

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

## Advice Memorandum

DATE: March 31, 2014

TO: Ronald K. Hooks, Regional Director  
Region 19

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

SUBJECT: Lionbridge Technologies  
Case 19-CA-115285

512-5012-0125-0000

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act by maintaining in its Employee Handbook a policy that prohibits anyone other than the Employer's Senior Vice President from modifying the employees' at-will employment status and further states that "[n]o statement, act, series of events or pattern of conduct can change this at-will [employment] relationship." We conclude that employees would not reasonably construe this policy to prohibit Section 7 activity. Accordingly, the Region should dismiss this charge allegation, absent withdrawal.

### FACTS

The Employer, Lionbridge Technologies, performs internet technology services on the Microsoft Campus in Redmond, Washington and in other locations around the world. The Employer maintains an Employee Handbook for its employees based in the United States. The Handbook applies to all employees working at the Employer's Washington facility and provides them with details about their terms and conditions of employment. The Handbook contains a provision informing employees that they are employed at-will. There is no evidence that the Employer either promulgated the at-will employment policy in response to union or protected concerted activity or has applied it to restrict the exercise of Section 7 rights. The policy states, in pertinent part:

Employment at [the Employer] is on an at-will basis unless otherwise stated in a written individual employment agreement signed by the [Senior Vice President of] Human Resources. This means that employment may be terminated by the employee or [the Employer] at any time, for any reason or for no reason, and with or without prior notice.

No one has the authority to make any express or implied representations in connection with, or in any way limit, an employee's right to resign or [the Employer's] right to terminate an employee at any time, for any reason or for no reason, with or without prior notice. Nothing in this handbook creates an employment agreement, express or implied, or any other agreement between any employee and [the Employer].

No statement, act, series of events or pattern of conduct can change this at-will relationship.

Employees are required to acknowledge receipt of the Handbook electronically on the Employer's intranet. The acknowledgment form that employees' electronically sign does not specifically mention the Employer's at-will employment policy.

In a related case,<sup>1</sup> the Region determined that the Employer violated Section 8(a)(1) by laying off the Charging Party in the current case because she had engaged in protected concerted activity, specifically, attempting to obtain healthcare benefits for certain coworkers. In that case, the Region also determined that the Employer violated Section 8(a)(1) by maintaining an overbroad confidentiality rule in the Handbook. The Employer has not taken a position on the legality of its at-will employment policy.

### ACTION

We conclude that employees would not reasonably construe the Employer's at-will employment policy to prohibit Section 7 activity. Accordingly, the Region should dismiss this charge allegation, absent withdrawal.

An employer violates Section 8(a)(1) through the maintenance of a work rule or policy if the rule would "reasonably tend to chill employees in the exercise of their Section 7 rights" even in the absence of enforcement.<sup>2</sup> In other words, the "mere maintenance of an overbroad rule tends to inhibit employees who are considering engaging in legally protected activities by convincing them to refrain from doing so rather than risk discipline."<sup>3</sup> The Board has developed a two-step inquiry to

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<sup>1</sup> Case 19-CA-111778.

<sup>2</sup> *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd mem.*, 203 F.3d 52 (D.C. Cir. 1999).

<sup>3</sup> *See Continental Group*, 357 NLRB No. 39, slip op. at 3 (2011).

determine if a work rule would have such an effect.<sup>4</sup> First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.<sup>5</sup>

In determining whether employees would reasonably construe a work rule to prohibit Section 7 activity, the Board has cautioned against “reading particular phrases in isolation,”<sup>6</sup> and it will not find a violation simply because a rule could conceivably be read to restrict such activity.<sup>7</sup> Instead, the potentially violative phrases must be considered in the proper context.<sup>8</sup> Rules that are ambiguous as to

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<sup>4</sup> *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–47 (2004).

<sup>5</sup> *Id.* at 647.

<sup>6</sup> *Id.* at 646.

<sup>7</sup> *See id.* at 647 (“[W]e will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way”). *See also Palms Hotel and Casino*, 344 NLRB 1363, 1368 (2005) (“We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it.”).

<sup>8</sup> *Compare Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 3 (Sept. 11, 2012) (finding context of confidentiality rule did not remove employees’ reasonable impression that they would face termination if they discussed their wages with anyone outside the company), *enfd*, No. 12-60752, 2014 WL 1178698 (5th Cir. Mar. 24, 2014), *and The Roomstore*, 357 NLRB No. 143, slip op. at 1 n.3, 16–17 (Dec. 20, 2011) (finding employees would reasonably interpret the employer’s “negativity” rule as applying to Section 7 activity in context of prior employer warnings linking “negativity” to the employees’ protected discussion concerning their terms and conditions of employment), *with Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (finding lawful handbook provisions prohibiting employees from “abandoning [their] job by walking off the shift without permission of [their] supervisor or administrator”; in context of direct patient care, employees “would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday”), *vacated in part on other grounds*, 345 NLRB 1050 (2005), *rev’d on other grounds sub nom. Johchims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful.<sup>9</sup> In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected activity, are not unlawful.<sup>10</sup>

Initially, the Employer's at-will employment policy here does not explicitly restrict Section 7 activity. There is also no indication that the Employer either promulgated it in response to union or other protected concerted activity or applied it to restrict such activities. Thus, under the *Lutheran Heritage*<sup>11</sup> standard, maintenance of the contested handbook provision is unlawful only if employees would reasonably construe it to restrict Section 7 activity.

We conclude that employees would not reasonably construe the contested Handbook provision to prohibit them from engaging in Section 7 activity to change their at-will employment status. The Handbook provision describes the employees' current status, which is that they are subject to termination with or without cause or notice and that their terms and conditions of employment may be changed unilaterally by the Employer. It then states that under no circumstances can the Employer's own officials, with the exception of the Senior Vice President for Human Resources, modify an employee's at-will status. The meaning of that statement is clarified by its context, specifically, the subsequent language stating that "[n]othing in this handbook creates an employment agreement, express or implied, or any other agreement between any employee and [the Employer]." Thus, the statement that only the Senior Vice President for Human Resources can modify employees' at-will employment relationship is not directed at employee conduct, but rather was included to protect the Employer against potential legal actions asserting that the Employee Handbook created an enforceable employment contract.<sup>12</sup> Indeed, this clause is

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<sup>9</sup> See, e.g., *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005) (rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity).

<sup>10</sup> See, e.g., *Tradesmen International*, 338 NLRB 460, 460–62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

<sup>11</sup> 343 NLRB at 646–47.

<sup>12</sup> See, e.g., *Smoot v. Boise Cascade Corp.*, 942 F.2d 1408, 1411 (9th Cir. 1991) (denying employee's claim for breach of implied employment contract because, among

harmonious with potential employee attempts to bargain collectively with the Employer because it explicitly designates the Senior Vice President for Human Resources as having the authority to enter into agreements that can alter the at-will employment relationship.<sup>13</sup> The provision then states that “[n]o statement, act, series of events or pattern of conduct can change this at-will relationship.” We conclude that, although this language *could* be construed to prohibit Section 7 protected efforts to change the at-will employment relationship, it *would not reasonably* be construed by employees in that manner. The provision is not phrased as a work “rule” directed at employee conduct, and it does not threaten employees with discipline for engaging in protected activity to change their at-will status.<sup>14</sup> Nor does this clause require

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other things, employer’s “written materials also contain explicit disclaimers that preclude their forming the basis of an employment agreement”). We note that, despite the at-will employment policy in its Handbook, the Employer would have an obligation to bargain in good faith with a union selected by its employees, including an obligation to bargain over a just cause discipline proposal. *Cf. J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (finding individual employment contracts that predated employees’ selection of bargaining representative could not limit scope of employer’s duty to bargain over terms and conditions of employment); *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940) (contract employer entered with individual employees that prohibited them from demanding “signed agreement by [their] employer with any Union” representing them was unlawful and unenforceable).

<sup>13</sup> See *Rocha Transportation*, Case 32-CA-086799, Advice Memorandum, dated October 31, 2012, at 4 (discussing how the employer’s requirement that only the company president could enter in agreements modifying the employment relationship specifically did not foreclose the ability of employees to collectively bargain over their at-will status); *Windsor Care Centers*, Cases 32-CA-087549, et al., Advice Memorandum, dated February 4, 2013 (same).

<sup>14</sup> See *Fresh & Easy Neighborhood Market*, Case 21-CA-085615, Advice Memorandum, dated February 4, 2013, at 4–5 (finding handbook provision that stated that “Any . . . agreement that changes your at-will employment status must be explicit, in writing, and signed by both a[n Employer] executive and you” would not reasonably be construed to prohibit future Section 7 activity); *SWH Corporation d/b/a Mimi’s Café*, Case 28-CA-084365, Advice Memorandum, dated October 31, 2012, at 3–4 (finding handbook provision stating, “No representative of the Company has authority to enter into any agreement contrary to the . . . ‘employment at will’ relationship” would not reasonably be construed to prohibit Section 7 activity).

employees to agree that their at-will status can never be changed, i.e., to waive their right to participate in future Section 7 activity.<sup>15</sup>

Finally, the instant case does not present a situation where the Employer has used the at-will employment policy to interfere with its employees' exercise of protected rights. For instance, the Employer has not threatened its employees with their at-will employment status to discourage them from engaging in protected concerted activities.<sup>16</sup>

Accordingly, based on the foregoing analysis, we conclude that the Region should dismiss this charge allegation, absent withdrawal.

/s/  
B.J.K.

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<sup>15</sup> In this regard, the Handbook provision and acknowledgment form at issue here are distinguishable from those found unlawful by an administrative law judge in *American Red Cross Arizona Blood Services Region*, JD(SF)-04-12, at 20–21, 2012 WL 311334, at \*18–21 (February 1, 2012), *remanded for entry of consent compliance agreement*, 2012 WL 1388668 (Board Order dated April 20, 2012). In that case, the acknowledgment form employees had to sign stated, “I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.” The ALJ held that by agreeing to such language, each employee had “essentially” waived the “right to advocate concertedly, whether represented by a union or not, to change his/her at-will status.” *Id.*

<sup>16</sup> See *Moisi & Son Trucking, Inc.*, 197 NLRB 198, 204–05 (1972) (statement by a supervisor that “the Company would find a reason to fire any driver who talked for the Union” unlawful); *Kingwood Mining Co.*, 166 NLRB 957, 958 (1967) (supervisor’s statement to employees that he could “find a reason to fire any man on the job”—including the signing of union cards—unlawful under Section 8(a)(1)), *enfd in relevant part*, 404 F.2d 348 (4th Cir. 1968); *Woodcliff Lake Hilton Inn*, 279 NLRB 1064, 1068 (1986) (supervisor threatening employee with physical harm for saying that, once the employees were represented by the union, the supervisor would not be able to discharge them for “any reason” violated Section 8(a)(1)), *enfd mem.*, 813 F.2d 398 (3d Cir. 1987). *Cf. Riverboat Services of Indiana, Inc.*, 345 NLRB 1286, 1291, 1295 (2005) (employer’s confirmation that it was firing employees for “no reason” after employees engaged in protect activity was unlawful).