

at the Employer's facility. Each unit is covered by a collective bargaining agreement, effective April 1, 2017 to September 30, 2021.

The Employer also has an Employee Handbook with various rules, including a Social Media Policy. The Social Media Policy is over two pages long. Underneath the main heading "GUIDELINES," the Employer defines "social media" to include

all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity website, web bulletin board or a chat room, whether or not associated or affiliated with Friendship Ridge,^[2] as well as any other form of electronic communication.

The policy is then delineated under several subheadings in bold font, including "Be respectful," "Be honest and accurate," and "Post only appropriate and respectful content." The Employer provided no specific justification for maintaining any aspect of its Social Media Policy, despite the Region repeatedly requesting that information.

ACTION

We conclude that provisions of the Social Media Policy prohibiting employees from posting online inaccurate or false information about the Employer and requiring employees to keep confidential the Employer's policies and procedures place a disproportionate adverse impact on NLRA rights and therefore violate Section 8(a)(1). We further conclude that in light of the Employer's legitimate justifications for the remaining portions of the Social Media Policy that are alleged to be unlawful, those provisions do not violate Section 8(a)(1).

I. The *Boeing* Standard for Determining Whether a Work Rule is Facially Lawful

In cases where a facially neutral employer work rule, if reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on Section 7 rights, and (ii)

² The Employer previously changed its trade name from Friendship Ridge to Brighton Rehabilitation and Wellness Center and had not yet updated the Employee Handbook at the time of this investigation.

legitimate business justifications associated with the requirement(s).³ The Board will conduct this evaluation “consistent with the Board’s ‘duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,’ focusing on the perspective of employees.”⁴ In so doing, “the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral),” and make “reasonable distinctions between or among different industries and work settings.”⁵ The Board will also account for particular events that might shed light on the purpose served by the rule or the impact of its maintenance on Section 7 rights.⁶

The Board also indicated that its balancing test will ultimately result in its ability to classify the various types of employer rules into three categories, thereby eliminating the need to conduct case-specific balancing as to certain types of rules so as to provide employers, employees, and unions with greater certainty in the future. The Board described the following categories:

- *Category 1* will include rules that the Board designates as *lawful* to maintain, either because: (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights and thus no balancing of rights and justifications is required; or (ii) even though the rule has a reasonable tendency to interfere with Section 7 rights, the potential adverse impact on those protected rights is outweighed by employer justifications associated with the rule. The Board included in this category rules requiring “harmonious relationships” in the workplace, rules requiring employees to uphold basic standards of “civility,” and rules prohibiting cameras in the workplace.
- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of Section 7 rights, and if so,

³ *Boeing Co.*, 365 NLRB No. 154, slip op. at 2–3 (Dec. 14, 2017) (expressly overruling the “reasonably construe” standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)).

⁴ *Id.*, slip op. at 3 (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967)).

⁵ *Id.*, slip op. at 15.

⁶ *Id.*, slip op. at 16.

whether any adverse impact on protected conduct is outweighed by legitimate business justifications.

- *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit Section 7 conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. The Board included as an example of a Category 3 rule one that prohibits employees from discussing wages and benefits with each other.⁷

The Board specified that these categories represent the results of the new balancing test, but are not part of the test itself.⁸

II. The Lawfulness of Various Provisions of the Employer’s Social Media Policy Under the *Boeing* Standard

Applying the Board’s new test here, as discussed below, we conclude that the portions of the Employer’s Social Media Policy under the heading “GUIDELINES” and the subheading “Be respectful” are lawful, Category 1 rules. On the other hand, we conclude that certain provisions under the subheading “Be honest and accurate” and the first paragraph under the subheading “Post only appropriate and respectful content” are unlawful, Category 2 rules. Finally, the remaining paragraphs under the “Post only appropriate and respectful content” subheading are lawful, Category 1 rules.

A. The text under the “GUIDELINES” heading does not contain an unlawful work rule

Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, residents, owners, suppliers, people who work on behalf of Friendship Ridge or “Sample’s”⁹ legitimate business interests may result in

⁷ *Id.*, slip op. at 3–4, 15.

⁸ *Id.*, slip op. at 4.

⁹ It appears that the policy’s reference to “Sample’s” is an editing error caused by the Employer using a “model” or “pre-packaged” policy where the user would insert the employer’s name at each location where “Sample” appears and then delete the word “Sample.”

disciplinary action up to and including termination in accordance with “Sample’s” Progressive Discipline Program.

We conclude that this is a lawful policy. This provision represents a form of on-duty conduct rule, and the vast majority of activity covered by such rules is unprotected. Thus, employees would not reasonably interpret this guideline to cover protected concerted activity, and therefore the guideline would have little, if any, impact on Section 7 rights.¹⁰ Indeed, even prior to *Boeing*, the Board has always been careful to note that employees would not, without more, read rules against improper conduct as applying to Section 7 activity.¹¹ Along those lines, this policy is similar to the one found lawful in *Lafayette Park Hotel* prohibiting “being uncooperative with supervisors...or otherwise engaging in conduct that does not support the Hotel’s goals and objectives,” because the rule did not reasonably tend to chill employees in their Section 7 rights.¹²

Even if there is some ambiguity in what conduct may fall within the meaning of “adversely affects” in this policy, on balance, the Employer’s interests in maintaining discipline and production outweigh any chilling effect of this provision. Employers have a significant interest in maintaining productivity and ensuring that an employee’s conduct does not affect his or her job performance or others’ job performance.¹³ As an employer in the healthcare industry, the Employer also has an

¹⁰ See Memorandum GC 18-04, “Guidance on Handbook Rules Post-*Boeing*,” at 6–7 (June 6, 2018).

¹¹ See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288–89 (1999) (finding that employees would not reasonably find a rule prohibiting “off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel” to encompass Section 7 activity).

¹² 326 NLRB 824, 825 (1998), *enfd. mem.* 203 F.3d 52 (D.C. Cir. 1999).

¹³ *Boeing Co.*, 365 NLRB No. 154, slip op. at 7 n.30 (citing *Lafayette Park Hotel*, 326 NLRB at 825 n.5, and discussing Member Hurtgen’s discussion in that case regarding how Board precedent, such as *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944), recognized that certain rules, such as no-solicitation rules, may restrict employees’ exercise of Section 7 rights “by subjecting employees to discipline or discharge if they engage in solicitation—including union solicitation—during working time,” but that the Board had permitted such restrictions for over 70 years because “[w]orking time is for work,” and “the employer’s interest in production outweighs the right of employees to engage in solicitation during working time.”)

interest in avoiding unnecessary conflict that interferes with patient care.¹⁴ Because any potential impact on protected rights by this guideline is outweighed by legitimate Employer justifications, this provision of the Employer’s Social Media policy is a lawful, Category 1 rule.

B. The text under the “Be respectful” subheading does not contain an unlawful work rule

Always be fair and courteous to fellow employees, residents, owners, suppliers or people who work on behalf of Friendship Ridge . . . Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage residents, other employees, owners or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone’s reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

The Board made clear in *Boeing* that employers may maintain work rules requiring “harmonious relationships” in the workplace and requiring employees to uphold basic standards of “civility.”¹⁵ In so holding, the Board noted that any adverse effect of such rules on Section 7 rights would be comparatively slight since a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility.¹⁶ The Board incorporated by reference the civility rules at issue in *William Beaumont Hospital* and Member Miscimarra’s dissent arguing for their legality, in which he reasoned that the vast majority of conduct covered by such rules does not implicate Section 7 at all.¹⁷

With respect to the potential adverse impact of this policy on protected rights, there is generally a distinction between rules restricting what employees can say about their coworkers (i.e., disparaging other employees), which have little to no

¹⁴ *Id.*, slip op. at 4 n.15, 11 n.48.

¹⁵ *Id.*, slip op. at 3–4, 15.

¹⁶ *Id.*, slip op. at 4 n.15.

¹⁷ See *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 21–23 (Apr. 13, 2016) (incorporated by reference in *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15).

impact on Section 7 activity, and those restricting what employees can say about their employer (i.e., disparaging the owners).¹⁸ Broad rules prohibiting disparaging the employer, absent limiting context or language, would cause employees to refrain from publicly criticizing employment problems, and therefore significantly burden protected activity.¹⁹ However, the restriction here on posts that “disparage . . . owners” appears in a sequence where the rule instructs employees not to post statements that are “malicious, obscene, threatening or intimidating.” Additionally, the Employer includes two examples in this paragraph of the types of posts that are prohibited, including “offensive posts meant to intentionally harm someone’s reputation”²⁰ or “posts that could contribute to a hostile work environment” based on someone’s protected status. In this context, employees would not reasonably interpret this provision as preventing protected concerted activity.

In contrast to the minimal impact that these types of civility rules have on Section 7 rights, employers have significant business interests in maintaining such rules. These interests include an employer’s legal responsibility to maintain a workplace free of unlawful harassment, its substantial interest in preventing violence, and its interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity, patient care (in hospitals), and other legitimate business goals.²¹

Here, the Employer’s legitimate interests in civility and harmonious interactions are apparent from the text of the rule. The Employer is not seeking to entirely prevent employees from complaining about or criticizing their terms and conditions of employment, which would interfere with protected concerted activity. Rather, the Employer is only requiring employees to be civil when they engage in such activity.

¹⁸ See Guideline Memorandum GC 18-04 at 4–5, 17.

¹⁹ See *Teletech Holdings, Inc.*, 342 NLRB 924, 931–32 (2004) (finding unlawful rule that employees were not to speak negatively about their job) (citing *Lexington Chair Co.*, 150 NLRB 1328 (1965) (holding unlawful rule prohibiting employees from criticizing company rules and policies), *enfd.* 361 F.2d 283, 287 (4th Cir. 1966)).

²⁰ The element of intent is significant, as even concerted defamatory speech to improve working conditions is unprotected if the defamation is intentional. *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S 53, 61 (1966).

²¹ *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15. See generally Guideline Memorandum GC 18-04 at 3–5.

Thus, this provision in the Social Media Policy is a lawful civility rule that belongs in Category 1.

C. The text under the “Be honest and accurate” subheading contains an unlawful work rule

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that are false about Friendship Ridge, fellow employees, owners, residents, suppliers, people working on behalf of Friendship Ridge.

We conclude that this is a Category 2 rule that warrants individual scrutiny because it is not obviously lawful or unlawful. We further conclude that this rule violates Section 8(a)(1) because its potential adverse impact on protected activity outweighs the Employer’s interests in maintaining the rule.²²

It is well-established that while employers may prohibit “maliciously false” statements, they may not prohibit and punish publication of only “inaccurate” or “false” statements.²³ Board and court precedent has long recognized that employees have the right to make a wide variety of statements in the context of a labor dispute, including inaccurate statements, as long as those statements do not constitute malicious defamation.²⁴ This reflects the congressional intent behind Section 8(c) of the Act, which is “to encourage free debate on issues dividing labor and management.”²⁵ Requiring complete accuracy in speech would thus burden protected concerted activity. Employees would have to work harder to ensure the accuracy of their complaints, and the rule would likely cause some employees to refrain from speaking out altogether, either due to uncertainty about whether their claims are

²² See Guideline Memorandum GC 18-04 at 17.

²³ See, e.g., *Cincinnati Suburban Press*, 289 NLRB 966, 975 (1988) (quoting *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132 (8th Cir. 1979)).

²⁴ *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 61 (1966).

²⁵ *Id.* at 62.

completely accurate or fear that the employer will challenge the accuracy of their statements.²⁶

At the same time, employers have a significant interest in protecting themselves, their reputations, and their employees from defamation. A business's existence, particularly with a healthcare provider, may depend on its reputation, and this interest is reflected by the availability of civil damages for the harm caused by intentional defamation.²⁷ Employers also have a legitimate, albeit lesser, interest in preventing inaccuracy, innuendo, and rumor in order to combat misinformation and protect the company's reputation. Here, the Employer's policy is not tailored to target defamatory statements or intentional misrepresentations about the Employer,²⁸ and therefore only the Employer's lesser interest in preventing its employees from publicizing non-malicious inaccuracies or rumors is to be balanced against the adverse impact on Section 7 activity.²⁹

Taking both of the preceding interests into consideration, we conclude that the rule here violates Section 8(a)(1) because it has a disproportionate impact on

²⁶ See *Cincinnati Suburban Press*, 289 NLRB at 975.

²⁷ See *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311 (2014), *enfd.* 629 Fed. Appx. 33 (2d Cir. 2015).

²⁸ Cf. *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 11–12 (Feb. 3, 2017) (Acting Chairman Miscimarra, dissenting in part) (although the Board found a rule prohibiting “misrepresenting the company’s products or services or its employees” unlawful under *Lutheran Heritage*, Acting Chairman Miscimarra in dissent argued that the rule was lawful under his test in *William Beaumont*).

²⁹ The Employer provided no argument in support of any legitimate rationale for its policy. The Employer's lack of specific and legitimate interests in maintaining this rule is further shown by its carelessness in preparing the Social Media Policy by neglecting to remove the word “Sample” and replace it with the Employer's name in multiple places throughout the policy. Cf. *Boeing Co.*, 365 NLRB No. 154, slip op. at 11 (noting that in *William Beaumont*, the Hospital's basis for its “harmonious interactions and relationships” rule was two specific incidents; one in which “a full-term newborn infant had unexpectedly died, and the ensuing investigation of that tragic event showed that the infant's death resulted in part from inadequate communication among the hospital's personnel,” and the other which involved a highly regarded obstetrics nurse resigning and the Hospital discovering that “two other obstetrics nurses had been mean, nasty, intimidating, and bullying.”).

employees' NLRA rights. This rule's inclusion of merely inaccurate or false statements has the potential to significantly chill employees' willingness to freely discuss and debate online about concerns with their terms and conditions of employment. That result would seriously undermine employee Section 7 rights. While the Employer has an interest in ensuring accuracy in such matters, the chilling effect such a rule has on debate involving labor speech runs against the principle affirmed by the Supreme Court in *Linn* that "debate . . . should be uninhibited, robust, and wide-open."³⁰ Thus, the Employer's interest in insuring the complete accuracy of all employee statements carries less weight than the negative impact such a rule is likely to have on employees' exercise of their Section 7 rights. On balance, although it presents a close question, we conclude that the Region should argue to the Board that this provision in the Social Media Policy violates Section 8(a)(1).

D. The first paragraph under the "Post only appropriate and respectful content" subheading contains an unlawful confidentiality rule

Maintain the confidentiality of Friendship Ridge private or confidential information. Do not post internal reports, policies, procedures or other internal business related confidential communications.

We conclude that this provision is an unlawful confidentiality rule. Certain types of confidentiality rules are lawful and belong in Category 1, such as those prohibiting employees from disclosing trade or business secrets, because the vast majority of conduct affected by such rules is unrelated to employee Section 7 activity.³¹ But a general prohibition on posting confidential information should be considered a Category 2 rule where employees would reasonably interpret it to include information about their terms and conditions of employment. Such a rule will violate Section 8(a)(1) where the adverse impact on Section 7 rights outweighs an employer's legitimate business justification for the rule.

³⁰ *Linn*, 383 U.S. at 58.

³¹ See *Lafayette Park Hotel*, 326 NLRB at 826 (finding lawful a rule prohibiting "divulging Hotel-private information to employees or other individuals"); *Super K-Mart*, 330 NLRB 263, 263 (1999) (a restriction on disclosing confidential information did not implicate Section 7 when terms and conditions of employment were not specifically included in the restriction). See also Guideline Memorandum GC 18-04 at 9.

With regard to the impact of this particular confidentiality rule on Section 7 activity, the requirement that employees keep confidential the Employer’s “policies, procedures” would reasonably be interpreted by employees to include information about their terms and conditions of employment.³² The provision is not limited to trade or business secrets, does not refer to residents’ medical information, and provides no other context that would indicate to employees that it does not cover information about their terms and conditions of employment.

Although requested by the Region, the Employer has provided no business justification for this broad confidentiality provision.³³ While the rule undoubtedly covers information that the Employer is legitimately entitled to keep secret, the Employer could tailor a confidentiality rule to achieve its legitimate goals without infringing on Section 7 rights. The adverse impact on Section 7 rights of such a general rule is significant: the ability to discuss wages and other terms and conditions of employment, amongst employees and with unions and other third parties, is a core right under the Act. In the absence of a compelling business justification for such a broad prohibition, we conclude that the balance should be struck in favor of protecting employee rights.³⁴ Therefore, the Region should argue to the Board that this confidentiality provision also violates Section 8(a)(1).

E. The last two paragraphs under the “Post only appropriate and respectful content” subheading are lawful work rules

Do not create a link from your blog, website or other social networking site to a website without identifying yourself as a Friendship Ridge employee and remember that being a Friendship Ridge employee means that you are taking

³² See Guideline Memorandum GC 18-04 at 17. Cf. *Cintas Corp.*, 344 NLRB 943, 943 (2005) (finding unlawful under *Lutheran Heritage* rule classifying “any information concerning the company, its business plans, its [employees] . . . and financial matters” as confidential), *enfd.* 482 F.3d 463 (D.C. Cir. 2007); *Fremont Manufacturing Co.*, 224 NLRB 597, 603–04 (1976) (finding unlawful provision in confidentiality rule that prohibited employees from “[m]aking any statement or disclosure regarding company affairs . . . without proper authorization from the company”), *enfd.* 558 F.2d 889 (8th Cir. 1977).

³³ As discussed in note 29, *supra*, the Employer failed to even replace the word “Sample” with its own name in several places throughout the Social Media Policy. The Employer maintains that the policy is currently under review by its attorney.

³⁴ See Guideline Memorandum GC 18-04 at 9-11, 17.

on the responsibility of presenting yourself in a professional manner. Express only your personal opinions.

Never represent yourself as a spokesperson for Friendship Ridge. If Friendship Ridge is a subject of the content you are creating, be clear and open about the fact that you are an employee and make it clear that your views do not represent those of Friendship Ridge, fellow employees, owners, residents, suppliers or people working on behalf of Friendship Ridge. If you do publish a blog or post online information related to the work you do or subjects associated with Friendship Ridge, make it clear that you are not speaking on behalf of Friendship Ridge. You must include a disclaimer such as “The postings on this site are my own and do not necessarily reflect the views of Friendship Ridge.”

We conclude that these two provisions of the Social Media Policy are Category 1 rules that lawfully prohibit employees from speaking on behalf of or attempting to represent the Employer online.

Work rules prohibiting employees from referring to their employer online have a significant adverse impact on core Section 7 activity. Although much online activity covered by this type of rule may be unrelated to Section 7 activity, almost any protected concerted activity taking place in public (which includes most social media activity) will involve use of an employer’s name. Public statements by employees about their workplace are “central to the exercise of employee rights under the Act,” as are social media postings among employees regarding concerns about working conditions.³⁵

On the other hand, employers have a significant interest in requiring that only authorized individuals speak for the company.³⁶ Therefore, employers may have rules

³⁵ *Schwan’s Home Service*, 364 NLRB No. 20, slip op. at 16 (Member Miscimarra, concurring) (concluding that rule requiring permission to use employer’s name was unlawful, applying his test in *William Beaumont* rather than *Lutheran Heritage*) (citing *Valley Hospital Medical Center*, 351 NLRB at 1252. See also *UPMC*, 362 NLRB No. 191, slip op. at 1, 25 (finding unlawful a rule prohibiting employees from “describing any affiliation with [the employer]” online, without the employer’s consent); *Triple Play Sports Bar & Grille*, 361 NLRB at 312–13 (discussing Facebook posts by employees about their terms and conditions of employment).

³⁶ See *UPMC*, 362 NLRB No. 191, slip op at 14 n.17 (August 27, 2015) (Member Johnson, concurring in part) (recognizing that the employer has a “legitimate interest

ensuring that employees do not, intentionally or unintentionally, make statements that can be interpreted as coming from the company, as long as it is not a total ban on use of the company's name.

Here, the rule is not an absolute ban on discussing the Employer online, since the policy acknowledges that employees may choose to post online about the Employer and provides certain instructions for doing so, such as utilizing a disclaimer. Instead, the rule would reasonably be interpreted to only restrict employees from speaking on behalf of the Employer without permission when posting online. This limited restriction is supported by the Employer's strong interest in determining who is an authorized representative or spokesperson, and therefore is a lawful rule.

Finally, the disclaimer requirement in the last sentence, when viewed in the larger context of the purpose of this rule, is lawful. The Employer is not requiring that employees use specific words for the disclaimer, only that they make it clear when posting online that the statements are their own and not mistaken as an official statement from the Employer. Therefore, any burden that the disclaimer requirement may have on Section 7 activity is outweighed by the Employer's significant interest in requiring that only authorized individuals speak for the company.

Accordingly, the Region should further process this case based on the analysis set forth above.

/s/
J.L.S.

ADV.06-CA-209251.Response.BrightonRehab2 (b) (6), (b) (7)(C)

in prohibiting non-authorized employees from acting as representatives or spokespeople" for the employer). *See also* Guideline Memorandum GC 18-04 at 14.