UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

KARL KNAUZ MOTORS, INC., d/b/a KNAUZ BMW

and **Case No. 13-CA-46452**

ROBERT BECKER, An Individual

Charles Muhl, Esq., Counsel for the General Counsel.
James Hendricks, Jr., Esq. and *Brian Kurtz, Esq., Ford & Harrison, LLP, Counsel for the Respondent.*

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on July 21, 2011 in Chicago, Illinois. The First Amended Complaint, which issued on July 21, 2011, and was based upon an unfair labor practice charge that was filed on November 30, 2010[1] by Robert Becker, alleges that Karl Knauz Motors, Inc., d/b/a Knauz BMW, herein called the Respondent, discharged Becker on June 22 because he engaged in protected concerted activities, in violation of Section 8(a)(1) of the Act. The Amended Complaint (as amended at the hearing) also alleges that since at least August 28, 2003 the Respondent has maintained four rules in its Employee Handbook that contain language that makes them unlawful. They are entitled: (a) Bad Attitude, (b) Courtesy, (c) Unauthorized Interviews, and (d) Outside Inquiries Concerning Employees. While admitting that from August 23, 2003 these provisions were contained in its Employee Handbook, the Respondent defends that on July 19, 2011 it notified its employees that these provisions had been rescinded, and that this allegation has been remedied.

Findings of Fact

I. Jurisdiction

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

II. The Facts

A. Becker's Termination

The Respondent operates a BMW dealership in Lake Bluff, Illinois, herein called the facility, selling new BMW automobiles, as well as used cars. The Respondent also owns an adjoining dealership that sells Land Rover automobiles, as well as other nearby dealerships that are not relevant to this proceeding. Becker began working at the Land Rover dealership in 1998; he transferred to the Respondent's BMW facility in July 2004, where he was employed until his

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2010.

termination on June 22. His immediate supervisor at the facility was Phillip Ceraulo, the general sales manager; Peter Giannini and Robert Graziano were the sales director and sales manager at the facility, and Barry Taylor was the vice president and general manager.

There are three contributing elements to the pay of the Respondent's salespersons: the first is a 25 percent commission of the profit derived from the sale of the vehicle, the profit being the difference between the selling price and the cost of the vehicle. The second element is based upon volume; in order to qualify for this bonus, the salesperson must sell twelve cars in a month, including, at least, two used cars. The final element is the Customer Satisfaction Index, which is based upon survey questionnaires sent to customers who purchased a car: "It's based on how well we perform for our clients."

The event that precipitated the situation herein was an Ultimate Driving Event, herein at times called the Event, held on June 9 to introduce a redesigned BMW 5 Series automobile. Everybody considered this to be a significant event, especially because the BMW Series 5 automobile is their "bread and butter" product. To make the event even more special, BMW representatives, rather than the Respondent's sales people, were to be present on June 9 to take the clients on test drives.

Becker testified that about a day or two prior to the Ultimate Driving Event, all the sales people met with Ceraulo in his office to discuss the event. In addition to Becker, the other sales people were Greg Larsen, Fadwa Charnidski, Steve Rayburn, Chad Holland, Howard Krause, and Dave Benck. Ceraulo told them about the Event and what was expected of them. He told them that for food, they were going to have a hot dog cart serving the clients, in addition to cookies and chips. He testified that the sales people rolled their eyes "in amazement" and he told Ceraulo, "I can't believe we're not doing more for this event." Larsen said the same thing and added: "This is a major launch of a new product and…we just don't understand what the thought is behind it." Ceraulo responded: "This is not a food event." After the meeting the sales people spoke more about it and Larsen told him that at the Mercedes Benz dealership they served hors d'oeuvres with servers. Becker also testified that Larsen said, "we're the bread and butter store in the auto park and we're going to get the hot dog cart." As to why this was important, Becker testified:

> Everything in life is perception. BMWs a luxury brand and…what I've talked about with all my co-workers was the fact that what they were going to do for this event was absolutely not up to par with the image of the brand, the ultimate driving machine, a luxury brand. And we were concerned about the fact that it would…affect our commissions, especially in the sense that it would affect…how the dealership looks and, how it's presented…when somebody walks into our dealership…it's a beautiful auto park…it's a beautiful place…and if you walk in and you sit down and your waiter serves you a happy meal from McDonald's. The two just don't mix…we were very concerned about the fact…that it could potentially affect our bottom line…

Larsen testified that the meeting with Ceraulo took place on the morning of the Event, June 9, telling them what was going to happen: "BMW comes up and they give us a tutorial of the new car, answer some questions that we may have. That's pretty much about it." There was no discussion of food being served, so Larsen asked, "what was going to be served and [I] hoped that they weren't going to use the hotdog cart." He thought that the Event should be catered: "It's our bread and butter car for BMW. I thought it should be more professionally done." There was "a little banter back and forth among the salespeople," and Becker said something about the food being offered, but he could not recollect more specifically what was said.

Ceraulo testified that prior to the Event a mailing was sent to customers and potential customers notifying them of the Event; there was no mention of food in this mailing. He and Graziano met with the sales people about the Event at their regular Saturday sales meeting on June 5. At this event they discussed the car that was being introduced, the incentives that were being offered by BMW and what was expected of the sales people. Sometime during this meeting Larsen asked what food was being served, but he could not recollect what was asked and what was said, and he cannot remember if anybody else asked about the food that was to be served.

On the day of the Event, there was the hot dog cart (with hot dogs), bags of Doritos, cookies and bowls of apples and oranges. Becker took pictures of the sales people holding hot dogs, water and Doritos and told them that he was going to post the pictures on his Facebook page.

As stated above, the Respondent also owns a Land Rover dealership located adjacent to the facility. On June 14 an accident occurred at that dealership. A salesperson was showing a customer a car and allowed the customer's thirteen year old son to sit in the driver's seat of the car while the salesperson was in the passenger seat, apparently, with the door open. The customer's son must have stepped on the gas pedal and the car drove down a small embankment, drove over the foot of the customer [2] into an adjacent pond, and the salesperson was thrown into the water (but was unharmed, otherwise).

Becker was told of the Land Rover incident and could see it from the facility. He got his camera and took pictures of the car in the pond. On June 14, he posted comments and pictures of the Ultimate Driving Event of June 9, as well as the Land Rover accident of June 14 on his Facebook page.[3] The Event pages are entitled: "BMW 2011 5 Series Soiree." On the first page, Becker wrote:

> I was happy to see that Knauz went "All Out" for the most important launch of a new BMW in years…the new 5 series. A car that will generate tens in millions of dollars in revenues for Knauz over the next few years. The small 8 oz bags of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch…but to top it all off…the Hot Dog Cart. Where our clients could attain a over cooked wiener and a stale bunn…

Underneath were comments by relatives and friends of Becker, followed by Becker's responses. On the following page there is a picture of Holland with his arm around the woman serving the hot dogs, and the following page has a picture of Holland with a hot dog. Page four shows the snack table with cookies and fruit and page 5 shows Charnidski holding bottles of water, with a comment posted by Becker:

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[2] On the following day, the salesperson met with management and, as punishment for what had happened the prior day, her "demo" vehicle was taken from her, along with gas and insurance, and in lieu thereof, she was given a $500 "demo allowance" and, until she was able to purchase her own car, the dealership gave her a used car for her use. She was told: "You need to slow down with your judgment and your decisions."

[3] At the time, Becker had approximately ninety five Facebook "Friends" fifteen or sixteen of whom were employed by the Respondent, who would be able to access his Facebook account. He testified that, at the time, his "Privacy Settings" allowed access, as well, to "friends of Friends," so that they could also see his postings.

> No, that's not champagne or wine, it's 8 oz. water. Pop or soda would be out of the question. In this photo, Fadwa is seen coveting the rare vintages of water that were available for our guests.

Page 6 shows the sign depicting the new BWW 5 Series car with Becker's comment below: "This is not a food event. What ever made you realize that?" The final two pages again show the food table and Holland holding a hot dog.

On June 14, Becker also posted the pictures of the Land Rover accident, as well as comments, on his Facebook page. The caption is "This is your car: This is your car on drugs." The first picture shows the car, the front part of which was in the pond, with the salesperson with a blanket around her sitting next to a woman, and a young boy holding his head. Becker wrote:

> This is what happens when a sales Person sitting in the front passenger seat (Former Sales Person, actually) allows a 13 year old boy to get behind the wheel of a 6000 lb. truck built and designed to pretty much drive over anything. The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a $50,000 truck. OOOPS!

There are a number of comments on the first page, one of which was from an employee of the Respondent in the warranty department, stating: "How did I miss all the fun stuff?" On the second page, under the photo of the car in the pond, Becker wrote: "I love this one…The kid's pulling his hair out…Du, what did I do? Oh no, is Mom gonna give me a time out?" Below, there were comments from two of Respondent's employees. Counsel for the General Counsel also introduced in evidence a Facebook page of Casey Felling, a service advisor employed by the Respondent, containing Becker's picture of the car in the pond with Felling's comment: "Finally, some action at our Land Rover store."

By the next day, the Respondent's representatives had learned of, and had been given copies of, Becker's Facebook postings for the BMW Event and the Land Rover accident. As a result, Ceraulo asked Becker to remove the postings, which he did, and Taylor decided that he wanted to meet with Becker on the following day to discuss the postings.

On June 16, at Taylor's request, Becker met with Taylor, Giannini and Ceraulo in a conference room at the facility. Becker testified that Taylor had the Facebook postings of the BMW Event and the Land Rover accident in his hand and tossed them to him and asked, "What were you thinking?" Becker responded that it was his Facebook page and his friends: "It's none of your business." Taylor asked, "That's what you're going to claim?" and Becker said, "That's exactly what I'm going to claim." Taylor again asked what he was thinking and Becker said that he wasn't thinking anything. Taylor said that they received calls from other dealers and that he thoroughly embarrassed all management and "all of your co-workers and everybody that works at BMW." Giannini then said, "You know, Bob, the photos at Land Rover are one thing, but the photos at BMW, that's a whole different ball game." Becker responded that he understood. Taylor then said that they were going to have to think about what they were going to do with him, and that they would contact him. Meanwhile, he was told to hand in the key to his desk. On the way out, he told Ceraulo that there was no maliciousness on his part and Ceraulo told him to let things settle down, and he left. After he got home, he called Giannini and apologized for what had occurred; Giannini testified that he does not recall receiving any apology from Becker. Becker later called William Knauz and apologized to him as well. Knauz told him that he should have apologized during the meeting with Taylor, Giannini and Ceraulo.

Notes of this June 16 meeting, taken by Giannini, state, *inter alia,* that the meeting was to discuss :

> …several negative articles on his Facebook directly pertaining to situations which happened at the Knauz Automotive Group.
>
> We were alerted to this action by receiving calls from other LR dealers who saw pictures/comments (negative) on the internet.
>
> Mr. Taylor showed Bob Becker copies of the postings and posed the question what was Bob thinking to do such a…thing to the company. (One posting was regarding the accident at Land Rover when an LR4 was driven into the lake and the second was surrounding our new 5 Series BMW Ride and Drive Event….)

Taylor testified that at the June 16 meeting he handed Becker the postings and asked why he would do that and Becker said that it was his Facebook and he could do what he wanted. He ended the meeting by telling Becker to go home and that they would review this issue and get back to him. Taylor testified that he saw both postings, but:

> I will tell you that the thing that upset me more than anything else was the Land Rover issues. The BMW issue, to me, was somewhat comical, if you will…if it had been that, that would have been it. But, no, it was the Land Rover issue.

Becker testified that he received a telephone call on June 22 from Taylor saying, "We all took a vote and nobody wants you back…and the only thing that we ask is that you never set foot on the premises." Becker said that he understood, and that was the end of the conversation. Giannini testified that on June 21 he attended a meeting with Taylor, Graziano, Ceraulo, Bill Knauz and William Madden, Respondent's President. They discussed Becker's "…posting a dangerous situation that occurred on our premises on his Facebook and, it being damaging to the company, as well as the individuals involved, personally and…of making light of it." They also discussed the fact that Becker had shown no remorse about what he did, and they decided, unanimously, that he should be terminated. I asked Giannini if there was any discussion at the June 21 meeting of Becker's Facebook postings and pictures of the June 9 Ultimate Driving Event and the hot dog cart and he responded: "Only in a comical way…that really had no bearing whatever…" He testified that they all saw the pictures of the Event and the hot dog cart and "we all concluded that…it was just somebody's personal feelings."

Ceraulo testified that during this meeting there was discussion about the June 9 Event and the hot dog cart, and the Land Rover accident, but: "The basis of the decision to terminate was the posting of the accident at the Rover store." Taylor testified that those present at the June 21 decided unanimously that Becker should be terminated because of his posting about the Land Rover accident: "it was…making light of an extremely serious situation…somebody was injured and…doing that would just not be accepted." He called Becker to inform him of his termination. Taylor testified that the discussions at that meeting "centered" on the Land Rover postings:

> …and that was, if you will, 90 percent of the discussion. Yes, the other one was mentioned because, we had that. But, again, it was nothing more than, you know hey this is part of Knauz is the hotdog cart…I mean we laughed about it. Unfortunately…that's not why we made a decision to terminate Bobby Becker.

Counsel for the General Counsel introduced into evidence a number of documents subpoenaed

from the Respondent that relate to Becker's termination. A Memorandum to Becker's personnel file, dated June 22, from Taylor states, *inter alia*:

> I told Bob [of the June 21 meeting] …that it was a unanimous decision to terminate his employment because he had made negative comments about the company in a public forum and had made light on the internet of a very serious incident (Land Rover had jumped the curbing and ended up in a pond) that embarrassed the company. I told him that we could not accept his behavior and he was not to return to work.

In a response to questions from the Board's regional office about how the Respondent learned of the Facebook postings, counsel for the Respondent stated that the manager of the Land Rover dealership received calls from two other Land Rover dealerships telling him of the postings. Counsel also attached notes written by Ceraulo and Graziano about the meeting prior to the June 9 Event. Ceraulo wrote that at the June 6 sales meeting to discuss the June 9 Event: "A couple of very brief, light hearted remarks were made by some of the sales staff at the meeting regarding the snacks being served during the event." As regards the Land Rover incident, Ceraulo stated:

> Mr. Becker had satirized a very serious car accident that occurred at our Land Rover facility on his Facebook page by posting pictures of the accident accompanied by rude and sarcastic remarks about the incident. His posting prompted a meeting on June 16th with Mr. Becker, Barry Taylor, Peter Giannini and myself to discuss his actions. The food comments were brought up in the meeting because he had coupled them with the Land Rover accident on his Facebook page. It was explained to Mr. Becker that the food comments albeit insulting to the company, were not the reason for his termination from the company. It was the postings of the Land Rover accident were unforgivable [sic] and justification for termination. When Mr. Becker was confronted with how serious his actions were regarding the Land Rover incident and asked how he could make fun of an accident that could have caused serious harm to life and limb, not to mention harming the company's reputation, he simply shrugged his shoulders in a cavalier manner and said, "OK."

Graziano's notes regarding the Saturday meeting preceding the June 9 Event states that at the meeting "A few client advisers jokingly make comments hoping we would not be using the hot dog cart." Giannini's letter regarding the June 16 meeting states that Taylor asked Becker "…what he was thinking by placing negative and discouraging comments regarding our company on the internet, specifically surrounding the incident which occurred at Land Rover involving an LR4 being driven into our lake."

B. The Employee Handbook

The Complaint herein, which issued on May 20, 2011, alleged only that Becker's termination violated Section 8(a)(1) of the Act. On July 11, 2011, Counsel for the General Counsel filed a Notice of Intent to Amend Complaint which, in addition to adding supervisors and agents to Paragraph II of the Complaint, alleged that certain portions of the Respondent's Employee Handbook, which were in effect from August 28, 2003 until July 18, 2011, violated Section 8(a)(1) of the Act. The alleged unlawful provisions are, as follows:

> (a) Bad Attitude: Employees should display a positive attitude toward their job. A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers.

> (b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.
>
> (c) Unauthorized Interviews: As a means of protecting yourself and the Dealership, no unauthorized interviews are permitted to be conducted by individuals representing themselves as attorneys, peace officers, investigators, reporters, or someone who wants to "ask a few questions." If you are asked questions about the Dealership or its current or former employees, you are to refer that individual(s) to your supervisor. A decision will then be made as to whether that individual may conduct any interview and they will be introduced to you by your supervisor with a reason for the questioning. Similarly, if you are aware that an unauthorized interview is occurring at the Dealership, immediately notify the General Manager or the President.
>
> (d) Outside Inquiries Concerning Employees: All inquiries concerning employees from outside sources should be directed to the Human Resource Department. No information should be given regarding any employee by any other employee or manager to an outside source.

On July 19, 2011, Madden and Taylor sent a Memorandum to all employees stating, *inter alia:*

> Because our employee handbook has not been updated since 2003 we have been in the process of updating and amending the KNAUZ employee manual for several months. We expect to have the finalized draft to you within the month. However, in the meantime, please be aware of the following areas in which significant changes are being made. If you have issues relating to these areas prior to the issuance of the new handbook, please see Julie Clement or Barry Taylor.
>
> - Bad Attitude- this policy is being rescinded effective immediately.
> - Courtesy- this policy is being rescinded effective immediately.
> - Unauthorized Interviews- this policy is being rescinded effective immediately.
> - Outside Inquiries Concerning Employees- this policy is being rescinded effective immediately.
>
> While there may be some additional changes and/or additions, the foregoing lets you know, in general terms, where the changes will be. Again, please let me know if you have any questions or concerns.

III. Analysis

Admittedly, Becker was terminated on June 22 for his Facebook posting(s) on June 14. The two crucial issues herein are was he fired because of both postings, the hot dog cart incident of the Event and the Land Rover accident, or only for the postings of the Land Rover accident, and were these postings protected concerted activities.

The evidence establishes that at the pre-Event sales meeting both Becker and Larsen commented about what they considered to be the inadequacy of the food being served at the Event. Larsen commented that he hoped that they weren't going to use the hot dog cart and that they should cater the Event, and Becker told Ceraulo, "I can't believe we're not doing more for

this event." Ceraulo's answer was that it was not a food event. On June 14, Becker posted his pictures and comments of the Event on his Facebook page.

Concerted activities does not require that two or more individuals act in unison to protest, or protect, their working conditions. In *Meyers II*, 281 NLRB 882, 887 (1986), the Board stated that concerted activities included individual activity where, "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." In *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969), the Court stated that the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." In *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995), the Court stated: "The fact that there was no express discussion of a group protest or 'common cause' is not dispositive…their individual actions were concerted to the extent they involved a 'logical outgrowth' of prior concerted activity. The lone act of a single employee is concerted if it 'stems from' or 'logically grew' out of prior concerted activity." As both Larsen and Becker spoke up at the meeting commenting on what they considered to be the inadequacies of the food being offered at the event, and the subject was further discussed by the salespersons after the meeting, even though only Becker complained further about it on his Facebook pages without any further input from any other salesperson, other than the Facebook pictures of Holland and Charnidski, I find that it was concerted activities, and find that it was protected concerted activities as it could have had an effect upon his compensation. While it is not as obvious a situation as if he had objected to the Respondent reducing their wages or other benefits, there may have been some customers who were turned off by the food offerings at the event and either did not purchase a car because of it, or gave the salesperson a lowering rating in the Customer Satisfaction Rating because of it; not likely, but possible.

Counsel for the Respondent, in his brief, argues that it was not protected concerted activities because neither Becker nor any other employee made Respondent aware that their complaints about the food being served was really about their commissions. However, this is not a requirement of protected concerted activities.

The final issue is whether the tone of the Facebook account of the Event rose "to the level of disparagement necessary to deprive otherwise protected activities of the protection of the Act." *Allied Aviation Service Company of New Jersey, Inc.*, 248 NLRB 229, 231 (1980). I find that it did not. Although Becker's Facebook account of the Event clearly had a mocking and sarcastic tone that, in itself, does not deprive the activity of the protection of the Act. In *Pontiac Osteopathic Hospital*, 284 NLRB 442, 452 (1987), the discriminatee, along with other employees, authored a fake newsletter employing satire and irony to mock the employer and its administrators. The administrative law judge, as affirmed by the Board, stated: "the fact that the authors used the literary techniques of satire and irony to make their point, as opposed to a more neutral factual recitation of their dissatisfaction, does not deprive the communication that they produced of any protection under Section 7 of the Act to which it might otherwise be entitled." Similarly, in *New River Industries, Inc.*, 299 NLRB 773 (1990), an employer announced that, to celebrate a partnership with another company, refreshments (ice cream) would be provided to the employees. A number of employees wrote sarcastic comments about this "reward," and two were fired for the "demeaning and degrading" comments. The administrative law judge, as affirmed by the Board, citing *Pontiac Osteopathic Hospital, supra*, found that the sarcasm employed by the employees did not exceed permissible bounds, and found the terminations unlawful. The Court, however, at 945 F.2d 1290, 1295 (4th Cir. 1991), refused enforcement finding that the matters being publicized were not related to the employees' mutual aid or protection, and was therefore not protected concerted activities. In *Timekeeping Systems,*

Inc., 323 NLRB 244, 249 (1997), the administrative law judge stated: "Unpleasantries uttered in the course of otherwise protected concerted activity does not strip away the Act's protection." Further, referring to supervisors as "a-holes" in *U.S. Postal* Service, 241 NLRB 389 (1979) and calling the company's chief executive officer a "cheap son of a bitch" in *Groves Truck & Trailer,* 281 NLRB 1194, 1195 (1986) did not lose the Act's protection, and neither did Becker in his Facebook comments on the Event.

On the other hand, I find that Becker's posting of the Land Rover accident on his Facebook account was neither protected nor concerted activities, and Counsel for the General Counsel does not appear to argue otherwise. It was posted solely by Becker, apparently as a lark, without any discussion with any other employee of the Respondent, and had no connection to any of the employees' terms and conditions of employment. It is so obviously unprotected that it is unnecessary to discuss whether the mocking tone of the posting further affects the nature of the posting. It is therefore necessary to determine whether Becker was terminated because of the Event posting, the Land Rover posting, or for both.

Becker testified that at the June 16 meeting, Taylor told him that his posting embarrassed his co-workers and everybody working at BMW, and that Giannini said, "The photos at Land Rover are one thing, but the photos at BMW, that's a whole different ball game." On the other hand, according to the testimony and notes prepared by Taylor, Giannini and Ceraulo, while the hot dog cart and the Event were discussed on June 16, they felt that it was "comical," and that they laughed about it, but that Becker was fired solely for his Land Rover Facebook posting. While I found Becker to be a generally credible witness, I also found the Respondent's witnesses to be more credible and can find no reason to discredit their testimony about the June 16 and June 21 meeting. Further, considering the nature of the June 16 meeting, I do not credit Becker's testimony that Giannini downgraded the serious nature of the Land Rover posting while stressing the seriousness of the posting of the Event. The evidence establishes, and reason dictates, that both incidents were discussed on June 16 and June 21, but that doesn't necessarily establish that both incidents caused his discharge. Rather, I find that Becker was fired on June 22 because of his Facebook posting of the Land Rover accident, and as a result, I find that Counsel for the General Counsel has not sustained his initial burden under *Wright Line*, 251 NLRB 1083 (1980).[4]

The final issue relates to paragraphs (a) through (d) of the Respondent's Employee Handbook that was in effect from about August 28, 2003 until these paragraphs were rescinded on July 19, 2011. The issues are whether these provisions violate the Act and, if they did, since they were rescinded prior to the hearing herein, whether these violations need to be remedied. The allegedly unlawful provision of paragraphs (a) and (b) state: "A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers" and "No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." Paragraphs (c) and (d) prohibit employees from participating in interviews with, or answering inquiries concerning employees from, practically anybody.

The Board has gone to great lengths in attempting to find the right balance between the exercise of employees' rights guaranteed them by Section 7 of the Act and an employer's right

[4] Counsel for the General Counsel, in his brief, argues the disparate treatment of Becker as compared to the Land Rover salesperson whose negligence cause the accident at the dealership, supports his case. I find no similarity between the two and find it not unreasonable that they resulted in different penalties.

to operate his business without unnecessary restrictions. In *Lafayette Park Hotel*, 326 NLRB 824, 825 (19978), the Board stated: "The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice even absent evidence of enforcement." In *Lutheran Heritage Village- Livonia*, 343 NLRB 646 (2004), the Board stated:

> 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.

In *Crowne Plaza Hotel*, 352 NLRB 382 (2008), the issue before the Board was the legality of a number of provisions contained in the employer's Employee Handbook, including one entitled Press Release and News Media, somewhat similar to (c) Unauthorized Interviews and (d) Outside Inquiries Concerning Employees. The provision provided that for any incident generating significant public interest or press inquiries, the release of information will be handled by the employer's general manager: "Under no circumstances will statements or information be supplied by any other employee." In finding this rule unlawful, the Board stated that the term "significant public interest" is broad enough to encompass a labor dispute, such as a strike, and "A rule that prohibits employees from exercising their Section 7 right to communicate with the media regarding a labor dispute is unlawful." The Board further found that the sentence quoted above, "would reasonably be construed as prohibiting all employee communications with the media regarding a labor dispute," and that this restriction violated Section 8(a)(1) of the Act. In the *NLS Group*, 352 NLRB 744, 745 (2008), the employer had the discriminatee sign an employment agreement containing the following confidentiality language:

> Employee also understands that the terms of this employment, including compensation, are confidential to employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.

The Board found this provision unlawful as it reasonably could be construed to prohibit activity protected by Section 7: "Employees would reasonably understand that language as prohibiting discussions of their compensation with union representatives."

Paragraphs (c) and (d) clearly would be understood to restrict and limit employees in the exercise of their Section 7 rights, and Respondent does not appear to argue otherwise. If employees complied with the dictates of these restrictions, they would not be able to discuss their working conditions with union representatives, lawyers, or Board agents. I therefore find that the restrictions contained in these paragraphs violate Section 8(a)(1) of the Act. The restrictions contained in Paragraphs (a) and (b) are not as obvious. As they do not explicitly restrict Section 7 rights, their legality is determined by the three criteria set forth in *Lutheran Heritage Village, supra.* As parts (2) and (3) have not been established, the test is whether employees would reasonably construe Paragraphs (a) and (b) to prohibit their exercise of Section 7 rights. In *Albertson's, Inc.*, 351 NLRB 254, 259 (2007), the Board stated: "In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of Section 7 rights, the Board will give the work rule a reasonable

reading and refrain from reading particular phrases in isolation." In dismissing the allegations regarding certain work rules, the Board stated that they did not believe that the cited rules could reasonably be read as encompassing Section 7 activity. Citing *Lafayette Park Hotel, supra,* the Board stated: "To ascribe such a meaning to these words is, quite simply farfetched. Employees reasonably would believe that these rules were intended to reach serious misconduct, not conduct protected by the Act."

Based upon the above cited cases, I recommend that the allegation regarding Paragraph (a) be dismissed. I believe that the one sentence prohibition would reasonably be read to protect the relationship between the Respondent dealer and its customers, rather than to restrict the employees' Section 7 rights. As was frequently mentioned during the hearing, BMW is a top of the line automobile with, I imagine, an appropriate sticker cost. A dealer in that situation, I believe, has the right to demand that its employees not display a bad attitude toward its customers. On the other hand, I find that Paragraph (b) violates Section 8(a)(1) of the Act in that employees could reasonably interpret it as curtailing their Section 7 rights. In *University Medical Center,* 335 NLRB 1318, 1321 (2001) the allegedly offending rule prohibited "insubordination…or other disrespectful conduct towards service integrators and coordinators and other individuals." The Board found that this rule violated the Act as employees could reasonably believe that their protected rights were prohibited by this rule. In its finding, the Board stated that a problem with this rule was the word disrespectful: "Defining due respect, in the context of union activity, seems inherently subjective."

Although I have found that Paragraphs (b), (c) and (d) violate the Act, Counsel for the Respondent alleges that as the Respondent rescinded these provisions prior to the hearing, there should be no finding of a violation and that there is no need for a remedy. While, at first glance, one would assume that the Respondent's rescission effectively withdrew the unlawful provisions negating the violation, certain requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) were not met. In that case, the Board stated that to relieve itself of liability for unlawful conduct by repudiating the conduct, "such repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from proscribed illegal conduct." The Board further stated: "Such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights." [5] While the Respondent notified all of its employees of the rescission and did not commit any other unfair labor practices, the Respondent merely told the employees that the offending provisions were rescinded, without a further explanation and without telling the employees that in the future it would not interfere with their Section 7 rights. I therefore find that Paragraphs (b), (c) and (d), although subsequently rescinded, violate Section 8(a)(1) of the Act.

Conclusions of Law

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

2. The provisions contained in Paragraphs (b), (c) and (d) of its Employees' Handbook from about August 23, 2003 to July 19, 2011 violate Section 8(a)(1) of the Act.

[5] It should be noted that in *Claremont Resort, Inc.*, 344 NLRB 832 (2005), the Board while finding that a rule about "negative conversations" violated the Act, stated: "We do not necessarily endorse all the elements of *Passavant."*

3. The Respondent did not further violate the Act as alleged in the Amended Complaint.

The Remedy

Having found that Respondent's rescission of the offending paragraphs does not satisfy the Board's requirements for rescission, I recommend that it be required to post the attached notice, and to notify the salespersons electronically, that it has rescinded these provisions of its Employee Handbook and that it will not interfere with the employees' Section 7 rights. However, as all the unit employees were informed of the July 19, 2011 rescission, it is unnecessary to specifically order the Respondent to, again, rescind these provisions.

Upon the foregoing findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended[6]

ORDER

The Respondent, Karl Knauz Motors, Inc., d/b/a Knauz BMW, its officers, agents, successors and assigns, shall

1. Cease and desist from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights as guaranteed them by Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its Lake Bluff facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 13, 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 physically posting the 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. 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 August 23, 2003.

(b) 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.

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[6] 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.

[7] 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."

IT IS FURTHER ORDERED that the allegation that the termination of Robert Becker violated Section 8(a)(1) of the Act be dismissed.

Dated, Washington, D.C., September 28, 2011.

Joel P. Biblowitz
Administrative Law Judge

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 or enforce the following rules that had been contained in our Employee Handbook: "(b) Courtesy," "(c) Unauthorized Interviews," and "(d) Outside Inquiries Concerning Employees."

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

KARL KNAUZ MOTORS, INC., d/b/a KNAUZ BMW
(Employer)

Dated_____ **By**_____
(Representative) **(Title)**

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

209 South LaSalle Street, Suite 900
Chicago, Illinois 60604-1219
Hours: 8:30 a.m. to 5 p.m.
312-353-7570.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 312-353-7170.