, the Order will additionally provide the Respondent with the option of immediately rescinding the unlawful provisions or modifying the existing provisions to make clear that the discussion of wages and other terms and conditions of employment is not prohibited. *Longs Drug Stores*, supra at 501 fn. 5.

[30] 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.

reasonably be interpreted as including wages or other terms and conditions of employment of its employees.

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

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

(a) Rescind or modify the language in the following provisions of its "Employee Agreement."

1. Sections 11.3 and 4(a), 11.3.22 and 11.3.24,

2. Section 11.7 to the extent that it defines the name, address, phone number and E-mail address of employees as confidential and prohibits disclosure of such information to any third parties,

3. The portions of Section 11.7 that provides that "All Costco employees shall refrain from discussing private matters of other employees. This includes topics such as, but not limited to sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers' comp. injuries . . . , etc.,"

4. Section 11.9 to the extent that it provides that all information relating to Costco's employees must not be disseminated, that payroll information may not be shared or transmitted and unauthorized removal of confidential material (as defined overbroadly by Respondent in its Employee Agreement) from Company premises is prohibited.

(b) Furnish all current employees with inserts for the current "Employee Agreement" that

1. advise that the unlawful rules have been rescinded or modified, or

2. provide the language of lawful provisions or publish and distribute to all current employees a revised "Employee Agreement" that

a. do not contain the unlawful provisions, or

b. provide the language of lawful provisions.

(c) Within 14 days after service by the Region, post at each of its facilities in the United States, where its "Employee Agreement" is in effect, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 34, 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. 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 May 3, 2009.

(d) 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 not found.

Dated, Washington, D.C. August 11, 2010

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT maintain provisions in our Costco Wholesale employee agreement (the employee agreement) that prohibit the unauthorized posting, distribution, or alteration of any material on Company property.

WE WILL NOT maintain provisions in our employee agreement that prohibit you from leaving Company premises during your work shift without permission of management.

WE WILL NOT maintain provisions in our employee agreement that may reasonably be interpreted as prohibiting you from discussing your wages and other terms and conditions of employment with other employees and third parties, including union representatives.

WE WILL NOT maintain provisions in our employee agreement that may reasonably be interpreted as prohibiting you from sharing or storing wage information or information relating to other terms and conditions of employment of employees without permission of management.

WE WILL NOT maintain provisions in our employee agreement that prohibit the removal of confidential material from Company premises, which we have defined as conduct that may reasonably be interpreted as including your wages or other terms and conditions of employment.

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

WE WILL rescind or modify the language in the following provisions of our "Employee Agreement."

1. Sections 11.3 and 4(a), 11.3.22 and 11.3.24,

2. Section 11.7 to the extent that it defines the name, address, phone number and E-mail address of employees as confidential and prohibits disclosure of such information to any third parties,

3. The portions of Section 11.7 that provides that "All Costco employees shall refrain from discussing private matters of other employees. This includes topics such as, but not limited to sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers' comp. injuries . . . , etc.,"

[31] 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."

4. Section 11.9 to the extent that it provides that all information relating to our employees must not be disseminated, that payroll information may not be shared or transmitted and unauthorized removal of confidential material (as defined overbroadly by Respondent in the Agreement) from Company premises is prohibited.

WE WILL furnish all current employees with inserts for the current "Employee Agreement" that advise that the unlawful rules have been rescinded or modified or provide the language of lawful provisions, or

WE WILL publish and distribute to all you a revised "Employee Agreement" that (1) does not contain the unlawful provisions, or (2) provides the language of lawful provisions.

COSTCO WHOLESALE CORPORATION