



1. The Board should take this opportunity to reexamine the *showing that must be made by the General Counsel to demonstrate that an employer's policy unlawfully restricts employees in the exercise of their Section 7 rights.*

Let's be clear: the General Counsel is affirmatively seeking Summary Judgment.

Typically, in applying for summary judgment, General Counsel's obligation would be as stated in *Lake Charles Memorial Hospital*, 240 NLRB 1330, 1330-1331 (1979):

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(e)<sup>3</sup> sets forth the burdens of the moving and opposing parties. **Briefly, unless the moving party (here the General Counsel) establishes by admissible evidence that there is "no genuine issue as to any material fact," the burden does not shift to the opposing party to show that there is a genuine issue for hearing.**

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<sup>3</sup> Our dissenting colleague cites only the last two sentences of Rule 56(e) which pertain to the obligations of the adverse party and asserts that these sentences require that Respondent must "come forth with facts showing that a genuine issue is present." **However, the adverse party has no obligation to respond, as is made clear even by that portion of the rule cited by our colleague, until the moving party (herein the General Counsel) has carried its burden of supporting the motion with admissible evidence (e.g., affidavits by persons competent to testify) . For reasons stated below, we find that the General Counsel has not met that burden in this case. Consequently, a simple denial of unlawful conduct is sufficient to raise a material question, without requiring a respondent to come forward with affidavits or other evidence.** The Board, including our colleague, has so held. See, e.g., *Florida Steel Corporation*, 222 NLRB 586 (1976). Our colleague's attempt to distinguish that case amounts to his saying it is distinguishable because he says it is.

(emphasis added)

Which is to say, relative to motions for summary judgment in any other context, issues of fact are not established *ipse dixit*, by the General Counsel saying the facts are such and such; they require *evidence*. Moreover, any facts are to be viewed in the light most favorable to the party opposing summary judgment. *Sun Electric Corporation*, 266 NLRB 37, 45 (1983).

Turning specifically to this case, in determining the lawfulness of an employer's social media policies or work rules, the Board has described the issues as follows:

The line between lawful and unlawful restrictions is very thin and often difficult to discern. The two principal Board cases relevant to this issue are *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.* 203 F.3d 52, 340 U.S. App. D.C. 182 (D.C. Cir. 1999), and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In *Lafayette Park*, the Board stated: "The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are **likely to have** a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice even absent evidence of enforcement." The test enunciated in *Lutheran Heritage* is:

Our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.

If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon **the showing of** one of the following: (1) **employees would reasonably construe the language** to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

*Quicken Loans, Inc.*, 2013 NLRB Lexis 453, \*\*14-16(emphasis added).

Respondent submits that whether a given rule is "likely to have" a chilling effect and whether General Counsel has made a "showing" that employees "would reasonably construe" language in a certain way, are, or should be considered (based on this Board's stated standards) *issues of fact*. However, nothing has been offered by the General Counsel in the record before the Board in this case to affirmatively establish these issues of fact.

In any other context, the Board would require the General Counsel to demonstrate, and not assume, facts which form the premise for an unfair labor practice charge in order to prevail on summary judgment. *See, e.g., Security Walls, LLC*, 361 NLRB No. 29, 2014 NLRB Lexis 671, \*6 ("Having duly considered the matter, we find that the General Counsel's and the Respondent's Motions for Summary Judgment have failed to establish the absence of a genuine issue of material fact, or that either party is entitled to judgment as a matter of law, as to the

violations of Section 8(a)(5) and (1) alleged in paragraph VI(a)-(e) and the related part of paragraph VIII. We accordingly find that summary judgment is not appropriate as to those allegations.”) Further, in any other context, the Board would construe the facts concerning General Counsel’s Motion for Summary Judgment in the light most favorable to respondent. But, in this area of social media and work rules, the General Counsel has been permitted to reach unilateral conclusions of what an employee is *likely* to do in response to a rule and how an employee *would* construe the language of a rule, based on assumptions, not demonstrated facts. This practice by the General Counsel has evolved, at least in part, because the Board determined not to follow the position of Member Hurtgen, when he opined, in dissent, in *Lafayette Park*, 326 *NLRB* 824, at 834:

I agree that the maintenance of a rule which, on its face, interferes with Section 7 activity, is unlawful, even if it has not been applied. However, I do not agree that a rule should be condemned as unlawful simply because it can be parsed broadly enough to theoretically cover Section 7 activity. Thus, where the rule does not refer to Section 7 activity (e.g., solicitation or distribution), is not motivated by such activity, has never been applied to such activity, and does not affect such activity, I would not reach out to condemn it. Indeed, I would not spend the Board’s scarce resources by ranging through employment rules in an effort to see if some of them can conceivably be construed to refer to Section 7 activity.

In the years since *Lafayette Park* was issued, the Board has had many cases before it construing social media policies, work rules, and Section 7 rights; but, how many of those cases have been hinged on fact scenarios in which an employer has, indeed, attempted to apply such a rule in an unlawfully restrictive manner or in which employees have testified to having reasonably felt their Section 7 rights were inhibited? Does the actual harm observed in 17 years of experience since *Lafayette Park* warrant continuing to allow General Counsel to pursue claims without a basis in fact, to reach conclusions as to the application of a policy without any evidentiary basis, and to abandon the concept that, in considering a Motion for Summary

Judgment, the facts are to be construed in a light favorable to the party opposing summary judgment? The Board should take this opportunity to revisit this issue, and the General Counsel's general assertion in his Motion in *this* case that, "[T]he challenged workplace policies at issue are unlawful because the rules could<sup>2</sup> be read to prohibit certain protected concerted activities." General Counsel's Cross-Motion for Summary Judgment, at 4.

2. The Board should take this opportunity to reemphasize, consistent with its prior decisions, that the General Counsel cannot focus on individual phrases, ignoring actual text of a given policy, to try to establish a claim that a work rule *could* be applied in an unlawful manner.

Mercy's second point, while related to the first, requires no change in the groundrules by this Board -- merely their enforcement. It is exemplified by General Counsel's first argument, as to his first issue.

The rule in question begins, in bold text: "1. **Adhere to HIPAA patient privacy and confidentiality.** Do not post proprietary or confidential information. Whether using social media for professional or personal purposes at work or outside of work, associates are bound by the Health Insurance Portability and Accountability Act (HIPAA). HIPAA protects patient privacy and promotes security and confidentiality of patient information. \* \* \*"

Notwithstanding that bolded language, and notwithstanding that the General Counsel's very first comment, at 5, *concedes*: "While this social media policy largely concerns patient information...", nevertheless, General Counsel asserts: "Because the first sentence ("Do not post proprietary or confidential information") is not narrowed to only concern patient information, the policy runs afoul of Section 8(a)(1) . . ." In other words, General Counsel not only cites to no

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<sup>2</sup> Again, as characterized by the General Counsel, the rules should be found unlawful, not because they have been applied unlawfully, and not even because they "*reasonably*" could be applied unlawfully, but merely because, in a hypothetical world, they *could* be applied unlawfully.

actual factual basis in the record for his conclusion, he actually *ignores evidence* which is right in front of him, by skipping over the first, bolded sentence entirely!

In the course of a rule consisting of 120 words, the words “HIPAA” or “patient” are included 9 times. Yet, the General Counsel asserts, without any factual predicate for doing so, that this rule “would reasonably be interpreted to include information concerning terms and conditions of employment” – and he makes this assertion notwithstanding having been expressly told by the Court in *University Medical Center v. NLRB*, 335 F.3d 1079, 1089 (D.C.Cir. 2003): “A reasonable employee would not believe that a prohibition upon disclosing information acquired in confidence, ‘concerning patients or employees’ would prevent him from saying anything about himself or his own employment.”

The General Counsel’s approach –expressly conceding that the social media policy before him “largely concerns patient information,” but, nevertheless, focusing on an isolated phrase because it could be parsed a certain way -- is used by the General Counsel throughout his Motion for Summary Judgment; -- and it is exactly the approach which this Board has held should not be used in evaluating neutral work rules. *See, e.g. Lutheran Heritage*, at 646 (“In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.”) When the Board has had the opportunity to review all the previously-filed briefs in this matter, it will readily observe that, throughout his Motion for Summary Judgment, the General Counsel disregards the prior teachings of the Board and, focusing on isolated phrases taken out of context, unilaterally declares that a hypothetical employee would reasonably find it to intend an improper restriction.

Nowhere is that point made more clearly than the General Counsel’s attack, at 12 of his Motion, on this language:

Unlawful or improper conduct off Employer premises or during non-work hours which affects the employee’s relationship to his job.

Virtually identical language was not only considered and approved in *Lafayette Park*; but, indeed, this Board expressly held, “**we do not believe that this rule can reasonably be read** as encompassing Section 7 activity.” *Nevertheless*, the General Counsel defiantly asserts, at 12, *the opposite*: “[B]ecause this rule could<sup>3</sup> cover almost any behavior that the Respondent finds objectionable, the rule violates the Act.” – citing to another opinion which (as we have already demonstrated in a prior brief) did not consider the same language as had already been approved in *Lafayette Park*.

#### CONCLUSION

For these reasons, in addition to those already briefed by Mercy, the Board should deny the General Counsel’s Motion for Summary Judgment.

Respectfully submitted,

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<sup>3</sup> Note three things: First, again, General Counsel applies the “could cover” terminology, rather than “*reasonably* could cover.” Second, General Counsel’s argument is based on his own assertion, without any reference to actual facts, actual application of the language, or evidence in the record. Third, because General Counsel has been permitted over the years to avoid dealing with actual facts in actual cases as concerns social media policies, he feels free to make his own assertions of how that given language could be parsed in an unlawful way, notwithstanding the Board’s having previously held, in *Lafayette*, that the identical language could not be *reasonably* parsed in that way.

