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Baylor University Medical Center *and* Dora S. Camacho. Case 16–CA–195335

March 16, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On February 12, 2018, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions with supporting arguments, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed a cross-exception and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The complaint in this case alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by including three provisions in severance agreements offered to numerous employees. The judge found two of the provisions unlawful, but not the third. For the reasons that follow, we find all three provisions lawful, and we therefore dismiss the complaint.

The Respondent offered departing employees the opportunity to sign individual separation agreements (the agreement) in exchange for severance pay and postemployment benefits to which they otherwise would not be entitled.[2] The Respondent did not require anyone to sign the agreement; any decision to sign was voluntary. In fact, Charging Party Dora S. Camacho declined the offer. The agreement included a "No Participation in Claims" provision, stating that the signatory "agrees that, unless compelled to do so by law, [he or she] will not pursue, assist or participate in any Claim brought by any third party against [Baylor] or any Released Party." The agreement also included a "Confidentiality" provision, which stated that the signatory "agrees that [he or] she must . . . keep secret and confidential and not . . . utilize in any manner all . . . confidential information of [Baylor] or any of the Released Parties made available to [the signatory] during [his or] her . . . employment, . . . including . . . information concerning operations, finances, . . . employees, . . . personnel lists; financial and other personal information regarding . . . employees."[3]

In analyzing the Respondent's actions, the judge applied the analysis set forth in *Boeing Co.*, 365 NLRB No. 154 (2017), which is used to assess the lawfulness of mandatory work rules relating to employees' terms and conditions of employment.[4] The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining the "No Participation in Claims" provision because (1) the provision banned individuals from voluntarily assisting Board agents in their investigations of unfair labor practice charges against the Respondent, and (2) the Respondent "effectively failed to offer a legitimate rationale" for this ban. The judge also found that the "Confidentiality" provision violated Section 8(a)(1) because (1) employees would reasonably construe it as banning protected discussions of wages, hours, and working conditions, and (2) the Respondent's stated confidentiality concerns did not outweigh the provision's limitation on rights under the Act.

We disagree with the judge's application of *Boeing* to the agreement at issue. *Boeing* applies only where an employer allegedly promulgates or maintains an unlawful work rule. See id., slip op. at 14–16. Here, the General Counsel did not allege that the "No Participation in Claims" and "Confidentiality" provisions themselves were unlawful, only that the "issuance" or mere proffer of the agreement containing these provisions to departing employees was unlawful. Moreover, we find that the agreement differs from a work rule in two fundamental ways. First, the agreement is not mandatory; signing it was not a condition of continuing employment, as it was optional and applied only in the event of separation. Second, the agreement exclusively pertains to postemployment activities and has no impact on terms and conditions of employment or any accrued severance pay credit or benefits arising out of the employment relationship that the Respondent would be obligated to pay regardless of whether a departing employee signed. Moreover, we find no merit in the General Counsel's allegation that the Respondent's proffer of the voluntary separation agreement

[1] The judge inadvertently referred to Charging Party Dora Camacho as "Doris" in the case caption of the underlying decision, which we have corrected. In addition, the judge at one point referred to her Confidential "Separation" Agreement and General Release as a Confidential "Settlement" Agreement and General Release. This error is immaterial and does not affect the decision.

[2] The Respondent's proffered agreements were not identical, but they all contained the provisions at issue here.

[3] The agreement also included a "Non-Disparagement provision," which the judge found lawful. We agree that this provision is lawful, but we do so for the reasons set forth in our discussion of the other provisions.

[4] The hearing was held before the Board issued its decision in *Boeing*. After *Boeing* issued, and upon a notice to show cause, the parties in this case declined to reopen the record to provide additional evidence.

was unlawful. The complaint does not allege that Charging Party Camacho or anyone else offered this agreement was unlawfully discharged for conduct protected by the Act,[5] or that the Respondent's proffers were made under any circumstances that would tend to infringe on the separating employees' exercise of their own Section 7 rights or those of coworkers.[6]

In these circumstances, we find that the mere proffer of severance agreements containing the three challenged provisions did not reasonably tend to interfere with, restrain, or coerce employees in the exercise of rights under the Act.[7] Accordingly, we reverse the judge in part and dismiss the complaint.[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 16, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Megan McCormick and *David Foley, Esqs.,* for the General Counsel.

Amber M. Rogers, Esq. (Hunton & Williams, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Fort Worth, Texas, on November 28, 2017. The complaint alleged that the Baylor University Medical Center (Baylor or the Respondent) violated the National Labor Relations Act (the Act) by tendering unlawful separation agreements to its employees. On the entire record, including my observation of the witnesses' demeanors, and after considering the parties' briefs, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

At all material times, Baylor has operated a health care system in Texas. Annually, it derives revenues in excess of $250,000, and purchases and receives goods and materials valued in excess of $5000 directly from out-of-state points. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of §2(2), (6), and (7) of the Act.

[5] Although Camacho filed an unfair labor practice charge over her discharge, the Acting Regional Director for Region 16 dismissed it, and she did not appeal that dismissal.

[6] Cf. *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 3 fn. 12 (2018) (finding provisions of a proffered separation agreement unlawful because, among other reasons, the employee had been unlawfully discharged), enfd. mem. No. 18–1170 (D.C. Cir. 2019) (per curiam); *Metro Networks*, 336 NLRB 63, 66–67 (2001) (same).

As in *Shamrock Foods* and *Metro Networks*, the employer in *Clark Distribution Systems*, 336 NLRB 747 (2001), offered employees severance agreements that included non-assistance clauses—i.e., clauses prohibiting the employees from assisting their coworkers if charges concerning coworkers were filed against the employer. In each of these cases, however, the employees to whom the agreements were offered had been discharged in violation of the Act. In other words, the employer in those cases had already demonstrated its willingness to retaliate against employees for engaging in Sec. 7 activity. Thus, it was reasonable to believe that further charges may have been filed or might be forthcoming and that the discharged employees might have relevant information they would wish to disclose to an investigating Board agent. Under those circumstances, offering a severance agreement with a non-assistance clause would reasonably tend to interfere with the exercise of rights protected by the Act. See *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959) ("[T]he test of interference, restraint, and coercion under [Sec.] 8(a)(1) of the Act . . . . is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."). In the instant case, however, severance agreements with non-assistance clauses were offered to individuals *lawfully* separated from employment, and the complaint does not allege that the Respondent has violated the Act in *any* way other than by offering the severance agreements themselves. There is no reason to believe that the Respondent harbors animus against Sec. 7 activity, let alone that it is willing to terminate employees who engage in it. Under these circumstances, the offer of a severance agreement does not *reasonably* tend to interfere with the free exercise of employee rights under the Act merely because the offered agreement contains a non-assistance clause.

We recognize, however, that the holding of *Clark Distribution Systems* is categorical: offering a severance agreement that includes a non-assistance clause violates the Act, period. As just explained, that holding is broader than necessary to safeguard Sec. 7 rights. Accordingly, *Clark Distribution Systems* is overruled to the extent it holds that it is invariably unlawful to offer employees a severance agreement that includes a non-assistance clause. Instead, the holding of *Clark* is limited to the fact pattern that case presents, where an employer offers such an agreement to one or more employees it has discharged in violation of the Act. And *Metro Networks*, supra, and *Shamrock Foods*, supra, are also limited accordingly.

[7] We reject the General Counsel's argument that precedent involving settlement agreements that resolve specific labor disputes is applicable here. See, e.g., *S. Freedman & Sons, Inc.*, 364 NLRB No. 82 (2016), enfd. 713 Fed.Appx. 152 (4th Cir. 2017). As stated above, the Respondent's offer of the voluntary separation agreement was not alleged to be related to any labor dispute, nor were the disputed provisions in the agreement alleged to have any effect on employees' terms and conditions of employment.

[8] In dismissing the complaint, we find it unnecessary to address the Respondent's remaining arguments.

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

II. Alleged Unfair Labor Practices

A. Doris Camacho's Termination[2]

Baylor fired Camacho on September 30, 2016.[3] On October 4, it offered her over $10,000 in exchange for signing a *Confidential Settlement Agreement and General Release* (theSeparation Agreement). She refused to sign the Separation Agreement and, instead, brought the instant charge challenging the legality of the agreement.

B. Challenged Separation Agreement Provisions

The Settlement Agreement contained, inter alia, these provisions:

> 6. No Participation in Claims:
> CAMACHO agrees that, unless compelled to do so by law, CAMACHO will not pursue, assist or participate in any Claim brought by any third party against … [Baylor] or any Released Party….
>
> 7. Confidentiality:
> CAMACHO agrees that …. she must … keep secret and confidential and not … utilize in any manner all … confidential information of … [Baylor] or any of the Released Parties made available to her during her … employment … , including … information concerning operations, finances, …, employees, … personnel lists; financial and other personal information regarding … employees; ….
>
> 8. Non-Disparagement:
> CAMACHO agrees that she shall not … make, repeat or publish any false, disparaging, negative, … or derogatory remarks … concerning … [Baylor] and the Released Parties … or otherwise take any action which might reasonably be expected to cause damage … to … [Baylor] and the Released Parties ….

(GC Exh. 2.)

C. Analogous Separation Agreements

Between November 30 and October 23, 2017, Baylor entered into 26 equivalent Separation Agreements with other workers. (GC Exh. 3.) These agreements contained analogous *No Participation in Claims*, *Confidentiality* and *Non-Disparagement* clauses.[4]

III. ANALYSIS

The *No Participation in Claims* and *Confidentiality* provisions are unlawful; the *Non-Disparagement* provision is, however, valid. The Board has held that the following analytic framework should be applied:

> [W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between … asserted business justifications and the invasion of employee rights in light of the Act and its policy," … focusing on the perspective of employees, which is consistent with Section 8(a)(1).… As the result of this balancing, … the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as "rules"):
>
> - *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are … the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility….
> - *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
> - *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Boeing Co., 365 NLRB No. 164, slip op. at 3–4 (2017).[5]

1. No Participation in Claims Clause

The *No Participation in Claims* clause is unlawful. This rule falls under *Boeing* Category 3, inasmuch as the adverse impact on core NLRA-protected rights is not outweighed by the rule's justification. Specifically, this rule has the very "predictable" impact of barring NLRA-protected conduct because it bans former employees from, "pursu[ing], assist[ing] or participat[ing] in any Claim brought by any third party against … [Baylor]." This litigation ban encompasses individuals, who might provide

[2] Her firing was not alleged to be unlawful. This Decision, thus, does not take a stance on the validity of this action.

[3] All dates are in 2016, unless otherwise stated.

[4] Although these agreements were entitled *Workforce Realignment Agreement and General Release*, they were essentially equivalent to Camacho's Separation Agreement. As a result, the term Separation Agreement shall globally describe these *Workforce Realignment Agreements and General Releases* as well as Camacho's agreement.

[5] On December 19, 2017, the parties were ordered to show cause whether this new precedent warranted reopening the record in this case for the taking of additional evidence. On December 29, 2017, the parties each declined to reopen the record in this case. The Order to Show Cause and the parties' responses are hereby admitted as ALJ Exhs. 2–4 respectively.

voluntary information to Board agents in furtherance of ULP charges filed against Baylor (i.e., NLRA-protected conduct). Given that the Board's "ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully to obtain relevant information and supporting statements from individuals,"[6] this ban strikes at the very core of NLRA-protected conduct. Baylor effectively failed to offer a legitimate rationale regarding why former employees cannot provide information to NLRB agents that is unrelated to their termination or might vindicate other valid NLRA interests. The balancing test, as a result, tips heavily in favor of finding that the severe impact of barring former workers from providing testimony to Board agents about alleged labor relations violations heavily outweighs Baylor's mostly unsubstantiated justification for the rule. This rule is, thus, invalid.

2. Confidentiality Provision

The *Confidentiality* provision is similarly unlawful. This rule also falls under *Boeing* Category 3, inasmuch as its adverse impact on NLRA-protected rights is not outweighed by any justification. The *Confidentiality* provision would reasonably be construed by former employees to prohibit §7 activities by banning discussion of wages, hours, and working conditions with current employees, unions or others after their separation. The Board has held that comparable rules have the predictive effect of limiting §7 discussions of wages, hours and working conditions.[7] See *Boeing*, 365 NLRB No. 164, slip op. at 4 (stating that an "example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another."). Although Baylor attempted to justify its rule as a protection against former employees divulging private health-care related information, its current provision also broadly encompasses wages and benefits, and is not expressly limited to health-care communications. The *Confidentiality* provision, therefore, fits within Category 3, and is unlawful because its limitation on NLRA-protected conduct (e.g., wage and benefit discussions) is not outweighed by Baylor's reported justification.

3. Nondisparagement Provision

The *Non-Disparagement* provision is lawful. The Board has held that, "rules requiring employees to abide by basic standards of civility" are generally lawful under *Boeing* Category 1. See *Boeing*, 365 NLRB No. 164, slip op. at 4. The *Nondisparagement* provision, which bars "false, disparaging, negative, . . . or derogatory remarks," is a valid civility standard. Id.

CONCLUSIONS OF LAW

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

2. Baylor violated §8(a)(1) by[8]

(a) Maintaining a *No Participation in Claims* clause in its Separation Agreements, which bars employees from pursuing, assisting or participating in claims brought against Baylor.

(b) Maintaining a *Confidentiality* clause in its Separation Agreements, which bans discussion of wages, hours, and working conditions with employees, unions or other parties.

3. The unfair labor practices set forth above affect commerce within the meaning of §2(6) and (7) of the Act.

REMEDY

Baylor is ordered to cease, desist and take certain affirmative action designed to effectuate the Act. Having found that its Separation Agreements contained unlawful *No Participation in Claims* and *Confidentiality* clauses, it shall be required to rescind those provisions and notify the employees who signed the releases, in writing, that it has done so. It shall also post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[9]

ORDER

Baylor, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining *No Participation in Claims* clauses in its Separation Agreements, which bar former employees from pursuing, assisting or participating in any claim brought by any third party against Baylor.

(b) Maintaining *Confidentiality* clauses in its Separation Agreements, which ban discussion of wages, hours and working conditions with employees, unions or other parties.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[6] See *Metro Networks*, 336 NLRB 63, 67 (2001).

[7] See also *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 1 fn. 1 (2015) (employer's confidentiality agreement provided that "information about physicians, other employees, and the internal affairs of [the company] are considered confidential"); *DirectTV U.S.*, 359 NLRB 545, 547 (2013), reaffd. 362 NLRB No. 48, slip op. at 1 fn. 1 (2015) ("confidentiality" provision warned employees to "[n]ever discuss details about your job, company business or work projects with anyone outside the company" and to "[n]ever give out information about . . . employees," and expressly included "employee records" as one category of "company information" that must be held confidential); *Cintas Corp.*, 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007) (rule "protect[ing] the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" could be reasonably construed by employees to restrict discussions of wages and other terms and conditions of employment with other employees and with the union).

[8] Baylor offered two equally unpersuasive defenses. First, it contended that its actions were lawful because Camacho, who had been fired, was not a statutory employee covered by the Act when offered the Separation Agreement. This argument ignores Board precedent that fired employees remain statutory employees covered by the Act. See, e.g., *Little Rock Crate & Basket Co*., 227 NLRB 1406 (1977). Second, Baylor averred that its actions were lawful because Camacho never signed the Separation Agreement. This contention ignores precedent holding that violations flow from offering invalid severance agreements, irrespective of whether they are signed. See *Metro Networks*, *Inc.,* 336 NLRB 63 (2001). It also ignores the fact that 26 *Workforce Realignment Agreement and General Releases,* with analogous language, had been signed.

[9] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

(a) Within 14 days of this Order, rescind the unlawful portions of the Separation Agreements described above and notify the employees who signed the releases, in writing, that this has been done.

(b) Within 14 days after service by Region 16, post at all of its offices copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director, 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 physical posting of 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 to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since October 4, 2016.

(c) 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 it has taken to comply.

Dated Washington, D.C. February 12, 2018

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 *No Participation in Claims* clauses in our Separation Agreements, which prohibit former employees from pursuing, assisting or participating in any claims brought against us by any third party.

WE WILL NOT maintain *Confidentiality* clauses in our Separation Agreements, which ban discussion of wages, hours and working conditions with our employees, unions or other parties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL rescind the unlawful *No Participation in Claims* and *Confidentiality* clauses in our Separation Agreements, and WE WILL notify each employee who signed agreements containing these clauses, in writing, that we have done so.

BAYLOR UNIVERSITY MANOR

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-195335 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[10] 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 Nation al Labor Relations Board."