

2007 Colorado Bar Association, Labor and Employment Section

*November 15, 2007
Denver Colorado*

**APPLICATION OF THE
NATIONAL LABOR RELATIONS ACT
TO THE NON-UNION SETTING:
CURRENT ISSUES**

**Michael Josserand, Regional Director,
Region 27, National Labor Relations Board**

*Outline Assistance
L. Joseph Ferrara
Attorney, NLRB, Region 27
Denver, CO*

I. Introduction: Current Issues involving the NLRA in the Non-Union Workplace

Application of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (“NLRA” or “Act”), to the non-union workplace is especially relevant and important today. The major reason is quantitative - - the sheer number of affected workers. In 2004, non-unionized employees comprised 87.5% of the total wage and salary workforce, 92% of private sector jobs. See C. Gifford (ed.), *Directory of U.S. Labor Organizations - - 2005 Edition* (BNA Books, 2005) at 1. On the qualitative side, while NLRA issues in the union context are important and often attract greater public attention, the non-union work place generates legal questions equally as challenging and meaningful as those in union settings.

(1) A summary of relevant aspects of employees’ protected rights under the Act is first presented.

(2) What are the boundaries that an employer must observe in adopting work rules that don't interfere with employees' protected rights under the Act?

and,

(3) What are the substantive and remedial limits of the Act relevant to employees engaging in activities involving such issues as employment discrimination based on considerations such as age, race or sex at the workplace?

II. Summary of Relevant Aspects of Employees' Protected Rights under the NLRA

A. Overview on Protected, Concerted Activity ("PCA")

Section 7 of the Act grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing. These rights recognized in Section 7 are union-oriented in nature and, as relevant, apply to a non-union workplace where employees are interested in seeking union representation. The emphasis today will be on discussion of the impact of Section 7 in workplaces that we will presume will remain non-union. Section 7 also confers upon employees broad rights applicable to the **non-union** context "**to engage in other concerted activities for the purpose of . . . other mutual aid or protection . . .**"¹ Protection of these rights is secured by **Section 8(a)(1)** of the Act, which makes it an unfair labor practice for an employer to "**interfere with, restrain, or coerce**" employees in the exercise of Section 7 rights.

For employee conduct in non-union contexts to fall within the scope of Section 7, it must be **both "concerted" and** engaged in for the **purpose of "mutual aid or protection."** These are separate and related elements, but **both** must be present for the activity to be considered protected under the Act. See *Meyers Industries*, 281 NLRB 882, 884, 885 (1986), *enfd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 556 (1988) ("*Meyers II*"); *Holling Press, Inc.*, 343 NLRB No. 45, slip op. at 2 (2004). The fact that activity is concerted does not create a presumption that is for mutual aid or protection. *Holling Press*, slip op. at 3. *Holling Press* is of significance since it did away with the presumption from prior Board cases that if an activity was concerted there was a mutual aid or protection object.

¹ Section 7 also gives employees the right to "refrain from any and all" such protected activity.

B. “Concerted Activity”

- When a **group** of employees **bands together in concert**, they are engaging in concerted activity. An **individual** employee acting **with or on the authority** of other employees is also engaged in concerted activity.

- Moreover, even the action of an **individual** employee **not** involving prior authorization by other employees or typical group activity **can** be treated as concerted under certain circumstances. A non-exhaustive list of examples includes situations when an individual employee - -

- Engages in conduct seeking to **initiate or to induce or to prepare for group action**. *Meyers II*, 281 NLRB at 887.
- Engages in activity, which, in its inception, involves only **speaking to even one other listening employee**. *Id.*
- Brings a **truly group complaint** to the attention of management. *Id.* at 886-87.
- Raises a **question or comment of common concern at a group meeting** with management attended by other employees. *Whittaker Corp.*, 289 NLRB 933, 933-34 (1988).
- Engages in activity that is a “**logical outgrowth**” of preceding or contemporaneous group activity. *Mike Yurosek & Son*, 306 NLRB 1037, 1038 (1992), supplemented and reaff'd. 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995).

Merely griping to an employer over one’s own **personal** complaints or acting solely by or **on behalf of oneself** will **not** be treated as concerted activity.

C. “For the Purpose of . . . Mutual Aid or Protection”

This element of PCA involves the **purpose** of the concerted activity. The key term in the phrase “mutual aid or protection” is “**mutual.**” When employees (or an employee) act **concertedly** over a **workplace subject** pertaining to such areas as the terms and conditions of their employment, they are engaged in PCA. But even when concertedness is present, if the purpose of the concerted activity is only one employee’s personal claim, it will **not** be treated as an object of **mutual** aid or protection and, hence, will not be deemed PCA. *Holling Press*,

slip op. at 2. A brief summary of common subjects of PCA relevant to this Panel discussion follows.

D. Common Subjects of PCA

In general, employees are free under Section 7 to **discuss** together the various **terms and conditions of their employment, such as wages and benefits**. This may include discussion of **existing** terms and conditions, those in the process of being **altered** by the employer, or desirable **future improvements or changes** in working conditions. Employee dissatisfaction over low **wages** is a common form of “grist on which PCA feeds.” *Whittaker Corp.*, 289 NLRB at 934, citing *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976). The same would apply to any **benefits** available to employees. Employees may **concertedly seek** from their employer **improvement** in their working terms and conditions or **protection** from an adverse change in the same. *Holling Press*, slip op. at 2. Employees may also concertedly **complain** about their dissatisfaction with working terms or conditions or other problems at work affecting them collectively. If an employer takes action to restrain or punish such PCA, it violates Section 8(a)(1).

III. Limits on Employer Rules

A. Traditional Rules for Solicitation and Distribution

In general employees have the right to solicit support for any activity protected by Section 7 in both work and non work areas on non work time. Distribution can be prohibited in work areas. *Republic Aviation*, 324 U. S. 793 (1945). Talk is normally not solicitation. *Jennie-O Foods*, 301 NLRB 305 (1991), But See, *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1219 (2004).

Off duty employees have a presumptive right to access to exterior non – work areas and parking lots of the employer’s premises to engage in Section 7 activities. An employer rule limiting off-duty employee access to the interior and working areas of the plant will be valid if the rule has been clearly disseminated to employees and applies equally to all employees seeking plant access and not simply to those seeking access for union activity. *Tri County Medical Center, Inc.*, 222 NLRB 1089 (1976)

Non employees can normally be barred from an employer’s property in the absence of exceptional circumstances. The party seeking to remove a non employee must have a valid property interest under state law and state must not provide for access by the non employee to the property. *Lechmere Inc.*, 502 U. S. 527 (1992).

B. A Modern Context of Solicitation: Employer E-mail Rules

The underpinnings of *Republic Aviation* are that the full exercise of Section 7 rights requires that employer property interests yield to the extent necessary to sufficiently accommodate the exercise of Section 7 rights. Those balances were developed by the Board and the courts in the context of an industrial workplace. Currently the workplace of employees in many industries is an electronic one. Are new balances required to assure that Section 7 rights are adequately protected in this electronic workplace?

On March 27, 2007 the Board held oral argument in *Guard Publishing Co., d/b/a The Register-Guard*, 36-CA-8743, the issue presented in *Register-Guard* is whether employees have a statutory right to communicate with each other using employer e-mail systems. The General Counsel urged the Board to find that employee use of e-mail is nothing more than a modern substitute for the traditional forms of oral solicitation or leafleting at work. The General Counsel urged the Board to apply the tests of *Republic Aviation* to balance employee rights to communicate with each other through this new electronic medium. The test suggested by the General Counsel as the appropriate balance is that employee Section 7 rights include the right to communicate with each other at work about union-related and other protected topics, subject to reasonable employer regulation such as restricting such activity to nonworking time.² General Counsel urged that the Guard's policy is unlawful because it bans all union-related solicitation or distribution through this medium. The Guard argued that the Board should apply the concepts of property rights which the Board has applied to other property such as telephone systems and copy facilities to allow regulation of its computer equipment.

Regardless of the outcome in *Register-Guard*, many existing e-mail rules violate Section 8(a)(1) on traditional rules of disparate treatment and the Board has regularly found violations in such situations. For example in *Register-Guard* the employer's e-mail rule permitted incidental personal use but not use on behalf of "outside organizations". The ALJ determined that the employer could not lawfully allow some personal use but restrict personal use on behalf of the union. *Guard Publishing Co., d/b/a The Register-Guard*, 36-CA-8743, 2002 WL 336963 (N.L.R.B., Div. of Judges, 2002). See also, *Media General Operations, Inc., d/b/a Richmond Times Dispatch*, 346 NLRB no. 11 (2005) enfd. mem. No. 06-1023 (4th Cir. 2007).

² The issue of whether an employer e-mail system is arguably a work place could arise in a variety of factual settings. See generally, Josseland, *The Impact of Employer Rules that Limit E-Mail Use and Internet Access*, The Colorado Lawyer, Vol. 29, No. 10, pg. 7 (2000).

C. Employer Rules that otherwise Limit Protected Concerted Activities

In general, while employers enjoy wide latitude in making and enforcing work, shop, or plant rules, the National Labor Relations Board (“Board”) in recent years has spelled out limits that apply to such rules in order to protect Section 7 rights. See *Martin Luther Memorial Home, Inc.*, 343 NLRB No. 75 (2004); *Lafayette Park Hotel*, 326 NLRB 824 (1998).

In general:

- The appropriate inquiry in such cases is whether a rule **would reasonably tend to chill** employees in the exercise of their Section 7 rights. *Martin Luther*, slip op. at 1, citing *Lafayette Park*, 326 NLRB at 825.
- In analyzing the lawfulness of a challenged rule, the Board must give the rule a **“reasonable reading,” “refrain from reading particular phrases in isolation,” and “not presume improper interference with employee rights.”** *Martin Luther*, slip op. at 1.
- If a rule **explicitly restricts** activities protected by Section 7, it is **unlawful** under the Act. *Id.*
- If a rule does **not** explicitly restrict Section 7 rights, a violation is dependent on showing one of the following:
 - Employees **would reasonably construe** the language to prohibit Section 7 activity. *Id.*, slip op. at 2.
 - The rule was promulgated **in response to** Section 7 activity. *Id.*
 - The rule has been **applied to restrict or punish** the exercise of Section 7 activities. *Id.*

A number of hypothetical cases are presented next, exploring the application of these general principles to specific problems.

C. Discussion of Hypothetical Cases on Non-Union Employer Work Rules

(**Note:** Relevant Board and court decisions containing possible answers to the following hypothetical cases here and in Section IV are found in **Section VI** below.)

Case No. 1 - - *Traditional Rules prohibiting solicitation and distribution.*

XYZ Widgets, Ltd., is concerned about union organization in its plant and the disruption that the solicitation of authorization cards has caused. XYZ had not anticipated that any union would ever be interested in organizing its workforce. XYZ announces a rule to its employees that provides as follows:

There can be no union solicitation during work hours or in work areas. Distribution of written materials is not allowed on company property.

Shortly after the rule Jones the employee XYZ believes to be behind the union campaign is discharged based on the complaint of employee Smith that Jones was interrupting work by discussing the union with Smith at his work station.

Would your answer be different if Jones had asked Smith to sign a union card at Smith's work station?

- **Case No. 1 - - *Rules prohibiting discussion of wages and salaries***

XYZ Widgets, Ltd., indicates that it has become concerned about possible "disruption" in its workplace caused by growing discussions among its employees about the different wage and salary rates paid for various jobs in the plant. In response, the Company has adopted a new written work rule that provides: "Pursuant to the Company's privacy and confidentiality policies, employees are prohibited from discussing with, or divulging to, other employees their own or any other employee's wage or salary rates. Violation of this rule will be treated as grounds for suspension or termination."

- *Is mere maintenance of this rule violative of the Act - - even if it is not applied to discipline any employee?*

- **Case No. 2 - - *Rules prohibiting discussion of "proprietary information"***

ABC Electronic Gizmotics, Inc., a telecommunications firm in a highly competitive market, states that it is serious about protecting its proprietary data on how it runs its business and makes its products. Its "Employee Handbook" sets forth a "Nondisclosure Rule" regarding such proprietary information. "Proprietary Information" is defined to include such matters as "business plans," "marketing plans," "copyrights,"

“patents,” “trade secrets,” and the like. One item in this list of definitions refers to: “customer and employee information, including organizational charts and databases.” The Rule prohibits disclosure of all such proprietary information covered by these definitions because it “could hurt the company competitively or financially.”

■ Is maintenance of the non-disclosure rule, insofar as it prohibits discussion or disclosure of “customer and employee information, including organizational charts and databases,” lawful under the Act? Does this phrase prohibit discussion among employees about their wages, hours, and working conditions or their disclosure of such information to a union trying to organize them? Would it be unlawful for the employer to enforce this against employees for discussing wages?

● **Case No. 3 - - Rules prohibiting abusive, threatening, harassing, or profane language**

AAA Harmonious Village, Inc., an assisted care community for the elderly, asserts that it seeks to maintain a “harmonious,” “civil,” and “ordered” workplace for the benefit of both the employees and the residents. To promote that goal, it recently adopted two work rules prohibiting: (a) “abusive, threatening, or profane language in the presence of, or directed towards, a supervisor, another employee, a doctor, a resident, a visitor, or any other person on Company property;” and (b) “harassment of supervisors or other employees.”

■ Does maintenance of either of these two rules violate the Act? Is it “harassment” of another employee if one employee interested in changes in working terms and condition solicits support from the other employee, who happens to be opposed to or uninterested in such change? Could either of these rules be enforced in such a way as to violate the Act?

● **Case No. 4 - - Rules prohibiting “uncooperative” behavior or other conduct not in accord with the employer’s “goals and objectives” and requiring employees to leave the premises after completion of their shifts**

The Golden Widget Hotel explains that it is appropriate to maintain a civil and well-mannered workplace. It says that it is concerned about employee conduct that could upset guests or cause public “scenes.” Accordingly, it has promulgated two work rules that provide: (a) “The following conduct is unacceptable: Being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Hotel’s goals and objectives;” (b) “Scheduling and Attendance: Employees are required to leave the

premises immediately after the completion of their shift and are not to return until the next scheduled shift.”

■ Does maintenance of either rule violate the Act? With respect to the “Cooperation” Rule above (Rule(a) above), what if one of the Hotel’s “goals and objectives” is to remain non-union? Does the “Scheduling and Attendance” Rule (Rule (b) above) prohibit off-duty employees access to parking lots, gates, and other outside, nonworking areas?

IV. Substantive and Remedial Limits under the NLRA on Non-Union Employees’ Complaints about Employment Discrimination or Safety Issues

A. Introduction

In addition to concerns over wages or work rules, non-unionized employees may also find the need to complain of **employment discrimination** based on such civil rights factors as race, color, religion, sex, or national origin (hereafter referred to as “employment discrimination”), or of **safety issues** in the workplace.

In general, employment discrimination, **standing alone**, is **not** a violation of the Act unless there is actual evidence, as opposed to mere speculation, that there is a connection between the allegedly discriminatory conduct and interference with or restraint of employees’ Section 7 rights. *Jubilee Mfg. Co.*, 202 NLRB 272, 272-73 (1973), *enfd. sub nom. Steelworkers v. NLRB*, 504 F.2d 271 (D.C. Cir. 1974). In *Jubilee Mfg.*, the Board **rejected** a theory that employment discrimination “inherently” impairs Section 7 rights. *Id.*

On the other hand, where such discrimination **does interfere with or restrain** employees’ exercise of protected rights, a violation of section 8(a)(1) will be made out. *Jubilee Mfg.*, 202 NLRB at 273. For example, when employees band together to protest employment discrimination, their concerted effort is protected Section 7 activity:

“The desire for [non-discriminatory employment practices] relates to a condition of employment affecting the entire [work force]; it is not personal to the [the individual employees involved].”

Id., quoting *NLRB v. Tanner Motor Livery, Ltd.*, 419 F. 2d 216, 218 (9th Cir. 1969). Thus, concerted activity intended to remedy employment discrimination is protected under the NLRA. *Id.*; see also *Holling Press*, slip op. at 4.

Similar rules apply with respect to concerted activity protesting **unsafe** conditions in the workplace. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 13-16 (1962) (non-union employees who join together and act in concert to complain about lack of heat in plant engaged in PCA). Employees may also make complaints to federal and state safety and health agencies over such dangers in the workplace (e.g., federal OSHA and MSHA (mining)).

Both types of such employee conduct **are subject to the *Meyers II* rules** on concerted conduct and mutual aid or protection object summarized above.

Employees interested in filing complaints over employment discrimination need to be aware of the different forums for such complaints and the different relief that may be awarded. Under Section 10(c) of the Act, the Board is authorized to take **affirmative action**, including **reinstatement with back pay**, to effectuate the Act's purposes. 29 U.S.C. § 160(c). Other typical affirmative NLRA relief includes requiring the employer's posting of notices concerning the unfair labor practice and its expunging of disciplinary material from files. **Preliminary injunctive relief** from an employer's unfair labor practices is potentially available under Section 10(j) of the Act. 29 U.S.C. §160(j).

Broader relief to aggrieved employees is available pursuant to federal civil rights law.³ Under section 706(g) of **Title VII of the Civil Rights Act of 1964**, 42 U.S.C. § 2000e et seq., courts hearing EEO suits may issue **injunctive and other affirmative** relief (including reinstatement and backpay). 42 U.S.C. § 2000e-5(g). Other diverse equitable relief may be granted as well, such as ordering promotions, freezing promotions, expunging adverse material from personnel files, ordering transfers or reassignments, or ordering sensitivity training for supervisors. Additionally, unlike relief under the NLRA, courts have ordered the award of **"front pay"** in Title VII cases. (Front pay is pay for positions to which discriminatees would have been promoted but for the employment discrimination, and is owing and due until the denied positions are actually conferred.) Section 706(k) of Title VII (42 U.S.C. § 2000e-5(k)), unlike the NLRA, also permits the award of **attorney's fees**, a considerable factor in such cases.

B. Discussion of Hypothetical Cases on Non-Union Employee Complaints about Employment Discrimination or Safety

- **Case No. 1 - - *Employee's Complaint to a State Civil Rights Agency***

Jane Doe believed that a male supervisor was sexually harassing her at work. After an unsuccessful complaint to management, she filed an unlawful employment practice charge with her state civil rights agency.

³ Civil rights relief may also be available through state or local agencies, as is the case in Colorado and the City and County of Denver.

Jane solicited another female employee to provide testimony in support of her charge before the state agency. The Employer then fired Jane for attempting to coerce the other employee into supporting an “unsubstantiated” charge of sexual harassment.

■ Do employee complaints to state and federal agencies or forums over employment conditions (as opposed to complaining directly to the employer itself) count as potential PCA? Did Jane engage in concerted activity when she sought another employee’s support for her state charge? If it was concerted activity, was the purpose of that activity mutual aid or protection? Did the employer violate the NLRA by firing Jane? Would conclusions be any different if a number of victimized employees and their supporters had been complaining together about sexual harassment in the workplace? In this scenario, is Jane left without a remedy outside the NLRA?

● **Case No. 2 - - Employee’s Complaints about Safety Defects**

John Truckin, a truck driver at a quarry, complained unsuccessfully to his employer about safety defects in the braking system of the truck he was required to drive. John then complained to a state transportation agency about the employer’s failure to repair the defects. After experiencing a solo accident in his truck at work, partly due to the bad brakes, John refused an order to drive the truck until and if the employer fixed the brakes. He was fired for refusing a work order.

■ Did John engage in PCA and was his termination violative of the Act? If the NLRA does not afford relief under these facts, does John have any other possible remedies?

● **Case No. 3 - - Nurses Concerned about the Welfare of their Patients**

Barbara J. and Ellen S. are nurses working at the Bright and Sunny Nursing Home. The Home’s air conditioning system is inadequate and, during a hot summer week, conditions at the Home became oppressively hot and unpleasant. The elderly residents were suffering from the heat, and a few almost passed out. Barbara and Ellen, after discussing the problem, each called the state Health Care Hotline to report the situation, an action which could impact the Home’s license.

Consider two scenarios regarding their calls: (a) The two tell the Hotline that they’re concerned about the effect of the situation on the residents and are not making personal complaints for themselves; or (b) The two tell the Hotline they’re concerned about the residents and that the oppressive conditions are making it very difficult for them and other

caregivers to carry out their job duties. When the Home learns of the calls, it suspends both nurses for making a complaint to an outside party without first bringing it to the attention of management in order to afford the Home an opportunity to rectify any situation requiring such action.

Under either scenario of the hotline calls, did the nurses engage in PCA and is the Home's discipline of them lawful under the NLRA? Are there remedies outside the NLRA on these facts?

- **Case No. 4 - - Employees Filing a Lawsuit against their Employer**

WXYZ Trucking had an oral agreement with its trucking employees to pay them at a certain wage rate under specified circumstances. Because business was slumping and that, according to the employer, represented an excusing "special circumstance," the employer failed to pay the full wage rates for six months in a row. Three employees, acting in good faith, then filed a civil action against the employer for breach of contract, seeking compensatory damages of \$15,000 for lost wages and punitive damages of \$25,000. When the employer learned of the suit, it sent the three employees warning letters to withdraw the claim for punitive damages or be discharged. The employees refused and were fired. Their suit was subsequently dismissed by the court.

- Is the filing of a civil action against an employer by a group of employees PCA? Would the result be any different if the employees had filed the suit out of malice or in bad faith? Is their discharge legal under the NLRA because the court dismissed their suit? Do they have any other remedies for nonpayment of wages owed?

V. Conclusion

This discussion addressed only some of the many NLRA issues arising in the non-union setting. Given the size of that sector in the American workforce and unions' continuing desire to expand their representation of such employees, there will be no shortage of issues and developing law in this context.

VI. Answer Guide to Hypothetical Cases

The following decisions provided the basis, loosely or otherwise, for the hypothetical cases above. A number of these decisions are split, with strong dissents, which may aid participants in fully examining all aspects of the issues presented.

A. Solicitation Distribution Hypothetical

1. **Case No. 1:** Generally, a rule implemented in response to union activity is invalid. *Friendly Ice Cream Corp.*, 254 NLRB 1206, enforcement denied, 677 F.2d 170 (1st Cir. 1982). This rule is facially invalid since it explicitly refers to **union solicitations**. The rule is also invalid because it prohibits solicitation during **working hours**. Employees must be permitted to solicit on lunch and break periods even if those periods are paid time. *Our-Way, Inc.*, 268 NLRB 394 (1983). Discipline or discharge for violation of an invalid rule violates Section 8(a)(1) even if the conduct could have been reached with a valid rule.

A. Work Rule Hypothetical Cases

1. **Case No. 1:** Generally, employers may **not** promulgate, maintain or enforce work rules prohibiting employees from discussing wages and salaries. See, e.g., *Automatic Screw Products Co.*, 306 NLRB 1072, 1072-73 (1992), and authorities cited. The same rationale applies to rules that prohibit employees from discussing other issues of dissatisfaction with their terms and conditions of employment, e.g., work rules or discipline issued to them or other employees. Rule prohibiting disclosure of “confidential or sensitive information concerning the Company or any of its employees” rule went on to describe confidential information as including disciplinary information, grievance/complaint information, performance evaluations, salary information, salary grade, types of pay increases, employee termination data. *Double Eagle Hotel & Casino*, 341 NLRB 112, 114 (2004). Employees also have a protected right to seek to enlist the support of the employer’s customers regarding complaints about terms and conditions of employment. *Guardsmark, LLC*, 344 NLRB No. 97 (Rule prohibiting employees “dissatisfied with any ...aspect of their employment” from “register[ing] complaints with any representative of the client.”

2. **Case No. 2:** Generally, employers **are free** under the NLRA to adopt and maintain work rules prohibiting the unauthorized dissemination of genuine proprietary information. See, e.g., *Mediaone of Greater Florida*, 340 NLRB 277, 278-79 (2003). In *Mediaone*, the Board found **lawful** the **maintenance** of a specific proprietary information rule much like the one in the hypothetical, concluding that it did not reasonably tend to chill employees’ exercise of Section 7 rights, did not explicitly restrict Section 7 activity, and that employees would not reasonably construe the language to do so. *Id.* The Board made clear, however, that **enforcement** of such a rule against employees for engaging in protected discussion of wages and salaries or in other Section 7 activity **would violate** the Act. *Id.* at 279. See also *Lafayette Park*, 326 NLRB at 826 (same analysis: maintenance of rule generally prohibiting disclosure of employer’s “private” or confidential information **not** violative).

3. **Case No. 3:** Employing the same analysis discussed in Case 2 above, the Board found maintenance of similar rules **lawful** in *Martin Luther*, slip op. at 1-4.

4. **Case No. 4:** In *Lafayette Park*, the Board found a similar “cooperation” rule **lawful**. 326 NLRB at 825-26. It also found the “leave the premises” rule **unlawful**, since it denied off-duty employees access and entry to outside nonworking areas, which could be used for Section 7 activity. *Id.* at 828-29, citing *Tri-County Medical Center*, 222 NLRB 1089 (1976). See also *Double Eagle Hotel and Casino*, 341 NLRB 112, 113 (2004) (finding **unlawful** overbroad work rule prohibiting discussion of “Company issues” in all “public areas”).

B. Employment Discrimination/Safety Issues`

1. **Case No. 1:** Employees’ **concerted** complaints about working conditions, through channels outside the immediate employer-employee relationship to state or federal agencies or judicial or legislative forums, are a recognized form of PCA. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566-68 (1978). While Jane **did** engage in concerted activity, its purpose was **not** mutual aid or protection but her **own personal** civil rights complaint and, thus, her activity was **not** PCA. See *Holling Press*, slip op. at 2-5. Jane is free to pursue her state civil rights action, which may make it unlawful for an employer to retaliate against an employee for filing such a complaint.

2. **Case No. 2:** John did **not** engage in either concerted activity or activity aimed at mutual aid or protection. His concern was an individual, personal complaint **outside** the NLRA’s protection. See *Meyers II, supra*. John has a number of other remedies: the state transportation agency, MSHA, federal surface transportation law, and a cause of action under state law. As is the similar case with Jane, some of this law forbids retaliation for making complaints about unsafe working conditions.

3. **Case No. 3:** If the nurses, who **are** acting concertedly, complain **only** about their **patients’** welfare, their conduct will **not** be deemed for mutual aid or protection; if, however, they also complain about the effect of the oppressive conditions on their **own** ability to do their **jobs**, their complaints **will be** treated as PCA. See *Waters of Orchard Park*, 341 NLRB 642, 643-44 (2004). In the first scenario, the nurses may have outside relief under any state whistleblower’s statute.

4. **Case No. 4:** Employees’ suing their employer over a matter involving their terms and conditions of employment **is** PCA, so long as the suit is brought in good faith, not malice. See *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365-66 (1975), supplemented 227 NLRB 792 (1977). The suit’s dismissal does **not** change this outcome. *Id.* The employees may also be able to seek relief from their state department of labor and employment.

