830 F.3d 542
United States Court of Appeals,
District of Columbia Circuit.

QUICKEN LOANS, INC., Petitioner
v.
NATIONAL LABOR RELATIONS BOARD, Respondent

No. 14-1231
|
Consolidated with No. 14-1265
|
Argued March 8, 2016
|
Decided July 29, 2016

Synopsis

Background: Company providing mortgage loan services petitioned for review of decision of National Labor Relations Board (NLRB), 2014 WL 5590503, finding that company had violated the National Labor Relations Act by forbidding its mortgage bankers for using or disclosing personnel information without prior written consent or to criticize publicly the company or management. NLRB cross-petitioned for enforcement.

Holdings: The Court of Appeals, Millett, Circuit Judge, held that:

[1] NLRB properly determined that company's confidentiality rule directly impinged on right of employees to self-organize and bargain collectively, and

[2] NLRB properly determined that company's non-disparagement rule directly impinged on right of employees to self-organize and bargain collectively.

Petition denied; cross-petition granted.

West Headnotes (17)

[1] **Labor and Employment**
Object or purpose of activity in general

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)2 Nature of Dispute and Purpose of Activity
231Hk1354 Object or purpose of activity in general

Right of employees to self-organize and bargain collectively necessarily encompass employees' rights to communicate with one another and with third parties about collective action and organizing a union, as well as to seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

1 Cases that cite this headnote

[2] **Labor and Employment**
Nature of Activity

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)3 Nature of Activity
231Hk1370 In general

Right of employees to self-organize and bargain collectively protects employees' rights to discuss organization and the terms and conditions of their employment, to criticize or complain about their employer or their conditions of employment, and to enlist the assistance of others in addressing employment matters. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

1 Cases that cite this headnote

[3] **Labor and Employment**
Interference, restraint, or coercion in general

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1439 Interference, restraint, or coercion in general

Whether workplace rules run afoul of the right of employees to self-organize and bargain collectively turns on an objective inquiry into whether the rules would reasonably tend to chill employees in the exercise of their statutory rights. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

Cases that cite this headnote

[4] **Labor and Employment**

Interference, restraint, or coercion in general

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1439 Interference, restraint, or coercion in general

A workplace rule could on its face restrict the right of employees to self-organize and bargain collectively by, for example, explicitly barring employees from complaining to third parties about their working conditions. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

Cases that cite this headnote

[5] **Labor and Employment**

Interference, restraint, or coercion in general

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1439 Interference, restraint, or coercion in general

Even if facially unobjectionable, a workplace rule is invalid as unreasonably chilling lawful employee activity if: (1) employees would reasonably construe the language to prohibit the right of employees to self-organize and bargain collectively; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of right of employees to self-organize and bargain collectively. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

1 Cases that cite this headnote

[6] **Labor and Employment**

Interference, restraint, or coercion in general

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1439 Interference, restraint, or coercion in general

In asking whether a workplace rule either expressly infringes on right of employees to self-organize and bargain collectively or would reasonably be understood to do so, courts focus on the text of the challenged rule; that means that the mere maintenance of a rule likely to chill such activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice even absent evidence of enforcement of the rule by the employer. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

2 Cases that cite this headnote

[7] **Labor and Employment**

Practices of Employer

231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)1 In General
231Hk1669 Exclusive, Concurrent, and Conflicting Jurisdiction
231Hk1676 Practices of Employer
231Hk1676(1) In general

National Labor Relations Board (NLRB) is entrusted with implementing the NLRA and determining, in the first instance, when an employer's workplace rules run afoul of those provisions. National Labor Relations Act §§ 7, 8, 29 U.S.C.A. §§ 157, 158(a)(1).

Cases that cite this headnote

[8] **Labor and Employment**

Deference to Board

231H Labor and Employment
231HXII Labor Relations
231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
231HXII(J)1 Review by Courts
231Hk1869 Deference to Board

231Hk1870 In general
The determinations of the National Labor Relations Board are entitled to considerable deference and will be sustained as long as the Board faithfully applies the legal standards, and its textual analysis of a challenged workplace rule is reasonably defensible and adequately explained.

Cases that cite this headnote

[9] **Labor and Employment**
Interference, restraint, or coercion in general
231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1439 Interference, restraint, or coercion in general
National Labor Relations Board (NLRB) properly determined that workplace confidentiality rule of company providing mortgage loan services, which prohibited employees from sharing information contained in personnel files, including personnel lists, employee rosters, and employee contact information, directly impinged on right of employees to self-organize and bargain collectively in violation of the NLRA; prohibition directly interfered with employees' ability to discuss their wages and other terms and conditions of employment with their fellow employees or union organizers. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

1 Cases that cite this headnote

[10] **Labor and Employment**
Interference, restraint, or coercion in general
231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1439 Interference, restraint, or coercion in general
In determining the validity of a workplace rule, the National Labor Relations Board (NLRB) is merely required to determine whether employees would reasonably construe the disputed language to prohibit the right of employees to self-organize and bargain collectively and not whether employees have thus construed the rule. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

1 Cases that cite this headnote

[11] **Labor and Employment**
Interference, restraint, or coercion in general
231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1439 Interference, restraint, or coercion in general
The objective inquiry by the National Labor Relations Board (NLRB), in determining the validity of a workplace rule, into whether employees would reasonably construe the disputed language to prohibit the right of employees to self-organize and bargain collectively allows the NLRB to block rules that might chill the exercise of employees' rights by cowing the employees into inaction, rather than forcing the NLRB to wait until that chill is manifest, and then try to undertake the difficult task of dispelling it. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

1 Cases that cite this headnote

[12] **Labor and Employment**
Intent or motive in general;pretext
231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1440 Intent or motive in general; pretext
In determining the validity of a workplace rule, the National Labor Relations Board's concern about discouraging protected employee activities exists just the same whether or not that is the intent of the employer.

Cases that cite this headnote

[13] **Labor and Employment**
Interference, restraint, or coercion in general
231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1439 Interference, restraint, or coercion in general

National Labor Relations Board (NLRB) could reasonably find, in determining that workplace rule prohibiting employees from sharing information contained in personnel files violated right of employees to self-organize and bargain collectively, that company's publication on its recruiting website of general description of mortgage banker position and generic salary and benefits packages available to successful applicants could not be construed by employees as relaxing rule's explicit and absolute prohibition against employees disclosing all manner of personnel information, including actual employee pay and benefits. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

Cases that cite this headnote

[14] **Labor and Employment**
Interference, restraint, or coercion in general
231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1439 Interference, restraint, or coercion in general

National Labor Relations Board (NLRB) properly determined that non-disparagement rule of company providing mortgage loan services, which barred mortgage bankers from publicly criticizing or disparaging company or its products, directly impinged on right of employees to self-organize and bargain collectively in violation of the NLRA; rule directly forbid from employees from expressing negative opinions about the company, its policies, and its leadership in almost any public forum. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

Cases that cite this headnote

[15] **Labor and Employment**
Interference, restraint, or coercion in general
231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1439 Interference, restraint, or coercion in general

Having concluded that employees would reasonably read a workplace rule to prohibit the right of employees to self-organize and bargain collectively, the National Labor Relations Board (NLRB) has no need to consider the absence of enforcement in concluding that the rule violates the NLRA. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

Cases that cite this headnote

[16] **Labor and Employment**
Unfair practices in general
231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)5 Evidence in General
231Hk1718 Admissibility of Evidence
231Hk1720 Unfair practices in general

National Labor Relations Board (NLRB) did not abuse its discretion, in determining that workplace rule prohibiting employees from sharing information contained in personnel files violated right of employees to self-organize and bargain collectively, by excluding evidence regarding whether employee actually read the employment agreement before filing charge, subjectively believed agreement forbade protected conduct, believed she had violated the rules, or discussed the agreement with supervisors; governing legal inquiry was whether rule on its face or as understood by a reasonable employee would chill the exercise of rights. National Labor Relations Act § 7, 29 U.S.C.A. § 157.

Cases that cite this headnote

[17] **Labor and Employment**
Scope and extent of review in general
Labor and Employment
Harmless error
231H Labor and Employment
231HXII Labor Relations
231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
231HXII(J)1 Review by Courts
231Hk1866 Scope and extent of review in general
231H Labor and Employment
231HXII Labor Relations
231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
231HXII(J)1 Review by Courts
231Hk1884 Harmless error
The evidentiary rulings of the National Labor Relations Board (NLRB) must be sustained unless they were an abuse of discretion and unduly prejudiced the complaining party; reversible prejudice exists only if admission of the excluded evidence would have compelled or persuaded a contrary result.

Cases that cite this headnote

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Attorneys and Law Firms

William M. Jay Washington, DC, argued the cause for petitioner. On the briefs were William D. Sargent, Robert J. Muchnick, Christopher R. Kazanowski, Detroit, MI, and S. Libby Henninger, Washington, DC.

Gregoire F. Sauter, Attorney, National Labor Relations Board, argued the cause for respondent. On the brief were Richard F. Griffin, Jr., General Counsel, John H. Ferguson, Associate General Counsel, Linda Dreeben, Deputy Associate General Counsel, and Kira D. Vol, Supervisory Attorney.

Before: Srinivasan, Millett, and Wilkins, Circuit Judges.

Opinion

***545** Millett, Circuit Judge:

Quicken Loans, Inc., a company that provides mortgage loan services, imposes a number of workplace rules on its mortgage bankers. As relevant here, Quicken forbids its mortgage bankers to use or disclose a broad range of personnel information without Quicken's prior written consent or to criticize publicly the company and its management. The National Labor Relations Board determined that those rules run afoul of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, because they unreasonably burden the employees' ability to discuss legitimate employment matters, to protest employer practices, and to organize. Because there was nothing arbitrary or capricious about that decision and no abuse of discretion in the Board's hearing process, we deny Quicken's petition for review and grant the Board's cross-application for enforcement.

I

A

[1] **[2]** Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" 29 U.S.C. § 157. Those rights "necessarily encompass[ ]" employees' rights to communicate with one another and with third parties about collective action and organizing a union, *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978), as well as to "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978). Section 7 thus protects employees' rights to discuss organization and the terms and conditions of their employment, to criticize or complain about their employer or their conditions of employment, and to enlist the assistance of others in addressing employment matters. *See, e.g.*, *Beth Israel Hospital*, 437 U.S. at 491, 98 S.Ct. 2463; *Stanford Hospital and Clinics v. NLRB*, 325 F.3d 334, 343 (D.C.Cir.2003); *Tradesmen, Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C.Cir.2002). Employers that "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by Section 7 commit an unfair labor practice, 29 U.S.C. § 158(a)(1), and are subject to civil sanction by the Board, *id.* § 160(a).

[3] **[4]** Whether workplace rules run afoul of Section 7's protections turns on an objective inquiry into " 'whether the rules would reasonably tend to chill employees in the exercise' of their statutory rights." *Adtranz ABB Daimler–Benz Transp. v. NLRB*, 253 F.3d 19, 25 (D.C.Cir.2001) (quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)). Unreasonable chilling of lawful employee activities can take two forbidden forms. First, a rule could on its face restrict protected Section 7 activity by, for example, explicitly barring employees from complaining to third parties about their working conditions. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374–375 (D.C.Cir.2007).

[5] Second, even if facially unobjectionable, a rule is invalid if (i) " 'employees would reasonably construe the language to prohibit Section 7 activity' "; (ii) the rule " 'was promulgated in response to union activity' "; or (iii) " 'the rule has been applied to restrict the exercise of Section 7 rights.' " *Guardsmark*, 475 F.3d at 374 (quoting *Martin Luther Memorial Home*, 343 NLRB 646, 647 (2004)).

***546** **[6]** In asking whether a workplace rule either expressly infringes Section 7 rights or would reasonably be understood to do so, courts "focus[ ] on the text of the challenged rule." *Guardsmark*, 475 F.3d at 379. That means that the " 'mere maintenance' of a rule likely to chill section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice 'even absent evidence of enforcement' " of the rule by the employer. *Id.* (quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced sub nom. Lafayette Park Hotel v. NLRB*, 203 F.3d 52 (Table) (D.C.Cir.1999)).

B

Quicken provides mortgage loan services through branch offices located across the United States. The company employs approximately 1,700 mortgage bankers who process loan applications, negotiate the terms of mortgage loans, and provide other financial services to Quicken's clients. As a condition of employment, each Quicken mortgage banker is required to sign a "Mortgage Banker Employment Agreement" that contains several mandatory rules and restrictions. Two of those rules are at issue here: the Proprietary/Confidential Information Rule ("Confidentiality Rule") and the Non-Disparagement Rule.

As relevant here, the Confidentiality Rule defines "Proprietary/Confidential Information" to include "non-public information relating to or regarding the Company's business, personnel, customers, operations or affairs." J.A. 32. The Rule further defines confidential "Personnel Information" as "including, but not limited to, all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses." *Id.* at 33.

For all of that information, mortgage bankers must "agree that" they will (i) "hold and maintain [it] in the strictest of confidence"; (ii) "not disclose, reveal or expose" that information to "any person, business or entity"; (iii) not use "any [of that] [i]nformation for any purpose except as may be authorized by the Company in writing"; and (iv) "take all necessary precautions to keep [that] [i]nformation secret, private, concealed and protected from disclosure[.]" J.A. 22.

The Non-Disparagement Rule, for its part, provides that:

> The Company has internal procedures for complaints and disputes to be addressed and resolved. You agree that you will not (nor will you cause or cooperate with others to) publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image (including, but not limited to, any statements made via websites,

> blogs, postings to the internet, or emails and whether or not they are made anonymously or through the use of a pseudonym). You agree to provide full cooperation and assistance in assisting the Company to investigate such statements if the Company reasonably believes that you are [the] source of the statements. The foregoing does not apply to statutorily privileged statements made to governmental or law enforcement agencies.

J.A. 29.

C

Lydia Garza began working as a mortgage banker in Quicken's Scottsdale, Arizona office in 2006, and signed a copy of the Employment Agreement containing both the Confidentiality and Non-Disparagement Rules. In 2011, she resigned and ***547** took a job with one of Quicken's competitors. Quicken then sued Garza for violating no-contact/no-raiding and no-competition provisions of the Employment Agreement. Garza responded by filing an unfair labor practice charge with the National Labor Relations Board alleging that the Confidentiality and Non-Disparagement Rules interfered with Quicken employees' Section 7 rights, in violation of the National Labor Relations Act. The Board's Regional Director accepted Garza's charge, and filed an unfair labor practice complaint against Quicken alleging that the challenged Rules violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).

A Board administrative law judge conducted an evidentiary hearing on the Regional Director's complaint. During that hearing, the ALJ excluded as irrelevant certain evidence that Quicken wanted to introduce concerning Garza's understanding of the challenged rules. Specifically, Quicken sought to introduce evidence about (i) whether Garza had read the Employment Agreement prior to signing it, (ii) what conduct Garza believed the Agreement prohibited, (iii) whether Garza believed that she had violated the contested Rules, and (iv) whether Garza had discussed the Agreement with her managers or supervisors at the company. The ALJ also barred as irrelevant evidence concerning the process by which Quicken recruited employees and the types of personnel information that were available on the Company's internal website.

The ALJ subsequently sustained the Regional Director's complaint, finding that both of Quicken's Rules violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), because they interfered with Quicken employees' Section 7 rights. With respect to the Confidentiality Rule, the ALJ had "no doubt" that the Rule's prohibition against disclosing personnel information, including "all personnel lists, personal information of coworkers * * * [and] personnel information such as home phone numbers, cell phone numbers, addresses and email addresses" would "substantially hinder employees in the exercise of their Section 7 rights." J.A. 160. That is because the rule flatly forbade employees "to discuss with others, including their fellow employees or union representatives, the wages and other benefits that they receive," and "the names, wages, benefits, addresses or telephone numbers of other employees." *Id.*

The ALJ also concluded that the Non-Disparagement Rule was invalid because it prohibited employees from "publicly criticiz[ing], ridicul[ing], disparag[ing] or defam[ing] the Company or its products, services, [or] policies * * * through any written or oral statement." J.A. 160. "[E]mployees are allowed to criticize their employer and its products as part of their Section 7 rights," the ALJ explained. *Id.* So any mortgage banker reading those restrictions "could reasonably construe them as restricting his rights to engage in protected concerted activities." *Id.*

The ALJ accordingly ordered Quicken to rescind both the Confidentiality and Non-Disparagement Rules.

The Board affirmed the ALJ's ruling as to the Non-Disparagement Rule, but amended the remedy for the Confidentiality Rule. With respect to the latter, the Board required that Quicken "rescind only the offending language" on which the ALJ had relied—that is, the portions of the Rule prohibiting disclosure of "non-public information relating to or regarding * * * personnel" and "personnel information, including * * * all personnel lists, rosters, personal information of co-workers, * * * handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email ***548** addresses[.]" J.A. 156, 162. The Board did not disturb the ALJ's evidentiary rulings.

II

[7] **[8]** Our review of the Board's decision is limited. Congress has entrusted the Board with implementing Sections 7 and 8(a)(1) of the Act and determining, in the first instance, when an employer's workplace rules run afoul of those provisions. *See Adtranz*, 253 F.3d at 25. The Board's determinations accordingly "are entitled to considerable deference," *id.* and will be sustained as long as the Board " 'faithfully applies' " the legal standards, and its textual analysis of a challenged rule is " 'reasonably defensible' " and adequately explained, *Guardsmark*, 475 F.3d at 374 (quoting *Adtranz*, 253 F.3d at 25). *See Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C.Cir.2007).

A

[9] The Board properly determined that Quicken's Confidentiality Rule, as applied to personnel information, directly impinged upon employees' Section 7 rights. The very information that portion of the Rule explicitly forbids employees to share—personnel lists, employee rosters, and employee contact information—has long been recognized as information that employees must be permitted to gather and share among themselves and with union organizers in exercising their Section 7 rights. *See, e.g.*, *International Union of Electrical, Radio and Machine Workers v. NLRB*, 502 F.2d 349, 351 (D.C.Cir.1974) (Board may require company to provide union "with a list of names and addresses of its employees" as "necessary and appropriate to guarantee that rights conferred by section 7 will not be denied[.]"); *see also Albertsons, Inc.*, 351 NLRB 254, 259 (2014) (confidentiality rule cannot prevent employee from providing list of employee names to union organizers); *HTH Corp.*, 356 NLRB 1397, 1421 n. 19 (2011) ("[T]he names and addresses of fellow employees cannot" be "held confidential" because that would "inhibit[ ] employees from engaging in conduct protected by Sec. 7."), *enforced sub nom. Frankl v. HTH Corp.*, 693 F.3d 1051 (9th Cir.2012); *Ridgley Manufacturing Co.*, 207 NLRB 193, 196–197 (1973) ("[M]emorizing the names of fellow employees from the timecards for the purpose of contacting them concerning union representation" was "protected activity" under the Act.), *enforced sub nom. Ridgley Manufacturing Co. v. NLRB*, 510 F.2d 185 (D.C.Cir.1975).

So too for "handbooks" and other types of workplace information contained in "personnel files." J.A. 33. Quicken's blanket prohibition directly interferes with mortgage bankers' ability to discuss their wages and other terms and conditions of employment with their fellow employees or union organizers, which is a core Section 7 right. *See, e.g.*, *Cintas Corp.*, 482 F.3d at 467–468; *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208 (5th Cir.2014) ("A workplace rule that forbids the discussion of confidential wage information between employees * * * patently violates [the Act.]") (internal quotation marks and alterations omitted); *NLRB v. Northeastern Land Services, Ltd.*, 645 F.3d 475, 478, 483 (1st Cir.2011) (striking down rule that prevented discussion of the "terms of * * * employment, including compensation"); *Lily Transportation Corp.*, 362 NLRB No. 54, 1 & n.3 (2015) (barring confidentiality rule prohibiting disclosure of "employee information maintained in confidential personnel files" because "employees would reasonably conclude that this language barred them from disclosing information about wages and other terms and conditions of employment").

[10] Quicken's objections to the Board's determination all fail. *First*, Quicken contends that the Board should have ***549** considered whether (i) Quicken employees actually construed the Confidentiality Rule to prohibit Section 7 activity, (ii) Garza herself had understood the Rule that way during her employment, or (iii) Quicken had ever enforced the Rule to interfere with Section 7 activity. *See* Pet. Br. 24–25. Those arguments, however, fail to come to grips with the governing law. The validity of a workplace rule turns not on subjective employee understandings or actual enforcement patterns, but on an objective inquiry into how a reasonable employee would understand the rule's disputed language. Thus "[t]he Board is merely required to determine whether 'employees *would reasonably* construe the [disputed] language to prohibit Section 7 activity, * * * and not whether employees *have* thus construed the rule." *Cintas Corp.*, 482 F.3d at 467; *see Guardsmark*, 475 F.3d at 375–376; *Lafayette Park Hotel*, 326 NLRB at 824, 825 (1998) ("[T]he mere maintenance" of rules that "are likely to have a chilling effect on Section 7 rights" violates the Act "even absent evidence of enforcement."), *enforced sub* *nom. Lafayette Park Hotel v. NLRB*, 203 F.3d 52 (Table) (D.C.Cir.1999).

[11] **[12]** That objective inquiry serves an important prophylactic function: it allows the Board to block rules that might chill the exercise of employees' rights by cowing the employees into inaction, rather than forcing the Board to "wait[ ] until that chill is manifest," and then try to "undertake the difficult task of dispelling it." *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), *enforced sub nom. Flex Frac Logistics*, 746 F.3d 205. And the Board's concern about discouraging protected employee activities exists just the same "whether or not that is the intent of the employer." *Id.* Quicken's complaints about the Board's analysis thus ignore the National Labor Relations Act's proactive role in safeguarding employees' rights. *See id.* (noting the "Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights").

Second, Quicken argues (Pet. Br. 26–28) that the Board overlooked the company's "substantial and legitimate interest" in protecting its non-public information in a business that is "highly-regulated, competitive, and involves substantial and significant confidential and proprietary information." *Id.* at 28. But by carefully confining its decision to the Confidentiality Rule's operation on the types of personnel information protected by Section 7, J.A. 162, the Board left portions of the Rule protecting proprietary information intact, and it afforded Quicken adequate room to revise and "narrowly tailor[ ] the * * * rule to achieve its goal without interfering with section 7 activity," *Guardsmark*, 475 F.3d at 376. *See Cintas Corp.*, 482 F.3d at 470; *see also Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088 (D.C.Cir.2003) (upholding rule that was narrowly tailored to achieve the employer's purpose without chilling protected activity). Indeed, the Board openly invited Quicken to revise its Confidentiality Rule to contain "the language of lawful rules." J.A. 162. In any event, Quicken's claim that some *sub-portion* of the covered information could properly be protected does nothing to legitimate the blunderbuss sweep of its existing rule.

[13] *Third*, Quicken argues that the Board ignored that the Rule's "disputed language only protects *non-public* information of co-workers." Pet. Br. 29. That matters, Quicken says, because the company "widely publicize[d] information related to what it pays employees, its compensation structure, benefits plans, and virtually all other terms and conditions of employment," so (in Quicken's view) no employee would construe the Rule as preventing the disclosure of similar information to co-workers or union organizers. *Id.* at 30. The ***550** problem with that argument is that the so-called "widely publicized" personnel information to which Quicken refers is little more than a general description on its recruiting website of the mortgage banker position and the generic salary and benefits packages that might be available to successful applicants. *See id.* at 4–6. It beggars belief—or so the Board could reasonably find—that Quicken's mortgage bankers would view the company's publication of such generalized information as relaxing the Rule's explicit and absolute prohibition against employees disclosing all manner of "personnel information," including *actual* employee pay and benefits. J.A. 33.

Quicken also claims that contact information for mortgage bankers would not be understood to be "non-public" because it is available on an *internal* company website. Pet. Br. 3–4. That makes no sense. Information that is only available internally is, by definition, not "public."

Quicken next argues that identities, work addresses, and work phone numbers of its mortgage bankers are available through publicly accessible third-party databases. *See* Pet. Br. 3–4. That misses the point. The Section 7 problem is that Quicken cannot forbid employees to *themselves* discuss and disclose personnel information bearing on their investigation and discussion of employment conditions or organizational efforts. Nor can Quicken compel employees to hazard potentially career-imperiling guesses about whether the Employment Agreement—that Quicken unilaterally drafted and required them to sign—means what it says and says what it means.

B

[14] The Non-Disparagement Rule similarly flies in the teeth of Section 7. That Rule, by its plain terms, bars mortgage bankers from "publicly criticiz[ing], ridicul[ing], disparag[ing] or defam[ing] the Company or its products, services, policies, directors, officers, shareholders, or employees" in any written or oral statement, including on the internet or even in private emails. J.A. 29. The Board quite reasonably found that such a sweeping gag order would significantly impede mortgage bankers' exercise of their Section 7 rights because it directly forbids them to express negative opinions about the company, its policies, and its leadership in almost any public forum. *See Guardsmark*, 475 F.3d at 374–375 (striking down rule that only allowed employees to complain internally); *Hills and Dales General Hospital*, 360 NLRB No. 70, 2 (2014) (invalidating a workplace rule requiring employees to represent the company "in a positive and professional manner" because it would "discourage employees from engaging in protected public protests of unfair labor practices, or from making statements to third parties protesting their terms and conditions of employment"); *KSL Claremont Resort, Inc.*, 344 NLRB 832, 832 (2005) (invalidating rule that prohibited "negative conversations about associates or managers" because employees would reasonably construe it to bar "discussing with their coworkers complaints about their managers that affect [their] working conditions").

Quicken claims (Pet. Br. 38) that employees would read the Rule as welcoming public complaints because the Rule references the company's "internal procedures for complaints and disputes to be addressed and resolved," J.A. 29. Quite the opposite. Pointing employees to an *internal* process for venting their complaints underscores that—as the Rule plainly says—employees may not air their grievances in public.

Quicken also notes that the Rule contains an exception for "statutorily privileged" ***551** statements that are "made to government or law enforcement agencies." J.A. 29. That only digs the hole deeper. The very narrowness of the exception emphasizes to employees that disclosures to nongovernmental personnel—like co-workers and union officials—are forbidden.

Quicken's next argument is that mortgage bankers are supposed to know that they can pursue their disputes with the company "in *public* forums" because another section of the Employment Agreement contains a clause identifying the courts in which suits relating to the Agreement and other employment matters must be brought. Pet. Br. 38 (citing J.A. 30). It should go without saying that an employer's selection of the courts in which it can be sued is not the same at all as permitting workers to voice their employment complaints publicly.

[15] Finally, Quicken stresses the absence of evidence that Quicken actually enforced the Non-Disparagement Rule to restrict mortgage bankers' rights under the National Labor Relations Act. That is beside the point. The absence of enforcement could just as readily show that employees had buckled under the Employment Agreement's threat of enforcement. "[H]aving concluded that employees would reasonably read the rule to prohibit [the exercise of Section 7 rights], the Board had no need to consider the absence of enforcement" in concluding that the rule violates the Act. *Guardsmark*, 475 F.3d at 377; *see id.* at 374 (The "mere maintenance" of a challenged rule can violate Section 8(a)(1) "even absent evidence of enforcement[.]").

III

[16] Quicken also lodges a procedural complaint, arguing that the Board erroneously excluded its evidence about whether Garza (i) actually read the Employment Agreement prior to filing her charge; (ii) subjectively believed that the Agreement forbade protected conduct; (iii) believed she had violated the Confidentiality and Non-Disparagement Rules; or (iv) discussed the Agreement with her managers or supervisors at Quicken. Quicken also sought to introduce evidence of its recruitment methods for mortgage bankers and the types of employment information available on the internal company website.

[17] The Board's evidentiary rulings must be sustained unless they were an abuse of discretion and unduly prejudiced the complaining party. *See Salem Hospital Corp. v. NLRB*, 808 F.3d 59, 67–68 (D.C.Cir.2015). Reversible prejudice exists only if admission of the excluded evidence would have " 'compel[led] or persuade[d] to a contrary result.' " *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n. 10 (D.C.Cir.1999) (quoting *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C.Cir.1988)).

The Board's evidentiary determination was not even close to an abuse of discretion. Because the governing legal inquiry was whether Quicken's Rules on their face or as understood by a reasonable employee would chill the exercise of Section 7 rights, Quicken's proffered evidence about how Garza in particular understood the Rules or reacted to them was off the mark. *See Cintas Corp.*, 482 F.3d at 467 (Evidence of "employees' actual interpretation of the confidentiality rule" is not "required to support the

Board's conclusion that the rule is overly broad and thus unlawful[.]").

Likewise, Quicken's argument about the relevance of its recruitment methods and the availability of some personnel information on its internal website simply recycles the already-rejected claim that those crumbs of information cured the Confidentiality Rule's plain prohibition on protected employee communications.

In sum, because Quicken's arguments misconceive the relevancy of information ***552** under the governing legal test, the evidence's exclusion was both proper and entirely non-prejudicial.

IV

The Board appropriately determined that employees would reasonably construe the sweeping prohibitions in Quicken's Confidentiality and Non-Disparagement Rules as trenching upon their rights to discuss and object to employment terms and conditions, and to coordinate efforts and organize to promote employee interests. Accordingly, the Board properly concluded that Quicken's adoption and maintenance of those Rules ran afoul of Sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 157, 158(a)(1). The Board's evidentiary rulings were also well within the bounds of its discretion. We therefore deny Quicken's petition for review and grant the Board's cross-application for enforcement.

So ordered.

All Citations

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