

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: September 22, 2003

TO : B. Allan Benson, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Hotel Employees Restaurant Employees, Local 5
Case 27-CA-18612

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This case was submitted for advice on whether the Employer's discharge of an employee for engaging in conduct not protected by Section 7 was nevertheless unlawful because the discharge was pursuant to an unlawfully over broad rule.

We conclude that the discharge was not unlawful because the Employer can establish a lawful basis for the discharge apart from the unlawful rule, i.e., the employee's conduct was unprotected.

Charging Party Kort was employed as a senior dues clerk with access to much Employer-Union information. The Employer-Union had issued the following confidentiality rule applying to all employees including Kort:

This is to inform you that NO Local 5 materials or information including items such as files, computerized information and/or any other information either verbal or written, is to leave this office, unless you have my approval.

Confidentiality is to be maintained. Any infractions well be subject to discipline up to and including discharge.

The Region has concluded that this rule is unlawfully over broad because it encompasses Section 7 conduct.¹

¹ The rule applies to all the Employer-Union's information and not just to "confidential" information. Employees thus may reasonably interpret the rule as barring the protected dissemination of employment related information. Compare Lafayette Park Hotel, 326 NLRB 824 (1998) (rule not over broad as confined to "Hotel-private information") and Super K-Mart, 330 NLRB 263 (1999) (rule not over broad as confined to "company business and documents ... confidential") with Boeing Co., Case 27-CA-16562, Advice Memorandum dated March 3, 2000 (rule barring dissemination of "information about

The Employer-Union discharged Kort for providing a list of newly elected shop stewards to outside persons, in violation of the above rule. The list of new shop stewards did not at all affect Kort's terms or conditions of employment. Kort's providing of the list thus did not constitute Section 7 protected activity. The Employer-Union therefore discharged Kort for engaging in non-protected activity in violation of an unlawfully, over broad rule.

The Board has stated that "disciplinary action taken pursuant to an unlawful no-solicitation rule is likewise unlawful . . ." in circumstances where the disciplinary action was also imposed against Section 7 activity.² However, the Board has also held that discipline pursuant to an unlawfully over broad no-solicitation rule may nevertheless be lawful if the employer can establish that the discipline was imposed for lawful reasons.³ In Daylin, the Board stated that a unlawful no-solicitation rule:

can provide no justification for the discharge of an employee who violated it. Therefore, if an employee is discharged for soliciting in violation of an unlawful rule, the discharge also is unlawful unless the employer can establish that the solicitation interfered with the employees' own work or that of other employees, and that this rather than violation of the rule was the reason for the discharge.

Id. (Emphasis added)

We have applied the Daylin principle in cases involving unlawfully over broad rules enforced against conduct other than solicitation and distribution.

In Luke Soules/ACOSTA Southwest, Case 16-CA-20317, Advice Memorandum dated June 6, 2000, the employer disciplined an employee for disclosing salary information. The employer relied upon a clearly unlawful rule barring the disclosure of wage and benefits information to individuals outside the company. The employer offered no basis for the discipline separate and apart from the rule, and the

the Company" unlawfully over broad because employees could reasonably believe that rule barred protected dissemination of information about company labor relations and/or terms and conditions of employment.)

² Saia Motor Freight Line, Inc., 333 NLRB 785, 786 (2001).

³ Daylin, Inc., 198 NLRB 281 (1972).

employee's conduct itself constituted protected activity.⁴ We therefore found the discipline, as well as the rule, to be unlawful under Daylin.

Under the rationale of Daylin, where an employer can adduce a reason not implicating Section 7 for the imposition of discipline under an otherwise admittedly unlawful rule, we conclude that the discipline itself is not unlawful merely because it was imposed under the unlawful rule. Here, Kort's disclosure of the list of newly elected shop stewards was not protected by Section 7. The Employer thus can adduce a lawful reason, not implicating Section 7 activity, to justify Kort's discipline.

Accordingly, the Region should not proceed on the allegation against Kort's.

B.J.K.

⁴ Certified Grocers of Illinois, Inc., 276 NLRB 133 (1985).